THE LAW COMMISSION

Item 7 of the Sixth Programme of Law Reform: The Law of Trusts

THE RULES AGAINST PERPETUITIES AND EXCESSIVE ACCUMULATIONS

To the Right Honourable the Lord Irvine of Lairg, Lord High Chancellor of Great Britain

PART I
INTRODUCTION

INTRODUCTION

1.1 A property owner is thinking of making a will or creating a trust. How far into the future should the law allow him or her to reach when tying up that property? Can he or she control the devolution of that property indefinitely? For a lifetime? For a fixed period of years? How far should one generation be given freedom to dispose of property in ways that will restrict the freedom of the next? These fundamental questions, which are the substance of this Report, are ancient ones, and different answers have been given to them at different times.[1] Those answers - whatever they may have been - have always involved striking a balance between complete freedom to tie up property in perpetuity on the one hand and the right to prescribe only the immediate devolution of the property on the other. Where that balance has been struck has varied from time to time, as have the factors that have been relevant in striking it. The rules grew up in relation to the devolution of estates and interests under family settlements. They have since been extended piecemeal to a wide range of rights over property unconnected with family arrangements, including options, rights of pre-emption and easements. This extension has not always occurred with a proper consideration of its appropriateness.

1.2 Since the end of the seventeenth century, there has been a "rule against perpetuities"[2] which has two effects. First, it restricts future dispositions of property by prescribing a time limit - the perpetuity period - in which those dispositions must take effect. Secondly, it now makes void those dispositions that actually fall outside it, and prior to the Perpetuities and Accumulations Act 1964,[3] it invalidated those that might possibly have done so.[4] The rule has been

[1] During the Second Reading of the Perpetuities and Accumulations Bill (which became the Perpetuities and Accumulations Act 1964), the then Lord Chancellor Lord (later Viscount) Dilhorne commented that the problem addressed by the rule against perpetuities was "a straightforward one. It arises from the fact that the law has for centuries set its face against the possibility of a person's tying up his property in perpetuity": *Hansard* (HL) 5 March 1964, vol 256, col 236.

[2] The content of which has varied.

[3] Referred to throughout this Report as "the 1964 Act".

[4] Dispositions made prior to 16 July 1964, when the 1964 Act was brought into force, are still subject to this rule: see below, para 1.7.

significantly modified by statute, principally the 1964 Act. In addition to the rule against perpetuities, which had a common law origin, there are statutory restrictions, dating back to 1800, which limit the time for which a direction to accumulate income can be validly made.

1.3 This Report, which follows our earlier Consultation Paper,[5] reconsiders the rules against perpetuities and excessive accumulations and attempts to reformulate them in a way that reflects contemporary needs. As we explain, our aims have been to restrict the two rules to those cases where they still perform an essential role and to simplify the law to make it easier to understand and apply. It has been made abundantly clear to us from the responses to the Consultation Paper that the rule against perpetuities causes particular difficulty in the context of commercial transactions, and it is this consideration above all that has prompted us to reconsider it. The rule against perpetuities places restrictions on the creation of future options and easements, for example, that are a significant obstacle to properly planned developments. Its application is especially hard to justify (and for practitioners to explain to clients) when there are no similar limitations on options in leases (whether for renewal or for the purchase of the freehold reversion). Furthermore, cases inevitably occur where the non-application of the rule to options in leases and its application to other property rights leads to a mismatch. These problems are intractable: the rule against perpetuities is an absolute one. Its effects cannot be circumvented by skilful drafting. We were told on consultation that the rule against excessive accumulations works a similar mischief in relation to trusts. It long predates the emergence of the modern discretionary trust, in which powers to accumulate are an important element. The reasonable wishes of settlors will often be incapable of fulfilment or will run the risk of being defeated by an absolute rule that cannot be side-stepped.

1.4 We anticipate that the reforms which we propose should have the following beneficial effects (amongst others)—

(1) they should greatly facilitate dealings with land by enabling parties to enter into reasonable contracts and other arrangements which at present they cannot, and as a result, should allow for the more effective use of land;

(2) they should allow for much greater flexibility in dealings with property and in drafting trusts;

(3) they should make the law much easier to understand for those who have to apply it, and should thereby significantly reduce the scope for making errors, something which can easily be done given the complexities of the present law;

(4) they should simplify and shorten the drafting of legal documents; and

(5) they should reduce legal and perhaps other professional costs.

[5] The Rules Against Perpetuities and Excessive Accumulations, Consultation Paper No 133, (1993), referred to through this Report as "the Consultation Paper". The delay in publishing this Report has been caused by a combination of staff shortages and the pressure to complete other more urgent projects.

1.5 In this Part we explain briefly the rules against perpetuities and against excessive accumulations, and the justification for them. We also mention the related rule against inalienability or perpetual trusts. We then summarise the main effects of the reforms that we shall propose in Parts VII, VIII and X respectively. Finally, we set out the structure of this Report and acknowledge the very considerable assistance that we have received in its preparation. To assist readers, there is a Glossary of Terms in Appendix E.

THE RULE AGAINST PERPETUITIES

The nature of the rule

1.6 As we have indicated above,[6] the rule against perpetuities restricts the time within which future interests in property created by a disposition must either vest or take effect. Despite its name, the rule against perpetuities is therefore concerned with the *commencement* of interests rather than with their duration, though by restricting the time within which future interests may be created, the rule may (and commonly will) have the effect of limiting the life of a trust.[7] Furthermore, to describe the rule as being *against* perpetuities is also somewhat misleading—

> The rule *against* perpetuities, to be comprehended, must be understood as *permitting* them within limits, and most modern discussion of the rule in England is distorted by a failure to appreciate that the contemporary oddity of the rule lies not in what it prevents, but in how much it allows. [8]

1.7 The rule against perpetuities has to be stated in two parts. For dispositions made before the 1964 Act came into force on 16 July 1964, the rule is as follows[9]—

(1) A future interest in any type of property will be void from the date that the instrument which attempts to create it takes effect, if there is any possibility that the interest *may* vest or commence outside the perpetuity period.[10]

(2) For these purposes, the perpetuity period consists of one or more lives in being plus a period of 21 years and, where relevant, a period of gestation.[11]

[6] See para 1.2.

[7] A leading authority on the rule observed that "The Rule against Perpetuities should have been called the Rule against Remoteness. It is aimed at the control of future interests; it has nothing to do, save incidentally, with present interests. But its name is a constant temptation to treat it as aimed against restraints on the alienation of present interests": J C Gray, *Gray on Perpetuities* (4th ed 1942) p x, quoting the preface to the first edition (1886).

[8] A W B Simpson, "Entails and Perpetuities" (1979) 24 Jur Rev 1, 17.

[9] See Sir Robert Megarry and Sir William Wade, *The Law of Real Property* (5th ed 1984) pp 241, 242, upon which our formulation is based. The rule is explained in more detail in Part IV.

[10] The rule is almost invariably couched in terms of an interest "vesting" outside the perpetuity period. That is appropriate where the future estate or interest arises under a trust or settlement. But, as we explain below, the rule has come to apply to the creation of most future rights in property, such as future easements or restrictive covenants and options. For these, the language of "vesting" does not seem apposite.

1.8 Where an instrument creates a future interest after 15 July 1964—

(1) that interest will only be void where it *must* vest or take effect (if at all) outside the perpetuity period;

(2) it is therefore necessary to "wait and see", if need be for the whole perpetuity period, to determine whether the interest is valid;[12] and

(3) an alternative perpetuity period of up to 80 years may be employed instead of a life in being plus 21 years.[13]

In addition to these general principles, the 1964 Act lays down a 21-year perpetuity period for options.[14]

The justification for the rule

1.9 It has been said that—

> [t]he most convincing modern explanation of the functions of the Rule [against perpetuities] is the so-called Dead Hand Rationale. According to this doctrine, the Rule is necessary in order to strike a balance between on the one hand the freedom of the present generation and, on the other, that of future generations to deal as they wish with the property in which they have interests. If a settlor or testator had total liberty to dispose of his property among future beneficiaries, the recipients, being fettered by his wishes, would never enjoy that same freedom in their turn. 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 the beneficiaries, unforeseeable by the best-intentioned and most perspicacious of donors.[15]

[11] A child *en ventre sa mère* is treated as a life in being for the purposes of the rule against perpetuities: this is explained more fully below, para 4.11.

[12] The doctrine of "wait and see", which was introduced by the 1964 Act, s 3(1), is explained below, paras 4.37 and following.

[13] See below, paras 4.34 and following.

[14] See below, para 3.42.

[15] Ruth Deech, "Lives in Being Revived" (1981) 97 LQR 593, 594 (footnote in the original text omitted). The great advocate of the "dead hand" rationale for the rule against perpetuities was Lewis M Simes: see his *Public Policy and the Dead Hand* (1955), pp 58 - 63. He went further than the view, expressed above, that the function of the rule was to maintain a balance between the living and the dead. He considered that it was desirable *per se* that wealth should be controlled by the living and not the dead. The thinking behind this was, of course, that the dead could not respond to changes in circumstances as they arose. This view has not escaped criticism, however. Professor A I Ogus has commented that "[f]ew would deny the existence of this social cost, however unquantifiable it may be, but Simes appears completely to ignore misallocations which may result from overreaching the dead hand's attempt at control. The more extensive the interference, the greater the incentive for the individual to alter his behaviour prior to death": "The Trust as Governance

It should perhaps be noted that the economic (as opposed to the social) desirability of some form of dead hand control has never been proved or disproved.[16]

1.10 Other arguments have been advanced in the past to justify the rule against perpetuities. In particular, it has sometimes been suggested that it is necessary to ensure that property is freely alienable.[17] However, this explanation will not bear scrutiny.[18] The rule against perpetuities did nothing to restrict those mechanisms that were evolved to frustrate the disposal of property during the time that it was held in trust or in a settlement.[19] Those devices were in fact overridden by a series of statutory reforms which promoted the freedom to alienate. These culminated in the Settled Land Act 1925 and the Law of Property Act 1925.[20]

1.11 Although, as we explain in Part II, the rule against perpetuities evolved in the context of family settlements, where the "dead hand rationale" was and (we shall suggest) remains a compelling reason for it, it has come to apply to most proprietary interests.[21] Indeed the touchstone of when the rule is applicable now depends upon whether a particular interest or right is proprietary.[22] One of the principal shortcomings that we shall identify in the present law is the applicability of the rule to commercial transactions in property, where the one sustainable rationale for it is absent.

Structure" (1986) 36 UTLJ 187, 215, 216. We are very grateful to Professor Ogus for drawing our attention to his article.

16 "How one should proceed to compare the costs arising from, respectively, dead hand and living hand control is beyond my competence; and I would not venture even an intuitive answer": A I Ogus "The Trust as Governance Structure", above, at p 216.

17 See, eg the well-known statement in G W Saunders, *An Essay on Uses and Trusts* (5th ed 1844), p 204: "A perpetuity may... be defined to be a future limitation, restraining the owner of the estate from aliening the fee-simple of the property, discharged of such future use or estate, before the event is determined or the period arrived, when such future use or estate is to arise".

18 For a penetrating discussion of this subject, see R H Maudsley, *The Modern Law of Perpetuities* (1979) pp 219 - 221.

19 See A W B Simpson, *A History of the Land Law* (2nd ed 1986) p 241; A I Ogus, "The Trust as Governance Structure" (1986) 36 UTLJ 187, 217.

20 The matter is accurately explained by the American author, Jairus W Perry, *A Treatise on the Law of Trusts and Trustees* (6th ed 1911) p 612, § 377, n (*a*): "It is frequently said that the purpose of the rule is to prevent restraints on alienation of property by the creation of remote interests in it which are inalienable by nature; but... it seems better to regard the rule as aiming to prevent the creation of remote unvested interests rather than to prevent restraints upon alienation of the property itself or of vested interests in it. In other words, the rule against perpetuities concerns itself solely with the time for the vesting of the limitations over, not with the duration of the prior estate".

21 Certain pension schemes are excluded from the rule by statute: see Pension Schemes Act 1993, s 163; below, para 3.54.

22 See *London and South Western Railway Co v Gomm* (1882) 20 ChD 562, 580.

THE RULE AGAINST EXCESSIVE ACCUMULATIONS

1.12 At common law, accumulations of income were permitted for the duration of the perpetuity period.[23] The rules which restrict the accumulation of income to some shorter period are entirely statutory and have their origins in legislation dating from 1800.[24] This was prompted by the notorious case of *Thellusson v Woodford*.[25] The concerns that prompted the legislature to intervene were quite different from those that led to the judicial development of the perpetuity rule, and are probably best seen as political.[26] The matter has been explained by Professor Maudsley as follows—

> The legislators over-reacted in 1800 to the decision of the Court of Chancery in the *Thellusson Case*. At that time, of course, the country's wealth was in the hands of very few, and was mostly in land. Long term provisions for accumulation could result in the "cornering" of an ever increasing proportion of the country's land by one family fund. And it may be significant, in the *Thellusson Case*, that he was a foreigner. This danger disappears with the vast increase in wealth since the advent of the industrial age, and the wider spread of that wealth among the population.[27]

He concludes by saying that "it seems that there is no sound policy reason requiring the instruction or maintenance of restrictive periods of accumulation".[28] Indeed the case for the repeal of the statutory restrictions on accumulations has been described by two of the leading authorities on perpetuities and accumulations as "overwhelming".[29] The economic case for so doing remains unproven because, it seems, economists cannot agree on the yardstick for determining the issue.[30]

1.13 In its present form, the law prescribes six periods for which the accumulation of income is permitted.[31] Four of these are found in the Law of Property Act 1925.[32]

[23] *Thellusson v Woodford* (1799) 4 Ves 227, 338; 31 ER 117, 171; (1805) 11 Ves 112, 147; 32 ER 1030, 1044.

[24] The Accumulations Act 1800.

[25] Above. It arose out of the will of the wealthy Swiss banker, Peter Thellusson, who died in 1796. For the Thellusson saga, see below, paras 9.4 and following.

[26] It is noteworthy that Lord Eldon LC could see no *economic* argument against allowing accumulations of income for the duration of the perpetuity period: see *Thellusson v Woodford* (1805) 11 Ves 112, 147; 32 ER 1030, 1044. He explained that the property was not taken out of circulation during the accumulation period, but was required to be invested. The fund was, therefore, "in a constant course of Circulation": *ibid*.

[27] *The Modern Law of Perpetuities* (1979) p 201.

[28] *Ibid*. See to like effect David Hayton, "Developing the Law of Trusts for the Twenty-First Century" (1990) 106 LQR 87, 94; Peter Sparkes, "How to Simplify Perpetuities" [1995] Conv 212, 223.

[29] J H C Morris and W Barton Leach, *The Rule against Perpetuities* (2nd ed 1962) p 305.

[30] See A I Ogus, "The Trust as Governance Structure" (1986) 36 UTLJ 187, 218; below, para 10.13.

[31] The present law is explained in Part IX of this Report.

[32] See s 164.

Two more were added by the 1964 Act.[33] We note at this stage that most jurisdictions outside England and Wales that have the rule against perpetuities have either never introduced a rule restricting accumulations to some shorter period, or if they did, have since abrogated it.[34]

THE RULE AGAINST INALIENABILITY

1.14 In addition to the rules against perpetuities and against excessive accumulations there is another rule that has evolved which has a related but distinct objective. This is the rule against inalienability, often called the rule against perpetual trusts. This rule does not restrict the future vesting of estates or interests, but the duration of trusts established for non-charitable purposes. Non-charitable purpose trusts are usually void because there is no beneficiary who can enforce them, but they are also objectionable because they may be perpetual.[35] Even in those exceptional circumstances where such purpose trusts are recognised notwithstanding the absence of any person who can enforce them (such as trusts for the upkeep of tombs), they are restricted to the perpetuity period.[36] However, we note that the courts view non-charitable purpose trusts with some suspicion, given the very real difficulties that exist in enforcing and policing them.[37] The rule against inalienability is, in reality, just one of the devices that is employed to keep the development of such trusts in check. In the light of this, any consideration of the rule against inalienability belongs more properly in a review of the law governing non-charitable purpose trusts and unincorporated associations. It was therefore expressly excluded from the Consultation Paper.[38]

THE PRINCIPAL REFORMS THAT WE PROPOSE

Summary

1.15 In this Report we make three principal recommendations—

(1) The rule against perpetuities should be restricted in its application to successive estates and interests in property and to powers of appointment, thereby restoring it to its original function. It would cease to apply to rights over property such as options, rights of pre-emption and future easements. The existing exclusion from the rule of some pension schemes would be widened to include virtually all such schemes.

(2) There should be a single perpetuity period of 125 years and the principle of "wait and see" should apply for this period.

[33] See s 13.

[34] See below, para 10.2.

[35] See *Thomson v Shakespear* (1860) 1 De G F & J 399; 45 ER 413; *Carne v Long* (1860) 2 De G F & J 75, 80; 45 ER 550, 552.

[36] See, eg *Re Denley's Trust Deed* [1969] 1 Ch 373 where the perpetuity period was for specified lives in being plus 21 years. Cf *Re Hooper* [1932] 1 Ch 38 (trust for the upkeep of a monument so long as the trustees might legally do so, held to be valid for 21 years only).

[37] Cf *Re Astor's Settlement Trusts* [1952] Ch 534, 547, where this policy consideration is clearly stated.

[38] Consultation Paper paragraph 1.4.

(3) The rule against excessive accumulations should be abolished except in relation to charitable trusts (to which, as we shall explain, special considerations apply).

Subject to certain minor exceptions, these recommendations would be prospective and not retrospective in effect. They would apply only to estates, rights and interests created after any legislation was brought into force.

Objectives

1.16 As we explain in the course of this Report, we have adopted these recommendations in the light of the responses to our earlier Consultation Paper. In formulating our recommendations in relation to the rule against perpetuities we have been guided by a number of objectives.

1.17 First, as we have explained,[39] the rule embodies a compromise. It is justified by the need to place some restriction on the freedom of one generation to control the devolution of property at the expense of the generations that follow. Where that justification is absent, the rule should not apply.

1.18 Secondly, we noted that a distinguished minority of those who responded to the Consultation Paper favoured the complete abolition of the rule against perpetuities and not merely its reform. Although we have concluded that the rule should be retained in some form, we have considered carefully the arguments in favour of abolition and have tried to accommodate them in our proposals for reform.

1.19 Thirdly, while we accept the continuing need for a rule against perpetuities to provide a means of "dead hand control", that justification does not carry with it the need to have a body of law as technical and complicated as that which presently applies.[40] We have therefore sought to simplify the law very considerably.

1.20 Fourthly, our desire to achieve simplification does have a price. It has been the single most important consideration in our decision to make proposals for reform that are, for the most part, prospective in effect. They could have had retrospective effect only if there had been a saving for vested rights. This could not have been achieved simply, and we are not convinced that it could have been accomplished fairly.[41] This does mean that for many years there will be different rules against perpetuities for—

(1) instruments made prior to the coming into force of the 1964 Act;

(2) instruments made after the coming into force of that Act but before the implementation of the reforms that we recommend in this Report; and

[39] Above, para 1.9.

[40] In responses to consultation it was described as "complex, technical, and altogether arcane", and its technicalities such as to "bring the law into disrepute... a trap for the unwary". The only defenders of those technicalities were a handful of very specialist members of the Chancery Bar.

[41] See below, paras 7.53, 8.18.

(3) instruments made after the coming into force of the reforms that we recommend in this Report.

The existence of three distinct sets of rules is far from ideal, but it is preferable to the alternatives of no reform at all or retrospective reform.[42]

STRUCTURE OF THIS REPORT

1.21 In this Report we consider first the rule against perpetuities. In Part II, we examine the origins, development and reform of the rule against perpetuities. We explain why we decided to look afresh at the rule and summarise both the content of the Consultation Paper and the responses that we received to it. The present law on the rule against perpetuities is stated in Parts III - VI as follows—

(1) Part III: when the rule against perpetuities applies;

(2) Part IV: the general principles which govern the rule;

(3) Part V: some common law problems and the statutory solutions to them;

(4) Part VI: the consequences of a breach of the rule against perpetuities.

In Parts VII and VIII, we set out our proposals for the reform of the rule against perpetuities. We make recommendations in Part VII as to when the rule should apply, and in Part VIII as to the content of the rule.

1.22 We then go on to consider the rule against excessive accumulations. In Part IX, we explain the history of the rule, its rationale and the law which presently applies. We make recommendations for its reform in Part X in the light of the responses that we received to the Consultation Paper. In Part XI, we summarise our recommendations. A draft Bill which would implement these recommendations is attached to the Report (Appendix A). The existing legislation on perpetuities and accumulations is found in Appendix B. In Appendix D we state in tabular form how the rules against perpetuities and excessive accumulation apply and have been altered under the Uniform Statutory Rule Against Perpetuities (United States of America) and in certain Commonwealth jurisdictions. A Glossary of Terms is provided in Appendix E.

ACKNOWLEDGEMENTS

1.23 As always, we are very grateful to those who responded to the Consultation Paper, and whom we list in Appendix C. We were particularly fortunate to receive a number of exceptionally full and detailed responses from practitioners with particular expertise in this field. We would also like to record our gratitude to two members of the Bar, Mr Edward Nugee, QC, and Mr James Kessler, who gave unstintingly of their valuable time to comment in detail on the draft Bill. Their comments have been of the greatest assistance to us and have guided us on matters that we would not otherwise have considered. We are also grateful to the Inland Revenue for their helpful comments on the draft Bill and the Charity Commission for their assistance on accumulations by charitable trusts. We wish to

[42] Cf Peter Sparkes, "Simplifying Perpetuities" [1995] Conv 212.

thank Mr Tim Cox (of Linklaters & Paines), Mr Geraint Thomas (of counsel) and Ms Jennie Kesser (of OPRA) for their advice on the application of the rule against perpetuities to pension schemes. Finally, we are indebted to a number of Scottish conveyancing practitioners and academics for their helpful comments on the workings of the law on perpetuities and accumulations in Scotland,[43] and also to the Scottish Law Commission, who assisted us with these enquiries.

[43] See below, para 2.33 where we list those who kindly assisted us.

PART II
THE ORIGINS, DEVELOPMENT AND REFORM OF THE RULE AGAINST PERPETUITIES

INTRODUCTION

2.1 In this Part, we examine both the origins of the rule against perpetuities and the reasons for it. We explain the harsh results that could flow from the "remorseless application" of the common law rule,[1] and summarise the principal changes that were made to it by the 1964 Act (which implemented recommendations made by the Law Reform Committee[2]). We explain the issues that were raised by the Consultation Paper and outline the responses that we received to it. We explain certain additional inquiries that we made following consultation. Finally, we indicate the approach that we have adopted in the light of those responses in making recommendations for the reform of the rule.

THE ORIGINS AND HISTORICAL RATIONALE OF THE RULE AGAINST PERPETUITIES

The common law and 'perpetuities'

2.2 It has been said that—

> The term 'perpetuity' has been applied at various times in the history of the law to refer to various arrangements made by conveyancers to enable landowners to restrict the power of free alienation of land, by imposing upon that land forms of settlement which made it impossible for their successors in title (usually their children) to deal with it as freely as they themselves had been able to do. Such attempts can be viewed as an abuse of the power of free alienation, for a settlor who makes such an attempt is using the freedom which the law gives him to deprive others of the same freedom; in consequence at most periods of English legal history the courts have set limits upon the degree to which landowners should be permitted to impose such restrictions.[3]

2.3 The common law rule against perpetuities in its current form does in fact date back to Lord Nottingham LC's decision in *The Duke of Norfolk's Case*, in 1681.[4] Long before that time, however, the common law courts had developed rules to prevent conveyancers from creating entails that could not be barred and interests in land which were virtually inalienable.[5] This complex corpus of rules, which has

[1] The phrase comes from J C Gray, *Gray on Perpetuities* (4th ed 1942) § 629.

[2] Fourth Report (The rule against perpetuities) (1956) Cmnd 18.

[3] A W B Simpson, *A History of the Land Law* (2nd ed 1986) p 208.

[4] (1681 - 5) 3 Chan Cas 1; 22 ER 931; 2 Swans 454 ; 36 ER 690; 1 Vern 163; 23 ER 388.

[5] For a discussion of these devices, see A W B Simpson, *A History of the Land Law* (2nd ed 1986) Ch IX.

been aptly described as "learned confusion",[6] was not based on any one principle, but comprised a series of devices (all of them now obsolete) which were intended to prevent settlors imposing their will too far into the future.[7] Although the decision in *The Duke of Norfolk's Case* was strikingly new, the policy to which it gave effect was not.

2.4 By 1681, however, the date of the decision in *The Duke of Norfolk's Case*,[8] the state of the law was confused and unclear and this uncertainty was reflected in the protracted litigation and internal disagreement within Lord Nottingham's Court.[9] The case appears to have been treated by Lord Nottingham as a test case to resolve that uncertainty and to lay down a clear rule for the future.

The decision in Howard v Duke of Norfolk and its significance

2.5 In 1647, the then Earl of Arundel created a trust of the barony of Greystock. One of the main objects of the trust was to protect the property settled against any adverse consequences of the insanity of his eldest son, Thomas. A term of 200 years had been granted to trustees upon trust for his second son, Henry, and any male issue that Henry might have, but if Thomas died without any male issue in Henry's lifetime, then in trust for Charles, his third son. In 1675, the 200 year term was assigned to Henry by means that are not here material. In 1677, Thomas died without issue. Charles brought a bill in Chancery against Henry seeking the execution of the trust. The question before the Court was whether Henry was bound by the trust, or whether it was void as being perpetuitous—

> The issue that divided the judges in this case was not whether perpetuities should be allowed, but what perpetuities were, or more exactly, whether this case presented a perpetuity. On one side it could be argued that the contingency upon which the disposition of the property turned was certain to happen within a short period of time, so it was foolish to refer to the gift as a perpetuity. On the other side, it might be argued that the type of interest created should be found

[6] S F C Milsom, *Historical Foundations of the Common Law* (2nd ed 1981) p 232.

[7] An example is the rule by which, prior to the Contingent Remainders Act 1877, a contingent remainder was destroyed if the prior interest determined before the contingency occurred and the remainder became vested. For example, if land were granted to A for life, thereafter to B in tail at 21, and A died before B attained 21, the gift to B failed. See generally, Sir Robert Megarry and Sir William Wade, *The Law of Real Property* (4th ed 1984) pp 1176 and following. For a full account of the development of restrictions on perpetuities, see D E C Yale, *Lord Nottingham's Chancery Cases, Vol 1* (1954) 73 Selden Society, pp lxxiii - xci. For a clear analysis of the developments, see S F C Milsom, *Historical Foundations of the Common Law* (2nd ed 1981) pp 229 - 233.

[8] *Howard v Duke of Norfolk* (1681 - 5) 3 Ch Cas 1; 22 ER 931; 2 Swans 454; 36 ER 690; 1 Vern 163; 23 ER 388. For accounts of the case and the rather complex course that the litigation took, see D E C Yale, *Lord Nottingham's Chancery Cases, Vol 1* (1954) 73 Selden Society pp lxxxiv - xci; J H Baker and S F C Milsom, *Sources of English Legal History: Private Law to 1750* (1986) pp 169 - 176.

[9] Lord Nottingham sought the opinions of the presiding judges of the three courts of common law, Pemberton CJKB, North CJCP and Mountague CB, but decided the case against their advice.

> destructible; otherwise the all important preference for free alienability would be compromised.[10]

2.6 Lord Nottingham held that the limitation in favour of Charles was good on the basis that that interest must vest, if at all, within the lifetime of Thomas. Therefore, he favoured the first of the two views expressed above. His decision was eventually[11] affirmed by the House of Lords in 1685. It provided the foundation of the rule against perpetuities which survives today and altered the legal perception of a perpetuity. There is no doubt that the decision marked a novel approach to the problem. It has been said that—

> Lord Nottingham's rule against remoteness of vesting was an innovation, and only the barest shreds of authority for the doctrine could be dragged out of the earlier cases which he reviewed...[12]

2.7 The importance and effect of the decision have been summarised as follows—

> Out of the welter the vision and strength of Lord Nottingham was able to extract a general rule. In the *Duke of Norfolk's Case* in 1681 he enunciated the basis of the modern rule against perpetuities. This took no account of the nature of the limitation as a whole, nor of the extent of the prior estate; nor did it concentrate, as some earlier decisions had done, on the moment of time at which the fee would become fully alienable. A contingent interest was good if the contingency had to be resolved within a certain period, so that the interest was incapable of vesting outside that period. The period that he set as clearly acceptable was that of a life in being, though he thought extension possible until experience disclosed some new mischief. The extension later permitted was that of a minority, a throw-back to the idea that what mattered was the time at which the fee became alienable; and this in turn became the modern period of 21 years in gross.[13]

2.8 As we have seen, the rule against perpetuities, as Lord Nottingham formulated it, shared the same underlying policy as a number of common law devices that were also intended to place restrictions on the ability of property owners to create future interests.[14] Ironically, however, the rule did not *reduce* the ability of property owners to tie up their property for the future, but actually *increased* it. It has been explained that the new rule—

> was a clear victory for the "dead hand", not for free alienability. The rule served the fathers, not the sons and if it did not attempt to make

[10] G L Haskins, "Extending the Grasp of the Dead Hand: Reflections on the Origins of the Rule against Perpetuities" 126 University of Pennsylvania LR 19, 37 (1977 - 1978).

[11] For the intervening vicissitudes, see J H Baker and S F C Milsom, *Sources of English Legal History: Private Law to 1750* (1986) p176.

[12] A W B Simpson, *A History of the Land Law* (2nd ed 1986) pp 227, 228.

[13] S F C Milsom, *Historical Foundations of the Common Law* (2nd ed 1981) p 233.

[14] See above, para 2.3.

> lawful a whole panoply of perpetuities, it did at least allow most that were needed.[15]

However, the rule did indirectly promote the free alienability of property. As a consequence of the rule, a person will become absolutely entitled to the property settled, sooner or later, and will then be free to dispose of it.[16]

2.9 We have explained that, at common law, an interest in property is void from the effective date of the instrument which created it, if it might vest outside the perpetuity period.[17] The "remorseless application" of this rule[18] could produce results that were harsh to an extent that could not be justified by the policy of the rule, as the following examples illustrate—

(1) where it was possible (but extremely unlikely) that an interest would not vest within the perpetuity period, that gift would fail even if the interest did, in fact, vest within the period;[19]

(2) where the vesting was made to depend on the attainment by a beneficiary who was not a life in being of an age exceeding 21, the gift would fail; and

(3) in relation to gifts to classes, if, at the time the instrument by which a disposition to a class is made takes effect, it was possible that any member of the class could take outside the perpetuity period, then the gift to the whole class would fail the common law rule, notwithstanding that other members of the class might already have satisfied or would have satisfied any specified contingency within that period.[20]

2.10 Coupled with the insistence on certainty that led to these harsh consequences, was the common law's failure to have regard to actual as opposed to possible events in relation to the question of whether an interest would be certain to vest within the perpetuity period of a life in being and 21 years.[21]

REFORM OF THE RULE

Introduction

2.11 Both the complexity and the harshness of the rule against perpetuities have made it a target for criticism and reform, both in this country and in other common law

[15] G L Haskins, "Extending the Grasp of the Dead Hand: Reflections on the Origins of the Rule against Perpetuities" 126 University of Pennsylvania LR 19, 46 (1977 - 1978).

[16] See A W B Simpson, *A History of the Land Law* (2nd ed 1986) p 228.

[17] See above, para 1.7.

[18] See above, para 2.1.

[19] This is subject to two exceptions concerning the validity of special powers of appointment and the validity of gifts subject to alternative limitations: see below, paras 4.31, 6.17.

[20] See, for example, *Pearks v Moseley* (1880) 5 App Cas 714.

[21] The failure of the common law to recognise limits to a woman's ability to have children attracted especial criticism. See the discussion of the cases of the "fertile octogenarian" and the "precocious toddler" in W Barton Leach, "Perpetuities: Staying the Slaughter of the Innocents" (1952) 68 LQR 35, 44-47, summarised below, paras 5.3, 5.4.

systems that have similar rules. In many states the rule has been modified by legislation and in some even abolished.[22] We give some examples of this which are drawn from the Commonwealth in Appendix D. In the United States of America, the Uniform Statutory Rule Against Perpetuities[23] has now been adopted in over 30 States of the Union. We examine here the reform of the rule that was brought about in England and Wales by the 1964 Act.

The Perpetuities and Accumulations Act 1964

2.12 That Act was based upon a report by the Law Reform Committee in 1956.[24] It was taken as axiomatic by the Committee that some time limit had to be placed on the vesting of future interests (though the reasons for this were not explored), and that "the foremost matter for examination" was "the length of the permitted period".[25] The Committee's principal concern was to find ways of reducing the harshness that the common law rule could produce, without apparent regard to the additional level of complexity that any solutions might produce.

2.13 The 1964 Act implemented the Law Reform Committee's recommendations but with some modifications.[26] We have already indicated[27] that the Act made two principal changes to the rule against perpetuities in relation to instruments which took effect after 15 July 1964[28]—

(1) It introduced a principle of "wait and see", by which future interests are no longer void from the outset just because of the possibility that they may vest outside the perpetuity period. An interest will not be void until such time as it becomes apparent that it must vest (if at all) outside the perpetuity period.[29]

(2) It allowed for the express stipulation of a fixed perpetuity period not exceeding 80 years instead of the common law measure of a life in being plus 21 years.[30]

2.14 The Act also introduced a number of other gift-saving devices, namely—

[22] See in particular the Manitoba Perpetuities and Accumulations Act 1983, and for comment, Ruth Deech, "The Rule Against Perpetuities Abolished" (1984) 4 OJLS 454.

[23] Published in 1987.

[24] Fourth Report (The rule against perpetuities) (1956) Cmnd 18.

[25] *Ibid*, para 4.

[26] For a commentary on the Act, see J H C Morris and H W R Wade, "Perpetuities Reform at Last" (1964) 80 LQR 486.

[27] See above, para 1.8.

[28] There was an exception for an instrument made in exercise of a special power of appointment, where that power had been created by an instrument that took effect before 16 July 1964. These remained subject to the old law: see the 1964 Act, s 15(5). The reason for this exception is that the perpetuity period which governs a special power of appointment is that which is applicable to the instrument which creates the power: see below, para 4.28.

[29] 1964 Act, s 3(1); see below, para 4.37.

[30] *Ibid*, s 1(1); see below, para 4.34.

(1) presumptions and evidence as to future parenthood;[31]

(2) rules for the reduction of age contingencies[32] and for the exclusion of class members to avoid remoteness;[33]

(3) conditions relating to the death of a surviving spouse;[34] and

(4) provisions for the saving and acceleration of expectant interests.[35]

2.15 In general the 1964 Act was not retrospective.[36] The common law rule against perpetuities therefore continues to apply to instruments which took effect before 16 July 1964. Furthermore, the "wait and see" provisions apply only if an interest would be void at common law,[37] so that it is necessary to apply the common law rule first rather than simply applying one statutory test. As we explain, this has made the law significantly more complicated.[38]

The Law Commission's Fourth Programme of Law Reform

2.16 It will be apparent, even from this brief summary (which glosses over the detail of the 1964 Act), that the present law governing perpetuities is highly technical and, for all except the specialist, difficult to understand and to apply. It was because of these concerns that the Law Commission proposed to re-examine the rules against perpetuities and excessive accumulations as part of its Fourth Programme of Law Reform[39]—

> *Perpetuity rule*. Carefully thought out dispositions of property run the risk of being declared wholly or partially invalid, eg *Re Drummond*, [1988] 1 WLR 234; *Re Green's Will Trusts*, [1985] 3 All ER 455, because through technicalities they infringe the rule against perpetuities. We wish to examine the policy behind the rule, and also the policy on accumulations, to see whether in modern conditions they can any longer be justified, and if so, whether they could be simplified and brought up to date (particular account being taken of any difficulties experienced with the operation of the 1964 Act).

[31] *Ibid*, s 2; see below, para 5.5.

[32] *Ibid*, s 4; see below, para 5.10. This was not the first Parliamentary intervention on this point: see Law of Property Act 1925, s 163, explained below, para 5.9.

[33] 1964 Act, s 4; see below, para 5.33.

[34] *Ibid*, s 5; see below, para 5.41.

[35] *Ibid*, s 6; see below, para 6.14.

[36] *Ibid*, s 15(5). There was one exception concerning the administrative powers of trustees: *ibid*, s 8; see below, para 3.25.

[37] *Ibid*, s 3(1).

[38] See below, paras 4.40 and following.

[39] (1989) Law Com No 185. See the Law of Trusts, Item 8(b).

LAW COMMISSION CONSULTATION PAPER

2.17 The Consultation Paper was published in October 1993. In it we identified a number of defects in the present law.[40] Of these the most significant were the needless complexity of the present law, the uncertainty of certain aspects of it, and the way in which the rule against perpetuities interfered with commercial contracts. In some instances, these defects had either been created or exacerbated by the provisions of the 1964 Act.

Options for reform

2.18 In the Consultation Paper,[41] we offered four possible options for consideration—

(1) no change in the law;

(2) the abolition of the rule against perpetuities;

(3) the replacement of the rule against perpetuities with a new rule; and

(4) the reform of the rule against perpetuities.

2.19 Of these, we considered abolition or reform to be the only viable options. We ruled out the possibility of leaving the law unchanged because of the defects that we had identified in it. Nor were we attracted by the possible replacement of the rule against perpetuities either by creating a new rule which restricted the duration of trusts, or by giving the courts a much wider power to vary trusts than they presently have.

2.20 In considering the possible abolition of the rule, the essential issue was whether the rule was still needed. This depended on whether the objectives which it was created to achieve - and in particular the need to impose limitations on dead hand control - were either no longer necessary[42] or were more effectively or appropriately met by other rules of law.[43]

2.21 In relation to the possibility of reforming rather than abolishing the rule, we offered a series of options which might be adopted individually or in some combination. They were as follows—

(1) remove the need to apply the common law before "wait and see";

(2) make a fixed period of years the only perpetuity period;

[40] See the Consultation Paper, paras 4. 2 - 4.19.

[41] Part V.

[42] See the Consultation Paper, paras 5.18 and following.

[43] *Ibid*, paras 5.23 and following. The rules which were identified were statutory powers of sale, tax legislation, the jurisdiction to vary trusts, and the powers of the court under the Inheritance (Provision for Family and Dependants) Act 1975. As regards trustees' powers of disposition, the law has been changed since the Consultation Paper by the Trusts of Land and Appointment of Trustees Act 1996, s 6, which gives trustees of land the same powers as beneficial owners.

(3) introduce a "*cy-près*" power for the court to reform dispositions which would otherwise be void for breach of the rule;

(4) make provision for advancements in reproductive technology; and

(5) introduce new exceptions to the rule such as pension schemes, future easements, options and contracts, rights of pre-emption, gifts to charity, and/or all commercial dispositions.

The response on consultation

2.22 We received sixty-two responses to the Consultation Paper from a wide range of interested persons and bodies, particularly those who were professionally involved in trusts matters. A list of respondents appears in Appendix C. There were also several articles and notes commenting on the proposals.[44] The following represents a concise summary only; where relevant, matters are discussed in more detail in the appropriate sections of this Report.

2.23 The Consultation Paper was, on the whole, well received.[45] What follows is a concise summary of the replies to the Consultation Paper. We make more detailed reference to the responses at the relevant part of the Report.

2.24 It appears that the criticisms of the present law that were made in the Consultation Paper were well-founded. They were generally endorsed by most of the consultees who commented on them. There was one criticism that was overwhelmingly supported and was clearly perceived to be the main shortcoming of the rule against perpetuities, namely its application to commercial transactions.

2.25 Almost all of those who responded agreed with the view, provisionally expressed in the Consultation Paper, against either leaving the law unchanged or introducing a wholly new rule which would restrict the duration of trusts. A significant and very distinguished minority of those who responded favoured the abolition of the rule against perpetuities. A majority were against this option however. They considered that the rule still fulfilled the function of controlling the power of one generation to dictate the devolution of property, that such a function remained an important one, and that no other rule of law was either sufficient to or as effective in achieving it. Some respondents considered that the abolition of the rule could have adverse economic consequences.[46] 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

[44] See, eg, Carl Emery, "Do We Need a Rule Against Perpetuities" (1994) 57 MLR 602; H W Wilkinson, "Your Money or Your Life or Lives in Being" [1994] Conv 92; Peter Sparkes, "How to Simplify Perpetuities" [1995] Conv 212.

[45] Although one respondent considered that the Commission could have employed its resources more profitably, we did receive the published accolade that our work was "an example of the Law Commission in its valuable quiet and contemplative role": H W Wilkinson, "Your Money or Your Life or Lives in Being", above, at p 96.

[46] We comment on this point further, below, para 2.30.

number of firms of solicitors who had clients who wished to do just that.[47] A range of other reasons for not abolishing the rule was given by those who responded.[48]

2.26 A majority of those who responded were in favour of a series of individual reforms to the rule against perpetuities. The reforms for which there was overall support were as follows—

(1) making a fixed period of years the only permissible perpetuity period;

(2) removing the need to apply the common law rule against perpetuities before applying the principle of "wait and see";

(3) making provision for advances in reproductive technology; and

(4) excluding pension schemes, future easements, options and contracts, rights of pre-emption and all commercial dispositions from the scope of the rule.

The reforms which were not, on balance, supported were—

(5) the introduction of a *cy-près* system; and

(6) the exclusion of gifts to charity from the application of the rule.

2.27 In the light of the responses to the Consultation Paper and further enquiries that we made subsequently,[49] we rejected the options of—

(1) leaving the law unchanged;

(2) introducing a new rule which would restrict the duration of trusts; and

(3) abolishing the rule.

2.28 We decided to recommend instead the reform of the rule. We have already summarised in Part I the manner in which we consider that it should be done, and the considerations that influenced our conclusions.[50]

ACTION FOLLOWING THE CONSULTATION PAPER

2.29 We conclude this Part by mentioning two further steps that we took at the same time as the responses to consultation were being analysed, to guide us in making recommendations for reform. As these steps were of some significance, we think it important to record them.

[47] Cf Peter Sparkes, "How to Simplify Perpetuities" [1995] Conv 212, 213.

[48] Eg, two respondents noted that trustees who were entitled to remuneration under the trust would be tempted to keep it alive indefinitely, even if that was not always in the best interests of the trust.

[49] See below, paras 2.29 and following.

[50] See above paras 1.15 and following.

Economic implications

2.30 First, we examined whether it would be possible to obtain any realistic economic assessment of the likely effects of abolishing the rule against perpetuities. A number of those who responded to the Consultation Paper had commented on the economic implications of both the rule and its possible abolition and had urged us to obtain expert advice on the subject. The concern that was expressed by two respondents was that property held in trust was subject to a conservative investment regime.[51] To the extent that property was held in trust, it was removed from the nation's supply of risk capital.

2.31 We initially sought the views of a distinguished economist.[52] On the very limited materials that we were able to give him, and subject to a number of caveats, he was inclined to favour the removal of the restrictions on the ways in which people might give away their property. He did suggest that we would obtain a more accurate impression of the effects of abolishing the rule against perpetuities by examining the position in Scotland,[53] where there are far fewer restrictions on creating perpetual trusts than is the case in England and Wales.

2.32 We then considered the possibility of commissioning a full study of the economic implications of abolishing the rule. In the end, we were unable to proceed with this because it proved impossible to obtain sufficient data for the consultant to make such a task anything other than guesswork. In any event, as we have explained,[54] in the light of the responses to consultation, we did not consider it appropriate to recommend the abolition of the rule for a reason that was unconnected with its economic ramifications, namely the desirability of placing some restrictions on how far settlors could tie up property for the future. Notwithstanding the absence of any economic assessment of the consequences of abolishing or retaining the rule, we consider that this reason for its retention is strong enough to outweigh any possible adverse economic effect.[55]

The position in Scotland

2.33 The second step that we took was to examine the equivalent rules of law that apply in Scotland, and to seek the views of a number of Scottish conveyancing lawyers on how those rules worked in practice.[56] We are very grateful to them for

[51] This was particularly so in relation to those older trusts that were still subject to the investment powers conferred by the Trustee Investments Act 1961.

[52] Professor John Vickers, Drummond Professor of Political Economy at the University of Oxford. We are very grateful to him for his assistance.

[53] Where, we were then making enquiries, as we explain below.

[54] Above, para 2.25.

[55] The economic consequences of dead hand control are not known: see above, para 1.9.

[56] Those who kindly assisted us were George Alpine Esq (Paull & Williamsons); Andrew S Biggart Esq (Maclay Murray & Spens); Messrs Brodies WS; Professor Douglas J Cusine (University of Aberdeen); Ian Edward Esq (Ledingham Chalmers); Richard Filleul Esq (Murray Beith & Murray WS); Robin D Fulton Esq (Shepherd & Wedderburn WS); Professor W M Gordon (University of Glasgow); Professor George Gretton (University of Edinburgh), James Laird Esq (McGrigor Donald); Professor A J McDonald (Thorntons WS); Professor M C Meston (University of Aberdeen); Messrs Morton Fraser Milligan WS; C W Pagan (Pagan Osborne); Peter A Ryden Esq (Tod Murray WS); Professor J H Sinclair

their assistance which, as we explain below, has helped us in finalising our policy for reform.

2.34 Scots law has never set its face against perpetuities in the same way as has happened in England and Wales.[57] Lord Cooper described the attitude of the common law of Scotland as "one of indifference and even benevolence",[58] and Lord President Boyle commented that Scots law did not view perpetuities "with the abhorrence in which they are held both in the language of English authorities and in the decisions of the Courts of that country...".[59] The law is "entirely of statutory origin".[60] By the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, if a person attempts to create a liferent interest[61] other than in favour of a person who is alive or *in utero* at that time, the deed confers on the grantee an absolute interest instead.[62] Subject to the court's jurisdiction to strike down grossly unreasonable testamentary provisions,[63] and the requirement that the purposes of any trust should be sufficiently certain, there are no other constraints on the making of future gifts or the creation of perpetual trusts in Scots law except the restrictions on accumulations of income.

2.35 The Scots law on accumulations is similar to English law, but the two systems are not identical. Like English law, it is a creature of statute, and there are six possible accumulation periods.[64] Because Scots law restricts perpetuities so lightly, these provisions necessarily have a role in controlling the dead hand in Scotland that they do not in England and Wales, where the rule against perpetuities is the primary means of achieving that end.[65]

2.36 It is certainly possible in Scotland to create perpetual trusts, particularly of a discretionary character (given the strict limits on the creation of successive

(University of Strathclyde). We are also very grateful to the Scottish Law Commission for its help in these enquiries and for providing us with a comparison of Scots and English law.

[57] It did however abolish entails in 1914, more than 82 years before they received their quietus in England and Wales.

[58] *Muir's Trustees v Williams* 1942 SC 5, 11. The reference to benevolence may have been misplaced: see Robert Burgess, *Perpetuities in Scots Law* (1979) 31 Stair Society p 18.

[59] *Suttie v Suttie's Trustees* (1846) 18 Scot Jur 442, 445.

[60] *Muir (or Williams) v Muir* [1943] AC 468, 474; *sub nom Muir's Trustees v Williams* 1943 SC (HL) 47, 51, *per* Lord Thankerton (explaining the history of the provisions up to that date).

[61] "Liferent is the right to use and enjoy a subject during life, without destroying or wasting its substance": J Rankine, *The Law of Land-Ownership in Scotland* (4th ed 1909) p 720.

[62] See s 18(1).

[63] See the colourful cases of *M'Caig's Trustees v Kirk-Session of United Free Church of Lismore* 1915 SC 426; *Aitken's Trustees v Aitken* 1927 SC 374; and *Sutherland's Trustees v Verschoyle* 1968 SLT 43.

[64] See Trusts (Scotland) Act 1961, s 5 and Law Reform (Miscellaneous Provisions) (Scotland) Act 1966, s 6. These are not exactly the same as the six periods available in England and Wales.

[65] This is a point of some importance in view of the recommendations that we make in Part X for the abolition of the rule against excessive accumulations. Although the Scottish and English accumulations provisions are similar, it does not follow that abolition in England and Wales should lead to abolition in Scotland.

interests), under which gifts may vest at some distant time in the future.[66] We were therefore very interested to learn what actually happened in what one distinguished Scottish respondent to the Consultation Paper[67] described as a "perpetuities-free world". What we discovered from our enquiries is that although perpetual trusts are created, they tend to be confined to public purposes, some of which are charitable and some of which are not. We were given a tiny handful of examples of perpetual private trusts, including one created in the 18th century which eventually became impossible to administer because of uncertainty as to the identity of the beneficiaries.[68] In practice, the maximum duration of trusts in Scotland was, we were informed, about 100 years. Most were of much shorter duration, and there was little pressure from clients to create long-term trusts.

2.37 The conclusions that we have drawn from our study of Scottish law and practice are as follows. The mere fact that the law allows the creation of perpetual trusts does not lead settlors to create them. In Scotland few do. Other factors, such as taxation, or the risk of the disposition eventually failing for uncertainty, tend to encourage trusts to be set up for a comparatively short duration. The Scottish experience has fortified us in our conclusion that the rule against perpetuities should operate as no more than a long stop to prevent unreasonable dispositions, in a similar way to other rules of law which are intended to prevent capricious provisions.[69] Another striking feature about Scots law is that there are no time constraints on the creation or duration of commercial interests in property such as options or servitudes (easements). This has encouraged us in our view that the

[66] In making enquiries in Scotland, we were told by several practitioners that the absence of any perpetuity restriction was regarded as an advantage because of the flexibility that it gave. Although settlors did not necessarily set out to create perpetual trusts, they could make their dispositions without the concern that they might by mischance be rendered void for perpetuity. One practitioner wished to see the abolition of even the limited restrictions that apply in Scotland.

[67] Lord Hope, then Lord President.

[68] The problems of uncertainty and the fragmentation of beneficial interests was seen as one of the reasons why perpetual private trusts were seldom created.

[69] See *Brown v Burdett* (1882) 21 ChD 667 (trust to seal up house for 21 years struck down); *Re Manisty's Settlement* [1974] Ch 17, 27 (a power for the benefit of the residents of Greater London would be capricious).

rule against perpetuities should no longer apply to such interests in England and Wales.

2.38 Although we have been greatly assisted by our study of the position in Scotland, we have not, in the end, replicated the Scottish approach of employing the rule against excessive accumulations as the principal means of dead hand control. Historically, the approaches of the two jurisdictions have developed in very different ways and from different perspectives. We have therefore decided to follow the model of many other jurisdictions[70] by further reforming the rule against perpetuities (which has traditionally been used as the primary instrument of dead hand control in England and Wales) and abolishing the rule against excessive accumulations of income.

[70] See Appendix D.

PART III
WHEN DOES THE RULE AGAINST PERPETUITIES APPLY? THE PRESENT LAW

INTRODUCTION

3.1 In this Part, we set out when the rule against perpetuities applies under the present law. We explain that it is applicable to most future interests subject to certain exceptions which we discuss. We examine the common law rules and the position under the 1964 Act.

APPLICATION OF THE RULE AGAINST PERPETUITIES TO SUCCESSIVE ESTATES AND INTERESTS

3.2 The usual situation in which the rule applies is in relation to successive estates and interests in property. The example may be given of a testator who leaves property by will to A for life, thereafter to A's eldest daughter for life, thereafter to A's eldest granddaughter absolutely. The rule against perpetuities applies to each of these gifts. To be valid at common law, it would have to be certain that the gift would vest within the perpetuity period. If, however, the will took effect on or after 16 July 1964, so that the 1964 Act applied, the gift would be valid if it did in fact vest within the perpetuity period.[1]

APPLICATION OF THE RULE AGAINST PERPETUITIES TO DETERMINABLE AND CONDITIONAL INTERESTS

Determinable and conditional interests at common law

Interests subject to a condition precedent

3.3 One common type of interest to which the rule against perpetuities applies is an interest subject to a condition precedent. For example, in a gift to A if he or she should attain 21, or marry, or become a barrister, A must satisfy the condition in question before he or she can ever acquire a vested interest in the property. This class of interest also includes the interests of beneficiaries under a discretionary trust. Unless limited to the perpetuity period, the trust is invalid at common law, since the beneficiary's right to receive any payment arises only when the discretion is exercised in his or her favour.[2]

Determinable interests

3.4 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."[3] For example, a gift to A until he marries confers on A a

[1] This is because of the principle of "wait and see" introduced by s 3(1) of that Act: see above, para 1.8; and more fully below, paras 4.37 and following.

[2] See, eg, *Re Blew* [1906] 1 Ch 624; and *Re Leek* [1967] Ch 1061.

[3] Kevin Gray, *Elements of Land Law* (2nd ed 1994) p 85.

determinable interest. In the case of realty, the original grantor retains a "possibility of reverter", whereby A's interest will terminate on his marriage and automatically revert to the grantor. In the case of personal property, on the determination of A's interest there will be a resulting trust in favour of the grantor.

3.5 The rule against perpetuities is concerned with the vesting of interests and not their duration. Therefore, provided the determinable interest in question must itself vest (if at all) within the perpetuity period, it is irrelevant that the interest is subject to divestment at a date which might fall outside the perpetuity period.[4] If the disposition goes on to create a gift over on the termination of the determinable interest, that gift over will be void at common law for remoteness, since it is not certain to vest (if at all) within the perpetuity period. However, if there is no express gift over, the grantor's possibility of reverter or resulting trust is, it seems, excluded from the scope of the common law rule against perpetuities.[5] The law chooses the lesser of two evils. As Professor Maudsley explained, " [t]he difficulty of holding the rule applicable to a possibility of reverter is that ownership will be left in the air".[6]

3.6 For example, the case may be considered of a gift of personalty to the first child of A, until he or she becomes a barrister, where A is alive but childless at the date of the gift. The gift to the first child of A is valid, since it must vest (if at all) within A's lifetime. It is irrelevant that the child may become a barrister and the interest thereby determined more than 21 years after the death of A, the relevant life in being. If the child does become a barrister outside the perpetuity period and there is no gift over in favour of a third party, the gift will automatically revert back to the disponor. However, if there had been a gift over to B in the event of the first child of A becoming a barrister, that gift over would be void for perpetuity and the gift would automatically revert to the disponor on a resulting trust.

Interests subject to a condition subsequent

3.7 Like a determinable interest, an interest subject to a condition subsequent is also of potentially perpetual duration, but the interest created is defeasible on the later fulfilment of the specified condition. In that event, the grantor will usually be able to take back real property by the exercise of a right of re-entry reserved to him or herself in the disposition. However, unlike a possibility of reverter, such a right of re-entry does not take effect automatically. The grantee's interest will end when the grantor exercises his or her right of re-entry, by taking steps to obtain the land.[7]

[4] See, eg, *Re Gage* [1898] 1 Ch 498; and *Hopper v Corporation of Liverpool* (1944) 88 SJ 213.

[5] See, eg, *AG v Pyle* (1738) 1 Atk 435; 26 ER 278 (relating to a possibility of reverter); *Re Cooper's Conveyance Trusts* [1956] 1 WLR 1096 (relating to a resulting trust of land following the ending of a determinable fee); and *Re Chardon* [1928] Ch 624 (relating to a resulting trust of personalty). Only one case has held that a possibility of reverter is subject to the rule against perpetuities: see *Hopper v Corporation of Liverpool* (1944) 88 SJ 213. For discussion, see a note by R E Megarry (1946) 62 LQR 222; and Philip H Pettit, "Determinable Interests and the Rule Against Perpetuities" (1957) 21 Conv (NS) 213, 217.

[6] See R H Maudsley, *The Modern Law of Perpetuities* (1979) p 190.

[7] In practice, the rule against perpetuities will only be applicable to conditional interests taking effect in equity under a trust. On the occurrence of the condition, the beneficiary

3.8 It is very difficult to formulate any clear test for distinguishing between a determinable interest and an interest subject to a condition subsequent. It has been said that—

> [a]t its root the distinction rests on the fact that in a determinable fee the limiting circumstance is integral to the formulation of the duration of the estate, whereas in the conditional fee the limiting proviso operates to cut short the estate before it reaches out to its normal span. The distinction is elusive in the extreme and is ultimately a matter of construction of the words used in the grant.[8]

So, where a grant takes a form such as "to A *on condition that* he shall not marry" or "to A *provided that* he shall not become a barrister", the likely effect is to create an interest subject to a condition subsequent. On the other hand, grants such as "to A *until* he shall marry" or "to A *as long as* he shall not become a barrister" will probably produce determinable interests.

3.9 This difficult semantic distinction between determinable interests and interests subject to a condition subsequent is unfortunate, since the perpetuities rule applies to the latter in a different way from the former. A condition subsequent will be void unless it must occur (if at all) within the perpetuity period.[9] If the condition is rendered void, this will not lead to the automatic reversion of the property back to the disponor. The converse is in fact true: the disposition becomes freed from the condition subsequent and is made absolute.[10] Even if the condition subsequent must occur (if at all) within the perpetuity period, the grantor's right of re-entry, exercisable for breach of condition or for any other reason in relation to an estate in fee simple, is limited to the perpetuity period.[11]

3.10 To illustrate these principles, the example may be given of a fee simple to the first child of A on condition that he does not become a barrister, where A is alive and childless at the date of the gift. The grant of the fee simple is valid, since A's first child must take (if at all) during the lifetime of A, the relevant life in being. However, the condition subsequent will be void for remoteness. This is because it is not certain that A's first child must become a barrister (if at all) within the perpetuity period of A's lifetime plus 21 years. The gift to the child is therefore converted into a gift of the absolute fee simple.

next entitled to the property will not usually need to take any steps to secure his or her interest. Once notified, the trustees will simply hold the property on trust for that person.

[8] Kevin Gray, *Elements of Land Law* (2nd ed 1993) p 87 - 88.

[9] See, eg, *Re the Trustees of Hollis' Hospital and Hague's Contract* [1899] 2 Ch 540 and *Re Da Costa* [1912] 1 Ch 337.

[10] *Re Da Costa*, above.

[11] Law of Property Act 1925, s 4(3).

Determinable and conditional interests under the 1964 Act

Determinable interests

3.11 In respect of instruments taking effect on or after 16 July 1964,[12] section 12 of the 1964 Act makes significant changes in the way in which the rule against perpetuities applies to determinable interests. The effect of section 12(1) is to assimilate the position of determinable interests to that of interests subject to a condition subsequent for the purposes of the rule against perpetuities. There are three elements in this. First, the section makes it clear that the rule against perpetuities applies to a provision causing an estate or interest to be determinable. This reverses what was generally thought to be the position at common law.[13] Secondly, the principle of "wait and see"[14] is applied. If the determining event does not in fact occur within the perpetuity period, the section provides that the clause is void. Thirdly, the section then reverses what would otherwise be the effect of the clause being so void. Normally, where the determining event upon which a determinable fee or interest is to terminate is void for some reason (such as public policy), the whole fee or interest is void *ab initio* and fails.[15] To avoid such an awkward result, section 12 provides for the opposite to occur. The determinable estate or interest becomes absolute, just as does a conditional estate or interest where the condition is void.

3.12 The effect of the provision may be illustrated in relation to the example, given above, of a gift to the first child of A until he becomes a barrister, where A is alive but childless at the date of the disposition. If A's first child in fact becomes a barrister within the perpetuity period, the determining condition takes effect, the interest of A's first child terminates and the property returns to the grantor by virtue of the possibility of reverter or resulting trust (as the case may be). However, if A's first child does not become a barrister within the perpetuity period, section 12(1) makes the determining condition void for remoteness and gives the first child of A an absolute interest in the property.

3.13 The approach adopted in section 12(1) created a technical problem that section 12(2) solves. Under the 1964 Act, the rule against perpetuities is made to apply to "dispositions", rather than (as in the draft Bill attached to this Report) to specific estates, interests and rights. Despite the broad definition of "disposition" in the 1964 Act,[16] "it is by no means clear that possibilities of reverter and rights of entry for condition broken arise by virtue of a disposition as that word is commonly understood".[17] This is because such possibilities and rights arise and take effect by operation of law. To overcome this difficulty, section 12(2) treats such possibilities and rights in the same way as if there were an express executory gift in favour of

[12] Perpetuities and Accumulations Act 1964, s 15(5).

[13] See above, para 3.5.

[14] Introduced by s 3(1) of the 1964 Act. For a full explanation of "wait and see", see below, para 4.37.

[15] See Sir Robert Megarry and Sir William Wade, *The Law of Real Property* (5th ed 1984) p 74.

[16] See s 15(2).

[17] J H C Morris and H W R Wade, "Perpetuities Reform at Last" (1964) 80 LQR 486, 527.

the person who would be entitled to the property on the occurrence of the determining event or contingency.[18] The perpetuity rule then applies to that gift.

Interests subject to a condition subsequent

3.14 The 1964 Act makes only one change in the law relating to gifts subject to a condition subsequent, namely the introduction of "wait and see" to save gifts which would otherwise be void for remoteness. This may be illustrated by the example of a gift "to the first child of A on condition that he does not marry", where A is alive and childless at the relevant time. It would be necessary now to "wait and see" whether in fact the first child of A married within the prescribed period. If this was the case, the grantor could exercise his or her right of re-entry to terminate the interest. If it was not, the condition would be rendered void for remoteness and the child would take absolutely.

THE APPLICATION OF THE RULE AGAINST PERPETUITIES TO POWERS

The distinction between administrative powers and dispositive powers

3.15 For the purposes of the rule against perpetuities, powers may be classified as either—

(1) administrative, that is, powers that authorise certain dealings with the subject matter of a disposition without affecting beneficial interests, for example, trustees' powers of investment or sale; or

(2) dispositive, that is, powers that authorise dispositions which do affect the beneficial interests in the property in question, for example, powers of appointment[19] and of advancement.

Administrative powers and the rule against perpetuities

The common law position

3.16 Although administrative powers do not affect beneficial interests, they may nevertheless create or alter property interests. They were therefore subject to the rule against perpetuities at common law. For example, a power given to a trustee to grant leases during the lifetime of a person as yet unborn[20] or to sell gravel pits when they had been worked out[21] was void at common law. This rule was subject to certain exceptions. For example, powers which were incidental to a beneficial interest did not have to be expressly limited to the perpetuity period if the beneficial interest was such that the power could only be exercised properly within that period, as where an administrative power was given to a life tenant who was a

[18] Thus if, eg, A makes a gift of property to B, which is determinable if B ceases to live in the United Kingdom, it is as if the gift went on to say expressly, "and if she does, then the property is to pass to A".

[19] For these purposes, a power of appointment includes "any discretionary power to transfer a beneficial interest in property without the furnishing of valuable consideration": s 15(2); below, para 3.18.

[20] *Re Allott* [1924] 2 Ch 498.

[21] *Re Wood* [1894] 3 Ch 381.

life in being for the purposes of the perpetuity rule. Some statutory administrative powers, such as those conferred on a life tenant under the Settled Land Act 1925 were also assumed to be valid at common law at whatever date they might be exercised.[22]

The 1964 Act

3.17 As will be seen below, section 8(1) of the 1964 Act[23] excludes the administrative powers of trustees from the scope of the rule against perpetuities.[24]

Dispositive powers and the rule against perpetuities: general and special powers of appointment

3.18 The application of the rule against perpetuities to dispositive powers and the dispositions made under them varies according to the nature of the power in question. The most important dispositive powers in this respect are powers of appointment, which for these purposes include trustees' powers of advancement and the power of disposition inherent in a discretionary trust. Indeed, under the 1964 Act, references to powers of appointment extend to "any discretionary power to transfer a beneficial interest in property without the furnishing of valuable consideration".[25]

3.19 For the purposes of the rule against perpetuities, a general power of appointment is one that is given by the donor to the donee to appoint in favour of anyone in the world, including the donee (or if the power is exercisable by will, to the donee's own estate). A special power of appointment is a power given by the donor to the donee to appoint to persons other than the donee (or his or her estate). In either case, the power may be invalid under the rule against perpetuities because it becomes exercisable at too remote a time. Furthermore, any appointment made under such a power is itself subject to the rule against perpetuities, to the extent that it creates future interests or rights. Different tests apply not only to each of these two distinct situations but also to each different type of power.

3.20 The way in which the rule against perpetuities applies to dispositive powers is explained more fully in Part IV of this Report.[26] For present purposes, the principles may be summarised as follows—

(1) the rule against perpetuities applies to the exercisability of a dispositive power, whether special or general so that—

(a) where the power was created before the 1964 Act came into force, it will be valid only if it was certain on the date of the instrument that created it—

[22] See Sir Robert Megarry and Sir William Wade, *The Law of Real Property* (5th ed 1984) p 280.

[23] Which has retrospective effect: s 8(2) and 15(5).

[24] See below, paras 3.24, 3.25.

[25] See s 15(2) of the 1964 Act.

[26] See below, paras 4.19 - 4.32; 4.51 - 4.61.

(i) that the power could be exercised within the perpetuity period; or

(ii) in the case of a power exercisable only by will, that it could not be exercised outside that period;

(b) where the power was created after the 1964 Act came into force, the power will be valid if it is in fact exercised within the perpetuity period;

(2) where a settlement is created under a general power, the perpetuity period applicable to that settlement commences at the date of the exercise of the general power; and

(3) where a settlement is created under a special power, the perpetuity period applicable to that settlement commences at the date of the instrument which created the power.

THE RULE AGAINST PERPETUITIES AND FUTURE EASEMENTS

Applicability of the rule at common law

3.21 The grant of an easement which is to arise at some time in the future may be void for remoteness under the rule against perpetuities.[27] The leading case is *Dunn v Blackdown Properties Ltd*,[28] which involved a right to use drains "now passing or hereafter to pass" under a private road, where no drain was in existence at the time of the grant. Cross J held that the easement was void. He assumed, without deciding, that the provisions of section 162(1)(*d*)(iv) of the Law of Property Act 1925 (which, for the removal of doubt, declares that the rule against perpetuities does not apply to the grant of an easement for the purpose of constructing sewers or drains[29]) included the grant of a right to use the sewers or drains so constructed. But he held that the statutory provisions related only to rights ancillary to a valid easement and did not validate the grant. This judgment has been criticised,[30] but has been followed.[31]

Future easements and the 1964 Act

3.22 The 1964 Act contains no specific provisions to save easements which are void for remoteness at common law. The only possibility is to "wait and see" for the

[27] See, eg *Smith v Colbourne* [1914] 2 Ch 533 at 543.

[28] [1961] Ch 433.

[29] See below, para 3.29.

[30] See *Hansard* (HC) 30 April 1964, vol 694, cols 699 - 701 (Mr Charles Fletcher Cooke); *Hansard* (HL) 19 March 1964, vol 256, cols 973 - 6. See also G Battersby, "Easements and the Rule against Perpetuities" (1961) 25 Conv (NS) 415, n 148.

[31] *Newham v Lawson* (1971) 22 P & CR 852.

duration of the perpetuity period whether the rights granted do in fact take effect.[32]

EXCEPTIONS TO THE RULE AGAINST PERPETUITIES

Introduction

3.23 In a number of situations, the rule against perpetuities either has no application, or its application is only partial. We explain first those interests which are wholly exempt from the application of the rule, namely the administrative powers of trustees, a landlord's right of entry for breach of a term of a lease, a right of entry to enforce a rentcharge, mortgages, limitations after entails and joint tenancies. We then consider a number of interests that are partially exempted from the rule's application. These are options, rights of pre-emption, certain charitable gifts and pension schemes.

Interests that are fully exempt from the rule against perpetuities

Administrative powers of trustees

3.24 At common law, the administrative powers of trustees[33] were subject to the rule against perpetuities in the same way as the trust to which they related.[34] Thus, a power of trustees to sell or lease land was void if it were capable of being exercised outside the perpetuity period. For these purposes it was irrelevant that the actual trust in question fully complied with the rule against perpetuities.[35]

3.25 However, the Law Reform Committee took the view that this was an inappropriate application of the rule against perpetuities: these powers have little to do with the tying up of property indefinitely and more with facilitating the proper administration of the trust. The Committee therefore recommended that they be excluded from the scope of the rule. This was implemented by section 8(1) of the 1964 Act, which provides that—

> The rule against perpetuities shall not operate to invalidate a power conferred on trustees or other persons to sell, lease, exchange or otherwise dispose of any property for full consideration, or to do any other act in the administration (as opposed to the distribution) of any property, and shall not prevent the payment to trustees or other persons of reasonable remuneration for the services.

This provision was given retrospective effect.[36]

[32] See the comments of Lord Dilhorne LC (as he then was) during the passage through Parliament of the 1964 Act when *Dunn v Blackdown Properties Ltd* was discussed: *Hansard* (HL) 19 March 1964, vol 256, cols 974 - 975. For "wait and see", see below, para 4.37.

[33] Which include, eg, the power to sell or lease land and the power to remunerate trustees or their agents.

[34] See above, para 3.16.

[35] See, eg, *Re Allott* [1924] 2 Ch 498.

[36] See s 8(2).

Forfeiture of leases

3.26 Although there is little direct authority, it seems to be generally accepted that the rule against perpetuities does not apply to a right of re-entry in the event of a breach of covenant by the lessee entitling the lessor to terminate the tenancy.[37] One explanation is that the interest of the reversioner is already a vested interest and therefore outside the scope of the rule.[38]

Rights for enforcement of rentcharges

3.27 A rentcharge is a right reserved to a person other than the owner of the reversion to the payment of an annual sum out of the property in question. By section 121 of the Law of Property Act 1925, the owner of a rentcharge is entitled, in the event of non-payment, to enforce his rights by entering upon the land and either levying distress or leasing the property until the sums due have been paid. This statutory right of entry for the purposes of distress or leasing the land is expressly excluded from the rule against perpetuities.[39]

3.28 However, if the instrument creating the rentcharge has expressly granted its owner the right to enter upon the land and enforce his rights by terminating the fee simple of the defaulting landowner, or the right to enter upon the land and enforce some covenant other than for the payment of an annual sum, it is not clear that these rights benefit from the exemption contained in the Law of Property Act 1925. Section 11(1) of the 1964 Act clarifies the situation by providing that—

> The rule against perpetuities shall not apply to any powers or remedies for recovering or compelling the payment of an annual sum to which section 121 or 122[40] of the Law of Property Act 1925 applies, or otherwise becoming exercisable or enforceable on the breach of any condition or other requirement relating to that sum.[41]

However, the section does not have retrospective effect.[42]

Section 162 of the Law of Property Act 1925

3.29 This section provides that certain miscellaneous rights, such as the power to distrain on land in respect of a rentcharge, and easements, rights, or privileges over or under land in connection with mining and with services such as sewers, are and always have been outside the perpetuity rules.

[37] See *Re Tyrrell's Estate* [1907] 1 IR 292, 298; and Sir Robert Megarry and Sir William Wade, *The Law of Real Property* (5th ed 1984) pp 294 - 5.

[38] J C Gray, *Gray on Perpetuities* (4th ed 1942) § 303. Cf Law of Property Act 1925, s 1(2)(*e*).

[39] See s 121(6).

[40] Which concerns the remedies in respect of rentcharges charged on other rentcharges.

[41] See *Halsbury's Statutes* (4th ed 1997 reissue) vol 33, p 1062: "[t]his would seem to cover not only a right of re-entry for non-payment of the sum in question, but also, eg, a right of re-entry for beach of a covenant intended to reduce the danger of default in payment, such as a covenant to repair or to insure".

[42] See the 1964 Act, s 15(5).

Mortgages

3.30 The rule against perpetuities has no application to mortgages. Therefore the parties may validly postpone the mortgagor's right of redemption until a time outside the perpetuity period.[43]

Limitations after entails

3.31 The rule against perpetuities does not apply to an estate tail because a tenant in tail can at any time bar the entail.[44] When the tenant in tail does so, he also bars all subsequent interests. Therefore, no limitation after an entailed interest is void for remoteness, provided that that limitation must vest (if at all) within the perpetuity period.[45]

3.32 The 1964 Act did not alter these rules, though it may save dispositions otherwise void under instruments taking effect on or after 16 July 1964 by the operation of the "wait and see" rules. After 31 December 1996 no new entails may be created.[46] The application of the rule against perpetuities to limitations after entails will therefore be even less important than it was before.

Joint tenancies

3.33 A joint tenant's right of survivorship is exempt from the rule against perpetuities, since it can always be destroyed through severance by the other joint tenant.[47]

Interests that are partially exempt from the rule against perpetuities

Options

OPTIONS AT COMMON LAW

3.34 The grant of an option creates an immediate contingent interest in the property in question which will not become vested until the option is exercised. For perpetuity purposes, four situations may be distinguished here.

3.35 The first is where the contract in question creates purely personal rights between the parties to it. No interest in land arises, and the rule against perpetuities is inapplicable to purely personal obligations.[48] Thus, the rights created cannot be rendered void for remoteness.

3.36 Secondly, even where there is a contract which creates an interest in land, the rule against perpetuities is nevertheless inapplicable as between the original parties to the contract. The reason is that as between those parties there is privity of contract. Action taken to exercise or enforce the right to purchase therefore

[43] *Knightsbridge Estates Trust Ltd v Byrne* [1940] AC 613.

[44] See, eg, *Newell v Crayford Cottage Society* [1922] 1 KB 656, 663, *per* Younger LJ.

[45] See J H C Morris and W Barton Leach, *The Rule Against Perpetuities* (2nd ed 1962) p 195.

[46] See the Trusts of Land and Appointment of Trustees Act 1996, Sched 1, para 5.

[47] *Re Roberts* (1881) 19 ChD 520.

[48] See *Borland's Trustee v Steel Brothers & Co Ltd* [1901] 1 Ch 279, 289.

operates in the sphere of personal obligations free from the restrictions imposed by the rule against perpetuities.

3.37 Thirdly, however, when the promisee tries to enforce an option to purchase an interest in land against a third party stranger to the contract,[49] the option will be void for remoteness and therefore unenforceable if it may possibly be exercised beyond the perpetuity period.[50]

3.38 Finally, it is well established that a tenant's option to renew his or her existing lease is excluded from the scope of the rule against perpetuities.[51]

OPTIONS UNDER THE 1964 ACT

3.39 The 1964 Act made several significant changes to the common law in relation to options created on or after 16 July 1964.

3.40 First, section 10 of the Act extended the rule against perpetuities by abolishing the principle, stated above, that the rule has no application to purely personal contracts. This applies equally both to contracts in respect of personal property and to contracts in respect of realty when there is a question of enforcement between the original parties to the agreement. The effect of section 10 is that if the contract would be void for perpetuity as against a third party, it will also be void between the parties themselves. In such a case, "no remedy shall lie in contract or otherwise for giving effect to it or making restitution for its lack of effect".

3.41 Secondly, section 9(1) provides that—

> The rule against perpetuities shall not apply to a disposition consisting of the conferring of an option to acquire for valuable consideration an interest reversionary (whether directly or indirectly) on the term of a lease if—
>
> (a) the option is exercisable only by the lessee or his successors in title, and
>
> (b) it ceases to be exercisable at or before the expiration of one year following the determination of the lease.[52]

This reform was intended to permit options which encourage the lessee to maintain and develop the leasehold land and are for the public good.[53]

[49] Or a successor in title to the promisee tries to enforce the option against the original promisor.

[50] *London and South Western Railway Co v Gomm* (1882) 20 Ch 562.

[51] *Muller v Trafford* [1901] 1 Ch 54, 61.

[52] This subsection applies in relation to an agreement for a lease as it applies in relation to a lease: see the proviso to s 9(1).

[53] Fourth Report of the Law Reform Committee (The rule against perpetuities) (1956) Cmnd 18, paragraphs 36 and 37.

3.42 Thirdly, section 9(2) provides for a 21 year perpetuity (and "wait and see") period in respect of a disposition consisting of the conferring of an option to acquire for valuable consideration any interest in land. The power conferred by section 1 to specify a fixed perpetuity period is not available in respect of such interests.[54]

Rights of pre-emption

RIGHTS OF PRE-EMPTION AT COMMON LAW

3.43 A right of pre-emption is a "right of first refusal": the grantor promises that, if and when he should choose to sell the property in question, the grantee shall have the right to purchase the property in preference to any other potential purchaser.

3.44 The precise status of a right of pre-emption at common law is uncertain. In *Pritchard v Briggs*[55] the Court of Appeal held by a majority that, whereas an option creates an immediate equitable interest in favour of the grantee as soon as it is granted, a right of pre-emption confers no equitable interest in the land on the grantee. Only when the grantor chooses (if at all) to sell the land was the right of pre-emption converted into an option and therefore an equitable interest in the property. This decision is controversial.[56] Several earlier cases had held that a right of pre-emption created an interest in land from the moment of its inception.[57] There were also a number of statutory provisions which were enacted on the assumption that rights of pre-emption created interests in land.[58] Moreover, the remarks of the majority of the Court of Appeal in *Pritchard v Briggs* have been recognised as obiter.[59]

[54] However, the proviso to s 9(2) states that "this subsection shall not apply to a right of pre-emption conferred on a public or local authority in respect of land used or to be used for religious purposes where the right becomes exercisable only if the land ceases to be used for such purposes". The reason for this proviso, which was added during the passage of the 1964 Act through Parliament, is as follows. At that time, when a new local authority development occurred, the local authority usually granted the land on lease, rather than disposing of the freehold. An exception was made for churches, because the various denominations were not willing to build except on a freehold site. The *quid pro quo* was that the local authority should be given a right of pre-emption so that they might acquire the site if and when the church was no longer required for religious worship: see the intervention by Lord Silsoe during the Committee Stage of the 1964 Bill: see *Hansard* (HL) 19 March 1964, vol 256, cols 979 - 981.

[55] [1980] Ch 338.

[56] The decision was powerfully criticised: see H W R Wade, "Rights of Pre-Emption: Interests in Land" (1980) 96 LQR 488.

[57] See, eg, *Birmingham Canal Co v Cartwright* (1879) 11 ChD 421. This was also the view of Walton J at first instance in *Pritchard v Briggs* [1980] Ch 338. On the other hand, several cases had held that a right of pre-emption was a merely contractual right and could never be an equitable proprietary interest: see, eg, *Murray v Two Stokes Ltd* [1973] 1 WLR 823. This was also the view of Goff LJ, dissenting, in *Pritchard v Briggs*.

[58] See, eg, Law of Property Act 1925, s 186 and Land Charges Act 1972, s 2(4)(iv). However, Goff LJ in *Pritchard v Briggs* held that such provisions were based on a mistaken understanding of the law and were thus of no effect: [1980] Ch 338, 399.

[59] See *London & Blenheim Estates Ltd v Ladbroke Retail Parks Ltd* [1994] 1 WLR 31, 38.

3.45 Therefore, the status of rights of pre-emption at common law, and in turn the question of whether or not they are subject to the rule against perpetuities at all, remains unclear.

RIGHTS OF PRE-EMPTION UNDER THE 1964 ACT

3.46 The status of rights of pre-emption is similarly unclear under the 1964 Act. Section 9(2), in laying down a 21 year perpetuity period in respect of options to acquire an interest in land for valuable consideration, specifically excludes one type of right of pre-emption from its scope. This tends to suggest that other rights of pre-emption are intended to be within the subsection.[60]

Charities

CHARITABLE GIFTS AT COMMON LAW

3.47 There are said to be two situations where the rule against perpetuities does not apply to charitable gifts. First, no charitable gift is void merely because the charity may continue and its property may be held in perpetuity. Once effectively given, it is taken outside the scope of the rule.[61] This is not in fact a true exception: the rule against perpetuities is concerned with the date at which future dispositions of property may either vest or take effect rather than with the duration of trusts. We have explained that there is a distinct rule that prevents the creation of trusts of perpetual duration.[62] It is from this rule (rather than the rule against perpetuities) that charitable trusts are exempt.

3.48 The second exception is, however, a genuine one. A gift over from one charity to another is exempt from the rule against perpetuities.[63] Thus, for example, in *Royal College of Surgeons of England v National Provincial Bank Ltd*,[64] there was a gift by will of money on trust to be paid yearly to the trustees of Middlesex Hospital for certain charitable purposes. The testatrix directed that "should the Middlesex Hospital become nationalised or pass into public ownership" there should be a gift over to the Royal College of Surgeons[65] absolutely for its general purposes. At the testatrix's death, it was not certain that nationalisation would occur (if at all) within the perpetuity period. Nevertheless, the House of Lords held that the gift over to the Royal College of Surgeons was valid because it was exempted from the rule against perpetuities.

3.49 However, the principle that a gift over from one charity to another is not subject to the rule has been exploited as a vehicle by which an indefinite non-charitable trust can be created - something which cannot otherwise be done except in certain

[60] This was certainly the assumption when the 1964 Bill was before Parliament: see *Hansard* (HL) 19 March 1964, vol 256, cols 979 - 981.

[61] *Chamberlayne v Brockett* (1872) 8 Ch App 206, 211.

[62] See above, para 1.14; and see further below, para 4.5.

[63] *Christ's Hospital v Grainger* (1849) 1 Mac & G 460; 41 ER 1343.

[64] [1952] AC 631.

[65] Also a charity.

limited and anomalous situations. Thus, in *Re Tyler*[66] a fund was given to one charity with a gift over to another charity if the family vault of the donor was not kept in repair. By making a gift to one charity conditional upon the carrying out of a non-charitable purpose with a gift over in favour of another charity should that non-charitable purpose fail to be fulfilled, a perpetual non-charitable trust may be created.

3.50 Except in these two situations, the rule against perpetuities applies to dispositions to charity in the same way as to any other disposition. The rule is likely to be of most relevance in the case of three types of gift—[67]

(1) a gift to a charity which is conditional on the happening of a remote contingent event;[68]

(2) a gift to an individual followed by a remote gift to a charity; and

(3) a gift to a charity followed by a remote gift to an individual. In this case, if there is a gift to a charity in perpetuity with a gift over to an individual on a contingency which may not happen within the perpetuity period, the gift to the charity will become absolute.[69]

CHARITABLE GIFTS UNDER THE 1964 ACT

3.51 In respect of instruments which make gifts to charities and take effect on or after 16 July 1964, the "wait and see" provisions of the 1964 Act may save a remote contingent gift to a charity, or a remote gift over from an individual to a charity, or a remote gift over from a charity to an individual.[70]

Pension schemes

THE COMMON LAW POSITION

3.52 Pension schemes are usually set up under trusts.[71] Under such trusts, benefits are commonly made contingent on beneficiaries attaining a pensionable age. In addition, some benefits may be dependent on the exercise of discretion by trustees.

3.53 In *Lucas v Telegraph Construction and Maintenance Co Ltd*,[72] it was held that the rule against perpetuities does apply to pension scheme trusts. In that case, the

[66] [1891] 3 Ch 252.

[67] These situations are discussed in more detail in J C Gray, *Gray on Perpetuities* (4th ed 1942) §§ 592-6 and 605-6.

[68] As, eg, in *Re Lord Stratheden and Campbell* [1894] 3 Ch 265 (annuity to the Central London Rangers - a charity - "on the appointment of the next lieutenant-colonel").

[69] *Re Bowen* [1893] 2 Ch 491. If the gift to charity is not in perpetuity but for a limited period, the invalidity of the gift over would cause a resulting trust on the termination of that period: *Re Randell* (1888) 38 ChD 213.

[70] See further R H Maudsley, *The Modern Law of Perpetuities* (5th ed 1984) pp 179 - 181.

[71] See Pension Law Reform - the Report of the Pension Law Review Committee (1993) Cm 2342, vol 1, paragraph 2.2.7. Paragraphs 2.1.23 and 3.1.45 of the Report contain a history of the application of the rule against perpetuities to pension schemes.

defendant had sought to ascertain whether or not the trusts that had been established might be void for remoteness. Russell J held that the trusts infringed the rule against perpetuities and the funds reverted to the company by way of a resulting trust. This was apparently on the basis that the perpetuity period applicable to the trusts of the pension scheme commenced when the scheme was set up. This view is, however, open to question in the light of later developments. A pension is now regarded as a form of deferred remuneration.[73] A better analysis (that is consistent with this view) may be that a pension scheme comprises a series of settlements.[74] Every time an employee joins the scheme, a new settlement is created, and he or she is regarded as the settlor. It follows that, in practice, although the perpetuity rule may apply, it does so to each individual settlement. The vesting of any benefits under the pension in favour of the employee's dependants is virtually certain to take place within the perpetuity period.[75] An analysis of this kind was adopted by a number of consultees and by others whom we contacted who were pensions practitioners.[76] However, in the absence of firm authority, there can be no certainty that it represents the law.

PENSION SCHEMES ACT 1993

3.54 Whatever may be the correct view, there have been statutory exemptions from the perpetuity rule for certain types of pension schemes since 1927.[77] The current law is contained in section 163 of the Pension Schemes Act 1993.[78] The principal provision is subsection (1), which provides that—

> The rules of law relating to perpetuities shall not apply to the trusts of, or any disposition made under or for the purposes of a personal or occupational pension scheme at any time when this section applies to it.

[72] [1925] Legal Notes 211. The case appears to consist of a series of submissions by counsel and Russell J's response to them. There was no reasoned judgment. It was assumed that if the trust was not charitable - which it clearly was not - it was void for perpetuity. No other arguments were submitted, eg as to the nature of a pension trust, that might have justified the court in concluding that the rule against perpetuities was not infringed.

[73] *Barber v Guardian Royal Exchange Assurance Group* [1991] 1 QB 344, 375, 400; *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587, 1610.

[74] See Geraint Thomas, "Trusts of Death Benefits Under Occupational Pension Schemes - Deep Waters for Advisers: Part I" [1995] Private Client Business 133, 140. We are indebted for what follows to Mr Thomas who kindly drew our attention to his two articles. For Part II, see [1995] Private Client Business 223. Reference should be made to them for a fuller exposition of the issues which are touched upon here.

[75] Cf *Re Thomas Meadows & Co Ltd and Subsidiary Companies (1960) Staff Pension Scheme Rules* [1971] Ch 278, where the relevant perpetuity period for the purposes of "wait and see" under the 1964 Act was, in relation to each employee, 21 years after his or her death.

[76] See too Geraint Thomas, "Trusts of Death Benefits Under Occupational Pension Schemes - Deep Waters for Advisers: Part I", above.

[77] See the Superannuation and Other Funds (Validation) Act 1927 and Social Security Act 1973, s 69.

[78] Replacing the Social Security Act 1973, s 69, as amended by the Social Security Pensions Act 1975, s 65(1) and Schedule 4 and the Social Security Act 1986, s 86(1) and Schedule 10, Part 1.

This applies whether the trusts or dispositions in question are created or made before or after section 163 first applies to the scheme. However, section 163 does not validate with retrospective effect any trusts or dispositions which the rules of law relating to perpetuities[79] already require to be treated as void before section 163 applies to the scheme.[80] If, therefore, a scheme that had been created before the 1993 Act came into force was void for perpetuity, it would not be validated by section 163.

3.55 By section 163(2), the exemption from the rule set out in section 163(1) applies to—

(1) a public service pension scheme;[81]

(2) an occupational pension scheme which is a contracted-out scheme in relation to any employment;[82]

(3) a personal pension scheme which is an appropriate scheme;[83] and

(4) an occupational or personal pension scheme which satisfies prescribed requirements.[84]

This definition is wide, but not all-inclusive. In particular, unapproved retirement benefits schemes are not excluded from the rule against perpetuities.[85]

3.56 Where a pension scheme no longer qualifies for exemption under section 163, trusts created and dispositions made under it or for its purposes shall then again be subject to the rules of law relating to perpetuities as if section 163 had never applied to it.[86] However, this provision is without prejudice to any rights which vested while section 163 applied to the pension scheme in question.[87] By section 163(6), regulations made under the Act may include provision by which a scheme[88] to which section 163 ceases to apply may nevertheless be treated as continuing to enjoy the benefit of the exemption for a further two years, or for

[79] Including, where applicable, s 3 of the 1964 Act on "wait and see".

[80] See s 163(3). It should however be noted that the section re-enacts earlier legislation, as explained above.

[81] As to which see the 1993 Act, s 1.

[82] As to which see the 1993 Act, s 7.

[83] *Ibid*.

[84] These requirements may be prescribed by regulation in accordance with Pension Schemes Act 1993, s 182. Regulations made under s 163(2)(d) may include various provisions as to the contents and tax status of the exempted pension scheme: see ss 163(4) and (5).

[85] See Personal and Occupational Pension Schemes (Perpetuities) Regulations 1990 (SI 1990/1143), reg 3, made under the Social Security Act 1973, s 69(5) (as amended). These regulations continue to have effect in relation to the Pension Schemes Act 1993: see s 189(1); Schedule 6, Part I, paragraph 2(2).

[86] See s 163(7).

[87] See s 163(8).

[88] Other than a public service scheme.

such other period as the Secretary of State[89] considers to be reasonable in the case of a particular scheme.[90]

3.57 As we explain in Part VII of this Report, unapproved schemes are becoming more important.[91] The present uncertainty as to how the perpetuity rule applies to such pension schemes is therefore of some practical significance and presents a potential trap for those who set up and administer such schemes.

Nominations of benefits under a pension scheme

3.58 It is common for pension schemes to make provision by which a member may, in certain circumstances,[92] nominate a beneficiary to whom the benefits may be paid. Such nominations have been described as "odd creatures",[93] and it has been said of them that they—

> have yet to attract to themselves any body of case law that is comparable with wills or many other classes of documents; indeed, such relevant authority as there is can at best be described as exiguous.[94]

However, although it is not possible to lay down principles that will apply to all such nominations, it appears that, in their usual form, they will not be testamentary in character, though this is ultimately a matter of interpretation of the provisions of the particular scheme.[95] The Privy Council has characterised such nominations as powers of appointment,[96] and this is no doubt how they will now be regarded.

3.59 There is no authority (of which we are aware) as to how, if at all, the rule against perpetuities applies to such nominations. If, as will commonly be the case, the pension scheme is itself exempt from the rule, one view might be that any

[89] See Pensions Act 1995, s 151; Schedule 5, paragraph 21

[90] See also Personal and Occupational Pension Schemes (Perpetuities) Regulations 1990; SI 1990 No 1143, reg 5 (as amended by Personal and Occupational Pensions Schemes (Preservation of Benefit and Perpetuities)(Amendments) Regulations 1996 ; SI 1996 No 2131, reg 3), made under the Social Security Act 1973, s 69(5) as amended. These regulations continue to have effect in relation to the Pension Schemes Act 1993 by virtue of s 189(1) and Schedule 6, Part I, paragraph 2(2) of that Act.

[91] See below, para 7.6.

[92] Typically death in service.

[93] *Re Danish Bacon Co Ltd Staff Pension Fund Trusts* [1971] 1 WLR 248, 256, *per* Megarry J.

[94] *Ibid*, at p 253.

[95] *Re Danish Bacon Co Ltd Staff Pension Fund Trusts*, above; *Baird v Baird* [1990] 2 AC 548. The fact that such nominations might in some cases be testamentary in character has been criticised: see G Kodilinye, "Pension Scheme Nominations and the Wills Acts" [1990] Conv 458.

[96] *Baird v Baird*, above, at p 557.

nomination should also fall within that exemption.[97] However, we doubt that this is correct and we prefer the view that—

> it is probable 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. [98]

3.60 On this basis, the rule against perpetuities ought to apply to a nomination under a pension scheme in the same way as it does to any other disposition made under a special power of appointment.[99] However, even on that basis, the application of the rule to such nominations presents considerable difficulties. The perpetuity period applicable to special powers is that which applies to the instrument which created the power.[100] However, it seems unlikely that the pension scheme is itself the relevant instrument for these purposes. The date that the employee joins the scheme or pays the first contribution seems to be the most likely time for the commencement of the perpetuity period.[101] There are also doubts as to what the perpetuity period might be under the present law, and in particular whether it is a life in being and 21 years, or merely 21 years from the death of the employee.[102] It is unnecessary to explore these difficulties. However, we note that, as a result of them, it has been suggested that—

> when there is an appointment of the death benefit under a pension scheme, the only perpetuity period that can safely be adopted is the period of 21 years from the death of the relevant member.[103]

3.61 Given that nominations of this kind are common, this uncertainty has little to commend it. It may needlessly constrain the arrangements that members of pension schemes wish to make.

Powers of advancement under a pension scheme

3.62 Some similar problems arise in relation to the power, commonly found in some form or other in pension schemes, for the trustees to make an advancement of capital in favour of a member of his or her family. For the purposes of the rule against perpetuities at least, a power of advancement is regarded as a special power

[97] Pension Schemes Act 1993, s 163(1) states that the rule does not apply to "any disposition made under or for the purposes of a personal or occupational pension scheme...". A nomination might, arguably, fall within those words.

[98] Geraint Thomas, "Trusts of Death Benefits Under Occupational Pension Schemes - Deep Waters for Advisers: Part I" [1995] Private Client Business 133, 143.

[99] For the manner in which the rule against perpetuities applies to special powers of appointment, see below, paras 4.19 - 4.32; 4.51 - 4.61.

[100] See below, para 4.28.

[101] Cf *Re Thomas Meadows & Co Ltd and Subsidiary Companies (1960) Staff Pension Scheme Rules* [1971] Ch 278; and see Geraint Thomas, "Trusts of Death Benefits Under Occupational Pension Schemes - Deep Waters for Advisers: Part I", above, at pp 146, 147.

[102] These are fully discussed by Geraint Thomas in "Trusts of Death Benefits Under Occupational Pension Schemes - Deep Waters for Advisers: Part I", above, at pp 143 - 148.

[103] *Ibid*, p 148.

of appointment.[104] Where the pension scheme falls within the scope of section 163 of the Pensions Scheme Act 1993,[105] the *exercise* of the power will be exempt from the rule against perpetuities, but the interests *created* by that exercise may not.[106] The position is, therefore, akin to that of nominations of benefits under a pension scheme, and there is a similar uncertainty.

[104] See *Pilkington v IRC* [1961] Ch 466, 488; [1964] AC 612, 641, 642; *Re Hastings-Bass* [1975] Ch 25, 34.

[105] See above, para 3.54.

[106] See above, para 3.59.

PART IV
WHAT ARE THE GENERAL PRINCIPLES OF THE RULE AGAINST PERPETUITIES? THE PRESENT LAW

INTRODUCTION

4.1 In this Part, we set out the present law concerning the general principles of the rule against perpetuities. First, we explain that the rule concerns the vesting of future interests and the commencement (rather than the duration) of future interests. We then examine the common law rule of "certainty of prediction", by which it must be certain when an interest is created that it must vest within the perpetuity period. We explain how the perpetuity period is calculated under the common law. The position under the 1964 Act and its departure from the requirement of "certainty of prediction" is then considered.

THE NATURE OF THE RULE

The rule is concerned with the *vesting* of future interests

4.2 An interest in property may be either vested or contingent. An interest is vested only if —

(1) the person or persons entitled to the property is or are in existence and ascertained;

(2) all contingencies attached to the disposition are satisfied, so that the interest takes effect in possession or is ready to take effect in possession subject only to some prior interest; and

(3) in relation to classes, the exact size of each beneficiary's interest is ascertained.[1]

Should any of these conditions remain unsatisfied, the interest is merely contingent.

4.3 Even if these conditions are satisfied and the interest is vested, it is still necessary to determine whether the interest is vested *in possession* (a present right to the present enjoyment of the property) or *in interest* (a present right to the future enjoyment of the property, where the owner must await the determination of some prior interest before he or she is entitled in possession). For example, if there is a gift to A for life, remainder to the first of A's children to attain 21, where A is alive and has minor children at the date of the gift, A has an interest vested in possession but the children have merely contingent interests. When one child

[1] For similar definitions, see R H Maudsley, *The Modern Law of Perpetuities* (1979) pp 10 - 11; E H Burn, *Cheshire and Burn's Modern Law of Real Property* (15th ed 1994) p 279; and A J Oakley, *Parker and Mellows: The Modern Law of Trusts* (6th ed 1994) pp 164 - 165.

attains 21, he or she will acquire an interest vested in interest. However, only when A later dies will that child acquire an interest vested in possession.

4.4 The rule against perpetuities is concerned only with interests that have not yet satisfied the conditions for vesting, that is, with interests which are contingent in the sense explained in paragraph 4.2 above.[2] Thus, in the above example, the rule would apply only so as to ensure that the remainder is certain to vest in the first child of A to attain 21 within the perpetuity period. It is not concerned to regulate when that interest subsequently vests in possession on the death of A.

The rule is concerned with the commencement and not the duration of future interests

4.5 The rule sets limits on the length of the period within which future interests created by a disposition must vest: interests that vest too remotely are void. The rule applies, therefore, to the commencement of interests. It is not concerned with their duration. The point may be illustrated by the example of a gift in a will to a corporation of a fee simple in land that is contingent on the fulfilment of some condition precedent. In order to satisfy the rule against perpetuities the fee simple must be certain to vest in interest within the prescribed period. However, if that is the case, it is wholly irrelevant that the corporation may hold that fee simple for much longer than the perpetuity period.

THE COMMON LAW RULE AGAINST PERPETUITIES

4.6 The common law rule against perpetuities may be expressed in the following terms[3]—

> a future interest in property is void from the outset if, at the time of its creation, it is not certain to vest (if at all) within the perpetuity period.

The interest must be certain to vest from the time of its creation: "certainty of prediction"

4.7 At common law, there is a strict requirement that the interest must be absolutely certain to vest (if at all) within the perpetuity period. Any possibility, however remote and unlikely, that the interest might vest outside that time will invalidate the gift.

4.8 Moreover, the requirement of certainty of vesting is applied as at the time when the instrument creating the disposition comes into effect. In the case of an *inter vivos* gift, this will be the date of the deed creating the settlement.[4] In the case of a testamentary settlement, it will be the date of the testator's death. In this Report, we refer to the date on which a disposition comes into effect as "the effective date". Only the facts existing at that date are relevant to determining the question of whether the interest is certain to vest within the perpetuity period. Whether the

[2] See too above, para 1.6.

[3] See also the famous formulation in J C Gray, *Gray on Perpetuities* (4th ed 1942) § 201: "[n]o interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest".

[4] See *Halsbury's Laws of England* (4th ed 1994 reissue) vol 35, paragraph 1062.

facts which do occur support or contradict these theoretical possibilities is immaterial. In short, at common law, fictional possibility is preferred to reality.[5] Such fictional possibilities were sometimes of a far-fetched or even impossible nature, as where the common law considered that a husband and wife both aged seventy could still produce children. As we explain below, the worst cases were dealt with by the 1964 Act.[6]

4.9 The point may be illustrated by the example of a gift in X's will to the first of A's children to attain the age of 21. The perpetuity period will be the life of A (the relevant life in being) plus 21 years, measured from the date of X's death. Looking at the matter from that date, it is certain that any child of A will attain 21 (if at all) within 21 years of A's death (since A cannot produce more children after his death[7]). On the other hand, a gift in X's will to the first of A's children to become a barrister would be void at common law. It is not certain, at the date of X's death, that any child of A will become a barrister (if at all) within 21 years of A's death. It is certainly possible that a child of A may become a barrister within that time; and this may in fact occur. However, looked at from the date of X's death, it is possible that the first child of A to become a barrister may not do so until after the perpetuity period has expired.[8]

Calculating the perpetuity period

4.10 The common law rule is that it must be certain, from the effective date of the instrument in question, that the interest it creates will vest (if at all) before the expiry of the perpetuity period. This period is measured according to the formula of "a life in being plus 21 years".

What is a life in being?

4.11 Every person alive at the effective date of the instrument (the execution of the deed or the death of the testator as the case may be) is a life in being. In addition, at common law, conception is treated as being equivalent to actual birth. Thus, a child *en ventre sa mère*[9] at the effective date of the instrument is considered to be a

[5] There are only two exceptions to this principle that the common law ignores what happens between the time when the instrument takes effect and the time when the validity of the interest thereby created is being considered. These are, first, in determining the validity of special powers of appointment and second, in determining the validity of a gift subject to alternative limitations: see below, paras 4.31 and 6.17, respectively.

[6] See below, paragraph 5.5.

[7] See Human Fertilisation and Embryology Act 1990, s 28(6)(b), which provides that where a man's sperm, or an embryo created using his sperm, is used after his death, he is not posthumously to be treated as the father of any resulting child, despite the genetic link.

[8] A good example drawn from the case-law is that of *Re Wood* [1894] 2 Ch 310 (affirmed [1894] 3 Ch 381): the testator directed his trustees to carry on his business as a gravel contractor until the gravel pits had been worked out, then sell them and divide the proceeds among his issue then living; at the date of the will it was clear that the pits would soon be worked out and in fact this happened within six years; nevertheless, looked at from the date of the will, there was a possibility that the pits would not be worked out within the perpetuity period of 21 years; the gift was therefore too remote.

[9] Ie "an unborn child inside the mother's womb": *Royal College of Nursing v Department of Health and Social Security* [1981] AC 800, 802 *per* Lord Denning MR.

life in being and therefore any actual period of gestation is included in calculating the perpetuity period.[10]

4.12 However, not every life in being so defined will be a relevant life in determining the duration of the perpetuity period in any particular case. The definition of such "measuring lives" has been the cause of some difficulty and, as we explain below, the subject of strongly held opposing views.[11]

Where the disponor expressly selects the relevant lives in being

4.13 It is possible for the disponor him or herself to select expressly the measuring lives which will be used to determine the perpetuity period applicable to his or her gift. For these purposes, the selected measuring lives need neither be nor have any relationship with a beneficiary under the disposition. The settlor or testator is free to choose *any* life or lives in being.[12] However, the lives selected must be such as to make it reasonably practicable to ascertain the date of the death of the last survivor. If this is not the case then the gift will be void for uncertainty, as, for example, where the selected lives are so great in number or obscure in their identification as to render it virtually impossible to determine the death of the survivor.[13]

4.14 A good example of the operation of these principles is given by the widespread use of "royal lives clauses". A common form of such clauses was to provide for a perpetuity period which was "the period ending at the expiry of 21 years from the death of the last survivor of all the lineal descendants of her late Majesty Queen Victoria who shall be living at the date when the gift comes into effect".[14] The lives thus selected have no connection with the intended beneficiaries under the settlement, but this is irrelevant: the question is simply whether the interests of the intended beneficiaries must vest (if at all) within 21 years of the death of the last survivor of the lineal descendants of Queen Victoria. The difficulty is to ascertain accurately the number, identity and continued existence of those lives in being.[15] In *Re Villar*[16] the courts accepted that a royal lives clause based on the lineal descendants of Queen Victoria was valid despite the fact that there were around 120 relevant lives in being scattered around most of the countries of Europe.[17]

[10] *Cadell v Palmer* (1833) 1 Cl & Fin 372, 421-2; 6 ER 956, 974-5. See also *Thellusson v Woodford* (1805) 11 Ves 112, 141-3; 32 ER 1030, 1041-2.

[11] See below, para 4.16.

[12] *Cadell v Palmer* (1833) 1 Cl & F 372; 6 ER 956.

[13] See, eg, *Re Moore* [1901] 1 Ch 936, where a trust which was to last for "the longest period allowed by law, that is to say, until the period of 21 years from the death of the last survivor of all persons who shall be living at my death" was held void for uncertainty.

[14] Later monarchs, such as King George V, have been substituted in more recent royal lives clauses.

[15] Cf Trevor Aldridge, "A Prince Passes" (1994) 138 SJ 1062.

[16] [1928] Ch 471, affirmed [1929] 1 Ch 243.

[17] However, it is not clear that the same result would be reached today: see the dicta of Morton J in *Re Leverhulme (No 2)* [1943] 2 All ER 274, 280, 281, warning against using the royal lives clause based on Queen Victoria "in the case of a testator who dies in the year 1943 or any later date". But see also *Re Warren's Will Trusts* (1961) 105 SJ 511, where a will

4.15 Some final qualifications should be noted. First, the lives selected by the disponor must be human, not animal.[18] Secondly, an artificial person, such as a company, cannot be a life in being for the purposes of the rule against perpetuities.

Where no relevant lives have been expressly selected by the disponor

4.16 Often the disponor will not explicitly refer to any particular person as being the relevant life for the purposes of determining the validity of a disposition under the rule. In such cases it may be more difficult to determine precisely who the relevant lives should be. This issue has been the subject of a well-known difference of opinion between those who consider that the measuring lives must be ones "which in some way or other govern the time when the gift is to vest"[19] (in other words, lives which are causally connected to the gift), and those (who are probably in the majority) who consider that the class of relevant lives is narrower, namely those, if any, which validate the gift.[20] It is unnecessary to express any view as to the merits of these opposing views. Some examples will, however, illustrate the issue—

(1) A gift "to the first child of A to attain 21". This would be valid at common law. If A is alive at the date of the gift, then A is the measuring life, whichever of the two views may be taken as to which lives are relevant. Any child of A who attains 21 must necessarily do so within 21 years of the death of A. If A is already dead when the gift is made, his living children (if any) are themselves the measuring lives and they must attain 21 (if at all) within their own lifetimes.

(2) A gift "to the first child of A to marry". If A is alive and has unmarried children at the date of the gift, this would be void at common law. Those who adopt the "causal connection" view of lives in being would suggest that A and his living children are the measuring lives. But even if that is correct, the gift will fail. A might subsequently have another child, B (who cannot be a life in being), then A and all his other children might die. B might then marry more than 21 years after the death of the relevant lives. It therefore cannot be said with absolute certainty that the first child to marry must do so within 21 years of the deaths of A and his living children.

containing a royal lives clause based on Queen Victoria and coming into effect in 1944 was upheld as valid.

[18] See *Re Kelly* [1932] IR 255, 260-1, *per* Meredith J. To the extent *Re Dean* (1889) 41 Ch 552 decided to the contrary, it is considered to be incorrect: see *Halsbury's Laws of England* (4th ed 1994 reissue) vol 35, paragraph 1014.

[19] Sir Robert Megarry and Sir William Wade, *The Law of Real Property* (5th ed 1984) p 251. See too J H C Morris and H W R Wade, "Perpetuities Reform at Last" (1964) 80 LQR 486, 497 ("The question is... whether, as a matter of causality, they [sc the lives] restrict the vesting period"); and A J Oakley, *Parker & Mellows: The Modern Law of Trusts* (6th ed 1994) p 166 ("every person who is living at the date of the gift and is mentioned in it or is implied by it... is a life in being").

[20] See David E Allen, "Perpetuities: Who are the Lives in Being?" (1965) 81 LQR 106; and R H Maudsley, *The Modern Law of Perpetuities* (1979) pp 94 - 100 (reviewing the literature and the arguments). The point is of considerable significance in relation to whether it was necessary to lay down statutory lives in being for the principle of "wait and see" as the 1964 Act did: see below, paras 4.40 and following.

Those who take the view that the only lives in being are those which validate a gift would say that there are no relevant lives in being on those facts. In the alternative situation, where A is dead at the date of the gift, it would be valid. His living children would be the measuring lives (whichever of the two views is taken), and they must marry (if at all) within their own lifetimes.

(3) A gift "to the first grandchild of A to attain 21". If A is alive at the date of the gift with several children and grandchildren, the gift is nevertheless void at common law. Those who adopt the "causal connection" approach would regard the measuring lives as A, his living children and living grandchildren. Although the children are not expressly mentioned in the limitation, the gift to the grandchildren presupposes their existence and so they are treated as lives in being. But A might have another child, B, after the effective date of the gift, then all the relevant lives might die more than 21 years before B has a child of his own. It cannot be said therefore that the first grandchild of A to attain 21 must do so within 21 years of the death of any person living at the date of the gift. Once again, those who consider that the only lives in being are those which validate a gift would say that there are no relevant lives in being on those facts. In the case where A is dead at the relevant time, the gift would be valid at common law. Again, both schools of thought would accept that the measuring lives would be the living children of A. Their children must attain 21 (if at all) within 21 years of the deaths of their parents.

4.17 Those who favour the "causal connection" approach to lives in being accept that there are limits on the utility of their test for the determination of relevant lives in being. The mere fact that a person is mentioned in a gift does not necessarily mean that that person is a relevant life.

Where there are no lives in being

4.18 If there are no lives in being applicable to a particular disposition, the perpetuity period is 21 years. This will usually be the case in relation to non-charitable purpose trusts, as for example in *Re Hooper*.[21] A testator directed his trustees to use money from the income of the trust, so far as they legally could do so, for the maintenance of certain graves and monuments. Maugham J held that the trust for the upkeep of the graves and monuments was valid for a perpetuity period of 21 years.

Powers of appointment under the common law

General powers of appointment

CREATION OF A GENERAL POWER OF APPOINTMENT

General power of appointment exercisable by deed alone; or either by deed or by will

4.19 At common law, a general power of appointment exercisable by the donee by deed alone or either by deed or by will (but not solely by will) is void for remoteness

[21] [1932] 1 Ch 38.

unless it is certain that it will become exercisable (if at all) within the perpetuity period. For these purposes, as at the effective date of the instrument in question,[22] it must be clear that within the perpetuity period—

(1) the donee of the power will become ascertainable;

(2) the events upon which the power is to arise will occur; and

(3) the condition precedents (if any) to the exercise of the power will be satisfied.[23]

4.20 Thus, for example, a general power of appointment given to the survivor of two living persons and their children will be void because it is not clear that the donee will become ascertainable within the perpetuity period.[24] The same is true of a general power given to an unborn person on his marriage, since it is not clear that this condition precedent to the exercise of the power will be satisfied within the perpetuity period.[25]

4.21 Provided that such a general power is exercisable within the perpetuity period, it is irrelevant that it is possible for the power to be exercised by the donee at a time after the period has expired. The reason seems to be that the donee of a general power of appointment which is exercisable during the donee's lifetime has a right of alienation equivalent to that of an absolute owner.[26] There is therefore no danger of the land in question being tied up contrary to the policy of the rule against perpetuities. Thus, for example, the creation of a general power of appointment (exercisable either by deed or by will) given to the future born child of a living person is valid at common law. It is irrelevant that the donee may not exercise the power until after 21 years from the death of any person now living.

General power of appointment exercisable only by will

4.22 In the case of a general power of appointment exercisable by the donee only in his or her will, the power must not only be certain to become exercisable within the perpetuity period, but there must also be no possibility of its being exercised beyond the perpetuity period. In this case, the donee does not have a right of alienation equivalent to absolute ownership, since he or she is bound by the terms of the power not to alienate the property during his or her own lifetime.[27] Thus, the above example of a general power given to the future born child of a living person would be void if it were exercisable only by will.

[22] Ie the time when the instrument creating the power of appointment takes effect: in the case of a will, on the death of the testator; and in the case of a deed, on its execution.

[23] *Re Hargreaves* (1890) 43 ChD 401.

[24] See *Re Hargreaves*, above.

[25] See *Morgan v Gronow* (1873) LR 16 Eq 1.

[26] See *Re Fane* [1913] 1 Ch 404, 413, *per* Buckley LJ and *Re Churston Settled Estates* [1954] Ch 334, 344-7, *per* Roxburgh J.

[27] See, eg, *Wollaston v King* (1868) 8 Eq 165 and *Morgan v Gronow*, above.

APPOINTMENTS UNDER A GENERAL POWER

4.23 An appointment made under a general power (whether exercisable by deed, by deed or by will, or by will alone[28]) is treated as being equivalent to a disposition made by an absolute owner of property: both have a similar right of free alienation.[29] Therefore, for the purposes of determining the validity of the appointment under the rule against perpetuities, the period of lives in being plus 21 years begins to run from the date of the appointment itself. The example may be given of a testator who died in 1980 and conferred on A by his will a power to appoint a fund to such persons and in such amounts as she shall in her unfettered discretion think fit. If A, in exercise of the power, creates a settlement in favour of her grandchildren, the perpetuity period that governs that new settlement will begin at the date when A creates it. It will not be governed by the perpetuity period applicable to the 1980 will trusts.

Special powers of appointment

CREATION OF A SPECIAL POWER OF APPOINTMENT

4.24 At common law, a special power of appointment, like a general one, must be certain to be exercisable within the perpetuity period if it is not to be void for remoteness. Thus, it must be clear at the effective date of the instrument that the donee of the power will be ascertained, that the conditions attached to the power arising will be satisfied and that any conditions precedent to the exercise of the power will be fulfilled within the period of lives in being at the date of the creation of the power plus 21 years.

4.25 However, if the creation of a special power of appointment is to be valid, it must *also* be clear at the outset that the potential objects of the power will be ascertained within the perpetuity period. Thus, in the case of a special power of appointment granted by will to the first child of A to appoint to his own children, where A is unmarried at the date of the testator's death, the power is void at common law. Although it is certain that the donee will be ascertained within 21 years from the death of A, it is not clear that the objects of the power will be ascertained within that period. The donee's children may be born more than 21 years after the death of A, the relevant life in being.

[28] See *Rous v Jackson* (1885) 29 ChD 521 and *Re Flower* (1886) 55 LJ 200.

[29] See J H C Morris and W Barton Leach, *The Rule Against Perpetuities* (2nd ed 1962) p 148.

4.26 Moreover, as in the case of a general power of appointment exercisable only by will, the donee of a special power is not treated as having a right of alienation equivalent to that of absolute ownership. He or she is therefore subject to the same requirement that there must be no possibility of the power being exercised beyond the perpetuity period. So, a special power given to the future born child of a living person (for example, to appoint in favour of his own offspring) would be void at common law.[30]

APPOINTMENTS UNDER A SPECIAL POWER

4.27 Assuming the special power of appointment has been validly created, the next question is whether a specific appointment made under that power is too remote.

4.28 Here, the exercise of the special power is not treated as equivalent to the exercise of an absolute owner's right of free alienation. By restricting the class of potential objects of the power, the original donor of the power has restricted the donee's right of alienation under it. Since the donor is still in that sense controlling the disposition of the property, the policy of the law has been to measure the perpetuity period not from the date when the special power is actually exercised but from the date that the power was originally created.[31] By this means, the donee is prevented from creating interests which the donor could not have created, a potential means of evading the rule against perpetuities.

4.29 The example may be given of a gift to A for life then to such of A's children as he should appoint. A is alive and childless at the date of the disposition. A later makes an appointment in favour of the survivor of his two children, B and C. The gift to the surviving child is void at common law: the death of one child, upon which the gift to the other is contingent, is not certain to occur within 21 years from the death of A, who is the relevant life in being as determined at the time when the special power of appointment was created.

4.30 One point of uncertainty was raised by a number of those who responded to the Consultation Paper. When creating a settlement under a special power, is it possible to specify other lives in being than those which governed the instrument creating the special power? This device is sometimes employed to enable a "royal lives" clause to be specified, thereby (in practice) creating a longer perpetuity period than that which governs the instrument which created the power. Whether or not it is effective has never been finally settled.[32] An example given by one practitioner was whether, in the case of a power created under a trust dated 1 January 1950, it was possible for the deed of appointment to limit the trusts it created by reference to the descendants of King George V living on 1 January

[30] See also *Re De Sommery* [1912] 2 Ch 622. In that case, a disposition was construed as conferring on trustees for the time being two special powers of appointment, one valid because it could only be exercised in favour of a life in being and so only exercisable during that person's life and the other in favour of a class of persons not lives in being and not confined in its exercise to the perpetuity period and therefore void.

[31] *Muir (or Williams) v Muir* 1943] AC 468, 483, *per* Lord Romer.

[32] One very experienced practitioner told us that he had little doubt that a longer perpetuity period could be introduced in this manner.

1950 plus 21 years. We make a recommendation in Part VIII to resolve this uncertainty.

4.31 In determining the validity of an appointment under a special power, it is possible at common law to take account of facts which have occurred between the date when the instrument creating the power took effect and the date of the appointment.[33] This is one of only two cases where the common law allows a form of "wait and see".[34]

4.32 The point may be illustrated by the example of a gift to A for life, then to such of A's children as he should appoint by will. A is alive and unmarried at the date of the gift. In his will, A appoints in favour of his children who shall attain the age of 25. At the time of A's death A has a single child aged five. The appointment would be valid at common law. The appointment must be read back into the original will creating the special power. Judged from that point in time, it cannot be said with certainty that all A's children to attain the age of 25 must do so within 21 years of the death of A, the relevant life in being. However, since A in fact left only one child and he or she must attain the age of 25 (if at all) within 21 years from A's death, the appointment is valid.[35]

THE RULE AGAINST PERPETUITIES AS MODIFIED BY THE 1964 ACT

4.33 This Act modified the rule against perpetuities in relation to instruments taking effect on or after 16 July 1964[36] in three main ways—

(1) It became possible to stipulate expressly a fixed perpetuity period not exceeding 80 years as an alternative to the common law measure of "lives in being plus 21 years".[37]

(2) "Wait and see" was introduced. A future interest which is not certain from the outset to vest within the perpetuity period is not automatically void; instead it is treated as exempt from the rule against perpetuities until such time, if any, as it becomes established that the vesting must occur (if at all) after the end of the "wait and see" period.[38]

[33] *Wilkinson v Duncan* (1861) 30 Beav 111; 54 ER 831.

[34] The other case concerns the validity of alternative contingencies: see para 6.17, below.

[35] See, eg, *Von Brockdorff v Malcolm* (1885) 30 ChD 172.

[36] The Act was not retrospective in effect, save for one provision relating to the exclusion of the administrative powers of trustees from the scope of the rule against perpetuities: s 15(5). Therefore, in respect of instruments taking effect before 16 July 1964, the unamended common law rule continues to apply.

[37] See s 1.

[38] See s 3.

(3) A number of provisions were introduced to address specific problems created by the operation of the common law rule.[39]

Section 1: Power to specify perpetuity period

4.34 Section 1(1) provides that—

> where the instrument by which any disposition is made so provides, the perpetuity period applicable to the disposition under the rule against perpetuities, instead of being of any other duration, shall be of a duration equal to such number of years not exceeding eighty as is specified in that behalf in the instrument.

4.35 This power to specify a fixed perpetuity period applies only in relation to instruments taking effect on or after 16 July 1964.[40] Two conditions must be satisfied for a disponor to take advantage of this alternative perpetuity period. First, the disponor must explicitly refer to a fixed period which satisfies the requirements of section 1 in the deed or will. Secondly, the vesting of the interests of the beneficiaries must be related to the period specified.

4.36 Furthermore, the power conferred by section 1 is limited in two ways. First, it does not apply to the exercise of a special power of appointment,[41] unless a fixed perpetuity period is specified in the instrument creating the power. If there is, the fixed period applies to the appointment made under the power as well as in relation to the power itself.[42] Secondly, the power to specify a perpetuity period is not available in relation to "a disposition consisting of the conferring of an option to acquire for valuable consideration any interest in land".[43]

Section 3: Uncertainty as to remoteness - "Wait and See"

4.37 Section 3(1) of the 1964 Act provides that—

> Where... a disposition would be void on the ground that the interest disposed of might not become vested until too remote a time, the disposition shall be treated, until such time (if any) as it becomes established that the vesting must occur, if at all, after the end of the perpetuity period, as if the disposition were not subject to the rule against perpetuities...

4.38 Therefore, in respect of instruments having effect on or after 16 July 1964,[44] the common law basis of the rule against perpetuities is fundamentally altered. It is still necessary to ask whether, from the outset of its creation, the interest in question is certain to vest within the perpetuity period. If it is, the interest will be

[39] See s 2 on presumptions as to fertility; s 4 on age reduction and the exclusion of members of a class; and s 5 on conditions relating to the death of a surviving spouse.

[40] See s 15(5) of the Act.

[41] For special powers of appointment, see above, paras 3.19; 4.24 and following.

[42] See s 1(2).

[43] See s 9(2).

[44] See s 15(5).

valid without further inquiry. If not, this uncertainty no longer renders the gift void from the outset. Instead, the gift is presumed to be valid unless and until it becomes clear that the gift must vest, if at all, outside the statutory "wait and see" period.

"Wait and see" where a fixed term of years has been stipulated in the instrument

4.39 A disposition prescribing a fixed perpetuity period under section 1 of the Act but which is not bound to vest within that period is void at common law, as, for example, in the case of a gift to the first child of A to marry where the perpetuity period applicable to the disposition is 80 years. However, such an interest may be saved by "wait and see" until such time (as any) as it becomes established that the vesting must occur after the end of the stipulated period. In the case of the above example, it would be necessary to "wait and see" if a child of A married within the 80 year period specified. Thus, where the instrument prescribes a fixed period of years under section 1, that period acts both as the perpetuity period for the purposes of the common law test of certainty of vesting and as the "wait and see" period for the purposes of section 3(1).[45]

"Wait and see" where no fixed term of years has been stipulated in the instrument

4.40 Where a disponor has failed either to stipulate a fixed period under section 1, or has failed to stipulate such a period correctly, and the gift fails for remoteness at common law, the "wait and see" provisions of section 3 of the Act come into operation. However, by section 3(4), the "wait and see" period is to be calculated by reference to the fixed list of statutory measuring lives (set out in section 3(5)) plus 21 years. It is not to be determined according to the common law measure of "lives in being plus 21 years", nor, in the case where the disponor has incorrectly specified a period under section 1, that period.[46]

[45] Some commentators suggest that the applicable "wait and see" period (even in cases where a fixed perpetuity period has been expressed under s 1) is that prescribed by s 3(4) of the Act and measured by statutory lives in being: see, eg, R H Maudsley, *The Modern Law of Perpetuities* (1979) pp 114, 123-4. But the view stated in the main text is based on the words of s 3(4): "[w]here... the duration of the perpetuity period is not determined by virtue of section 1", the provisions of s 3(4) are inapplicable. Moreover, the inapplicability of a period measured by statutory lives is consistent with s 1(1), which provides that when a period of years is specified as the perpetuity period, the perpetuity period is the specified period instead of being of any other duration.

[46] This aspect of the 1964 Act was controversial: see J H C Morris and H W R Wade, "Perpetuities Reform at Last" (1964) 80 LQR 486, 496 - 501. As we have explained above, para 4.16, there is a difference of opinion between (i) those who consider that where there is no express choice of lives in being, the lives must be causally connected with the gift; and (ii) those who hold the view that the only relevant lives in being are those which validate the gift. The 1964 Act is drafted on the assumption that (ii) is correct. If the only relevant lives are those which validate the gift, a set of statutory lives in being that are different from those at common law is essential. To "wait and see" for the common law perpetuity period would produce exactly the same answer as the common law rule of initial certainty: the gift would be void because there would be no validating lives in being. It is otherwise if all causally connected lives may be lives in being: see David E Allen, "Perpetuities: Who are the Lives in Being?" (1965) 81 LQR 106, 108.

MEASURING THE "WAIT AND SEE" PERIOD: THE STATUTORY LIVES

4.41 Section 3(4) of the 1964 Act states that where the provisions of section 3 apply to a disposition, the duration of the perpetuity period for the purposes of the "wait and see" test shall be determined according to the lives of those persons listed in section 3(5), plus the usual 21 years. However, since the certainty of the old common law rule has now been replaced by the relative uncertainty of the "wait and see" approach, the Act seeks to minimise the potential for ambiguity and confusion by ensuring that at the very least the duration of the "wait and see" period is clear from the outset. Therefore, the Act imposes certain criteria, discussed below, which the statutory lives must satisfy if they are to be used in calculating the statutory period. In this way, trustees can be sure from the outset which lives they must monitor to determine the "wait and see" period and therefore the validity of the disposition.

SECTION 3(5)

4.42 The persons who may be relevant lives for the purposes of calculating the "wait and see" period are listed in section 3(5) as—

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

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

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

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

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

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

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

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

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

THE STATUTORY LIVES MUST BE "IN BEING AND ASCERTAINABLE"

4.43 By virtue of section 3(4)(a), the statutory lives listed in section 3(5) can only be treated as relevant lives in the case of a particular disposition if they are "individuals in being and ascertainable at the commencement of the perpetuity period". In particular, it is provided that "the lives of any description of persons" falling within paragraph (b) or (c) of section 3(5) "shall be disregarded if the number of persons of that description is such as to render it impracticable to ascertain the date of death of the survivor".

4.44 A number of problems have arisen in the interpretation of this provision. The first can be illustrated by the example of a trust in favour of an employer's family, employees and their dependants. It is not possible to identify all the settlor's family members, thus making it impracticable to ascertain the date of the survivor. But, in calculating the "wait and see" period, are the trustees to disregard the lives only of the settlor's family or also those of the employees? The uncertainty arises because section 3(4)(a) directs trustees to disregard "the lives of *any description of persons* falling within" section 3(5)(b) or (c); and this would seem to include both the family and the employees, even though it is only the former that suffer from the defect of unascertainability.[47]

4.45 Secondly, the section refers to the disregard of potential statutory lives when the *number* of persons renders impracticable the ascertainment of the death of the survivor. This has been criticised as unduly narrow: modern registers of births and deaths can make it fairly easy to trace the existence of large numbers of individuals, whereas there may be other reasons why it may be difficult to ascertain the date of death of the survivor.[48]

WHERE THERE ARE NO STATUTORY LIVES

4.46 It is provided by section 3(4)(b) that where there are no relevant statutory lives under sections 3(4)(a) and (5), the "wait and see" period shall be 21 years.

RELATIONSHIP BETWEEN THE STATUTORY LIVES AND COMMON LAW LIVES IN BEING

4.47 The list of statutory lives in the Act does not entirely replicate all the potential lives in being at common law. Not all common law lives in being may qualify as statutory lives in being. It is therefore possible to envisage situations in which a gift would be valid under the common law test of remoteness but invalid under

[47] For discussion, see E H Burn, *Cheshire & Burn's Modern Law of Real Property* (15th ed 1994) pp 320, 321.

[48] E H Burn, *Cheshire & Burn's Modern Law of Real Property* (15th ed 1994) pp 320, 321, give the example of the ascertainment of the grandparents of an immigrant from a third world country where no records of births and deaths are kept. However, it is concluded that "the Act will presumably be construed in a pragmatic manner, with no undue emphasis on the word 'number'".

"wait and see".[49] An example would be a gift to the first of A's lineal descendants to marry X (who is alive at the time of the gift). At common law, this gift would be valid. The first of the lineal descendants of A to marry X must do so (if at all) within the lifetime of X; and X is the relevant life in being. However, under the 1964 Act, X is not a relevant life. Unless the marriage to X takes place within 21 years of the death of the survivor of the statutory lives listed in section 3(5), the gift will be void. Similarly, where the disponor uses a royal lives clause to determine the duration of the common law perpetuity period, the relevant survivor will not normally qualify as a life in being under section 3.

"Wait and see" and options to acquire for valuable consideration any interest in land

4.48 Section 9(2) lays down a fixed perpetuity and "wait and see" period of 21 years "[i]n the case of a disposition consisting of the conferring of an option to acquire for valuable consideration any interest in land". Thus, if a disposition is not so limited that it is bound to vest within 21 years, it is void at common law. But it will be treated as valid by virtue of section 3(1) of the Act until such time, if any, as it becomes established that the vesting must occur after the end of the 21 year period.

Intermediate income

4.49 The operation of the "wait and see" provisions of the Act presents a difficulty which was not encountered at common law. What should the trustees do with the intermediate income produced by the trust funds while they are waiting to see whether in fact the interest of the beneficiary vests within the perpetuity period?

4.50 The example may be given of a gift by will of land to the children of A when they become barristers, where A is alive but childless at the date of the gift. At common law, such a gift would be void *ab initio*. It is not possible to say with certainty that the children of A who become barristers must do so within 21 years of the death of A. No separate question of the application of the income of the land therefore arises. But under the 1964 Act, the trustees would have to "wait and see" whether in fact any of A's children become barristers within the perpetuity period. During this time, what are the trustees to do with the income accumulated from the land? The gift is a contingent specific devise and, as such, carries the intermediate income by statute.[50] The trustees may therefore exercise any power of maintenance, making payments out of income for the maintenance, education or benefit of A's children while they are minors.[51] Once any child has attained 18, the trustees *must* pay the income to them.[52] The question arises as to what should happen if none of the children eventually become barristers and those

[49] Though this is not a point of importance, because the statutory lives are only relevant if the gift is *void* at common law: see the 1964 Act, s 3(1).

[50] See Law of Property Act 1925, s 175(1). For a summary of the law on intermediate income, see A J Oakley, *Parker & Mellows: The Modern Law of Trusts* (6th ed 1994) pp 485 - 487.

[51] See Trustee Act 1925, s 31(1)(i).

[52] See *ibid*, s 31(1)(ii).

entitled to the property on the failure of the gift seek to recover the income from the "wait and see" period? This question is answered by section 3(1) of the Act. If it is established by the application of "wait and see" that the interest must vest (if at all) outside the perpetuity period, this "shall not affect the validity of anything previously done in relation to the interest disposed of by way of advancement, application of intermediate income or otherwise". Thus, in the example above, the trustees of the land could lawfully apply the income of the land for the maintenance of the children of A during the perpetuity period, even though an application of "wait and see" might ultimately prove that vesting will not take place within the time prescribed by law.

Powers of appointment under the 1964 Act

4.51 The 1964 Act makes some substantive change to the common law position on the validity of powers of appointment. Because of the introduction of the principle of "wait and see", neither a general nor a special power will be void because it might be exercised outside the perpetuity period. The power will be void only if this in fact occurs. These reforms only apply to instruments taking effect on or after 16 July 1964.[53] The Act also seeks to clarify the distinction between general and special powers.

The creation of powers of appointment

GENERAL POWERS

4.52 Section 3(2) of the Act reverses the common law rule that a general power is void if it may possibly be exercised outside the perpetuity period. It provides instead that—

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

4.53 Its effects may be illustrated by the example of a general power of appointment exercisable only by will conferred on the first child of A, where A is alive but unmarried at the date of the instrument in question. At common law, the power would be void. However, by virtue of section 3(2), the power will be valid if A's first child is born and dies within 21 years from the death of the last statutory life.

SPECIAL POWERS

4.54 These are dealt with in a more general provision, section 3(3), which states that—

> Where... a disposition consisting of the conferring of any power, option or other right would be void on the ground that the right might be exercised at too remote a time, the disposition shall be treated as regards any exercise of the right within the perpetuity period as if it

[53] And in the case of an instrument made in the exercise of a special power of appointment, only where the instrument creating the power takes effect after 15 July 1964: s 15(5).

> were not subject to the rule against perpetuities and... shall be treated as void for remoteness only if, and so far as, the right is not fully exercised within that period.[54]

4.55 It has been explained how a special power of appointment granted to the first child of A (who is alive but unmarried at the date of the gift), to appoint to his own children, is void at common law.[55] Under section 3(3), the power will be valid if it is in fact exercised by A's first child within 21 years of the death of the last statutory life.

Appointments made under a power

4.56 Provided that the power (general or special) satisfies the test of validity of creation (either at common law or through the help of the statutory provisions) the question remains of whether an actual appointment pursuant to the power is valid.

APPOINTMENTS UNDER A GENERAL POWER

4.57 At common law an appointment under a general power of appointment is treated as a disposition by an outright owner. This is also true under the 1964 Act: if the grant is void at common law, it is possible to apply the usual statutory devices to save it, starting with "wait and see".

APPOINTMENTS UNDER A SPECIAL POWER

4.58 If an appointment under a special power is void at common law, the general "wait and see" provisions of section 3(1) apply. Provided that the power is actually exercised within 21 years of the death of the last statutory life (as measured at the date of the creation of the power), the appointment will therefore be valid despite the fact that there was a possibility of the interest failing to vest within the perpetuity period. It should be noted that the Act does not alter the common law principle that for the purposes of measuring the perpetuity period applicable to an appointment under a special power, the appointment is "read back" into the original instrument creating the power and the period measured therefrom.

4.59 The illustration may be given of a gift by will to A for life, then to such of his children as he shall appoint by will. A is alive but unmarried at the date of the gift. On his death, A makes an appointment in favour of his son B on his qualifying as a barrister. At common law, the appointment is void because it is not certain that B will become a barrister (if at all) within 21 years from the death of A, the relevant life in being at the effective date of the donor's will. However, under the Act, the appointment will be valid if B does in fact qualify as a barrister within 21 years from his father's death.

[54] This section also catches general powers of appointment, but since the effect of the provision is essentially the same as that of s 3(2), no inconsistency between the statutory provisions arises.

[55] See above, para 4.25.

Definitions of "general" and "special" powers

4.60 In addition to changing the basis on which powers of appointment are taken to be valid or void for remoteness, the 1964 Act clarifies which powers are to be treated as special and which as general. The effect of section 7 is that powers of appointment are either special or general. A general power of appointment is one under which there is only one donee of the power who can appoint the property either—

(1) to him or herself during his or her lifetime; or

(2) to his or her estate where the power is exercised by will.[56]

Any other power is a special power. The section preserves the classification of a general power of appointment by will as a general and not as a special power. Although somewhat illogical, this classification was long-established prior to the Act.[57]

4.61 There was some confusion as to whether this provision was applicable to trusts in existence when the 1964 Act came into force. By virtue of the proviso to section 15(5) of that Act, section 7 applies "in all cases". In the light of this, it was suggested that section 7 was intended to resolve any difficulties of classification of powers of appointment in relation to all instruments, whether they were made before or after the 1964 Act came into force.[58] However, it is now settled that its effect was prospective only. In *Re Earl of Coventry's Indentures*,[59] Walton J observed that "[i]t appears to me quite clear that section 7 was enacted for the purpose of quieting difficulties for the future, and nothing more".[60]

[56] The power will still be a general power if the only reason why the donee cannot make the appointment is that he or she is not of full age or otherwise lacks capacity.

[57] See E H Burn, *Cheshire & Burn's Modern Law of Real Property* (15th ed 1994) p 325.

[58] See J T Farrand, *Wolstenholme and Cherry's Conveyancing Statutes* (13th ed 1972) vol 2, p 143.

[59] [1974] Ch 77.

[60] *Ibid*, at p 84.

PART V
COMMON LAW PROBLEMS AND STATUTORY SOLUTIONS UNDER THE PRESENT LAW

INTRODUCTION

5.1 The common law rule against perpetuities did, in certain circumstances, lead to harsh results. The 1964 Act succeeded in reducing such harshness. The principal means by which this was achieved was by the introduction of the principle of "wait and see", which has already been explained.[1] Not only does it represent a fundamental change in approach from the common law, but it is also the most important of a number of "gift-saving" devices that exist under the present law. We go on to explain these devices, some of which are judge made, and some of which are statutory.

GIFT SAVING DEVICES THAT HAVE ALREADY BEEN EXPLAINED

5.2 We have already mentioned two "gift-saving" devices and reference should be made to the treatment of them earlier in this Report. Those devices are—

(1) "wait and see";[2] and

(2) provisions for making determinable interests absolute rather than void.[3]

We examine below the gift-saving devices that have been adopted in relation to the ability to procreate, the postponement of vesting to an age greater than 21 years, class gifts, and the problem of the "unborn widow". In Part VI, we shall examine one further device, the provision for the saving and acceleration of expectant interests.[4]

PRESUMPTIONS AS TO FERTILITY

The common law position

5.3 A number of particularly infamous cases illustrate the strictness with which the common law rule against perpetuities was applied, and the harsh results which resulted.[5] The common law's refusal to recognise any upper or lower age limit at which people were capable of having children was, in particular, the subject of criticism.

[1] See above, para 4.37, where the law is more fully explained.

[2] *Ibid*.

[3] See above, para 3.11.

[4] See below, paras 6.14 - 6.16.

[5] These are set out in W Barton Leach, "Perpetuities: Staying the Slaughter of the Innocents" (1952) 68 LQR 35, 44-47.

5.4 The consequences of this refusal may be seen from the following examples—

(1) "The fertile octogenarian". There is a gift by will to A for life, terminable on her marriage, then to such of the testator's nephews and nieces as should attain the age of 21. At the date of his death, the testator's parents are both aged seventy and he has several adult siblings with infant children of their own. A marries. The gift to the nephews and nieces is void at common law. Despite their age, the common law presumes that the testator's parents are still capable of producing another child. It is then possible that the testator's new sibling will have a child who will attain the age of 21 more than 21 years after the death of any person living at the testator's death.[6]

(2) "The precocious toddler". The case may be considered of a gift by will to A for life, then to such of A's grandchildren living at the date of the testator's death or born within five years thereafter as shall attain the age of 21. At the time of the testator's death, A is sixty-five with two children and an infant grandchild. The gift to the grandchildren would be void at common law. This is because it was considered to be possible that, within the space of just five years, A might have another child and that child might herself have a child. The latter might then reach the age of 21 more than 21 years after the death of any person living at the death of the testator.[7]

The position under the 1964 Act

5.5 The 1964 Act has modified the common law presumptions as to the ability to procreate. Section 2(1) states that—

> Where in any proceedings there arises on the rule against perpetuities a question which turns on the ability of a person to have a child at some future time, then—
>
> (a) subject to paragraph (b) below, it shall be presumed that a male can have a child at the age of fourteen years or over, but not under that age, and that a female can have a child at the age of twelve years or over, but not under that age or over the age of fifty-five years; but
>
> (b) in the case of a living person evidence may be given to show that he or she will or will not be able to have a child at the time in question.[8]

5.6 However, section 2(2) provides that—

[6] See, eg, *Jee v Audley* (1787) 1 Cox 324, 29 ER 1186, applied by the House of Lords in *Ward v Van Der Loeff* [1924] AC 653.

[7] See, eg, *Re Gaite's Will Trusts* [1949] 1 All ER 459 (although on the facts this conclusion was avoided by holding that the possible marriage of the future born child of A would have been void under the Age of Marriage Act 1929. This reasoning is criticised by W Barton Leach, "Perpetuities: Staying the Slaughter of the Innocents" (1952) 68 LQR 35, 46).

[8] Cf *The Times*, 16 January 1998, recording that a woman aged 60 had given birth to a son. Her 19 year old grandson was quoted by the paper as saying "My gran is amazing. She's just taken this in her stride, although I don't think she is planning any more".

> Where any such question [as to the ability of a person to have a child at some future time] is decided by treating a person as unable to have a child at a particular time, and he or she does so, the High Court may make such order as it thinks fit for placing the persons interested in the property comprised in the disposition, so far as may be just, in the position they would have held if the question had not been so decided.

5.7 The effect of the statutory reforms may be demonstrated by reference to the example, given above, of a gift to A for life, terminable on her marriage, then to such of the testator's nephews and nieces as should attain the age of 21. Since the testator's parents are both aged seventy at the relevant date, section 2(1) applies to discount the possibility that they will have another child. The gift in favour of the children of the testator's siblings alive at the date of the will is thereby validated.[9]

POSTPONEMENT OF VESTING TO AN AGE GREATER THAN 21 YEARS

5.8 A gift to the first child of A to attain the age of 25, where A is alive and has no children at the date of the gift, would have been void at common law: the first child of A to attain 25 is not certain to do so (if at all) within 21 years of the death of A, the relevant life in being.

5.9 This once common cause of invalidity has prompted two statutory interventions. First, section 163 of the Law of Property Act 1925 had provided that where (in relation to instruments executed after 1925 or wills of testators dying after 1925) the vesting of a gift or the ascertainment of a beneficiary or class of beneficiaries depends on the attainment by the beneficiary or members of the class of an age exceeding 21 years (thereby rendering the gift void for remoteness) there shall be substituted for the age stated in the disposition that of 21 years. Thus, the above gift would be rewritten as "to the first child of A to attain the age of 21".

5.10 Secondly, in relation to dispositions taking effect after 15 July 1964, the 1964 Act makes two alterations in the law—

(1) The first means of recourse to save a gift which postpones vesting to an age greater than 21 years is the "wait and see" regime. Suppose the above gift to the first child of A to attain the age of 25 where A is alive but childless at the date of the gift. At the death of the last statutory life, A leaves a child aged five. The gift may be validated by an application of the principle of "wait and see" if the child attains the age of 25 within 21 years of the death of the last statutory life.

(2) However, "wait and see" cannot save every such gift. Suppose that, in the above example, A had left a son aged three. Even "wait and see" cannot help the child to attain the age of 25 within 21 years of the death of the last statutory life. If section 163 of the Law of Property Act 1925 were now to

[9] For a critical appraisal of these provisions, see R H Maudsley, *The Modern Law of Perpetuities* (1979) pp 118 - 120.

apply, the age required by the settlor would be reduced to 21. In fact, section 4(1)[10] of the 1964 Act introduces a new age reduction rule—

> Where a disposition is limited by reference to the attainment by any person or persons of a specified age exceeding 21 years, and it is apparent at the time the disposition is made or becomes apparent at a subsequent time—
>
> (a) that the disposition would, apart from this section, be void for remoteness, but
>
> (b) that it would not be so void if the specified age had been 21 years,
>
> the disposition shall be treated for all purposes as if, instead of being limited by reference to the age in fact specified, it had been limited by reference to the age nearest to that age which would, if specified instead, have prevented the disposition from being so void.

5.11 The aim of this provision was to achieve a better balance than that obtained by section 163 of the Law of Property Act 1925 between validating the gift and respecting, as far as possible, the settlor's desire to postpone the age of vesting. So, in cases where vesting has been postponed to an age greater than 21 years, rather than automatically reduce the specified age to 21 in each and every case, it was thought better to reduce the requirement only to that age which is necessary to prevent the gift being rendered void for remoteness. Thus, in the example above, where, at the death of the last statutory life, A leaves a child aged three, section 4(1) would apply to reduce the age requirement not to 21 but to 24.

5.12 However, there is difficulty in applying the 1964 Act to a disposition which is contingent on more than one person attaining the age in question. An example would be a gift by will to the first child of A to attain the age of 25, where A is alive with three children at the date of the testator's death: B aged three; C aged two; and D aged one. Should the age be reduced to 22 in respect of all three children; or should the ages of 24, 23 and 22 be substituted for B, C and D respectively?

5.13 There appears to be no case directly on this issue and the opinion of textbook writers is divided. For example, Sir Robert Megarry and Sir William Wade[11] favour the view that the age of 25 should be reduced on the successive premature deaths of the elder children, so that the age of 24 is substituted for B, on his death the age of 23 is substituted for C and on his death the age of 22 is substituted for D. On the other hand, Edward Burn[12] gives the example of a class gift to the children of X at 30 years, where at X's death his son is four and his daughter five. He argues that the specified age of 30 be reduced to 25 for both children. There is only one "disposition", not several dispositions to cover all members of the class.

[10] As amended by Children Act 1975, Sched 3 para 43, inserting s 4(7) so as to correct a drafting error which would have meant that s 4(6) was ignored: see (1976) 120 SJ 498.

[11] *The Law of Real Property* (5th ed 1984) p 269.

[12] *Cheshire & Burn's Modern Law of Real Property* (15th ed 1994) p 323.

5.14 It may be that the relevant distinction is between a gift to an individual ("to the first child of A to attain 25") where there are several contenders for the gift; and a gift to a group ("to the children of A who shall attain 25") where there are several potential members of the class. In the former case, there is one disposition with only one potential beneficiary and the age reduction provisions can apply on an individual basis to each candidate. In the latter case, there is one disposition with several potential beneficiaries and the age reduction provisions should be applied to the candidates as a whole without discrimination between them.

CLASS GIFTS

Definition of "class gifts"

5.15 In *Pearks v Moseley*,[13] Lord Selborne LC defined a class gift as a gift —

> to all those who shall come within a certain category or description defined by a general or collective formula, and who, if they take at all, are to take one divisible subject in certain proportionate shares...

5.16 The shares do not have to be equal: a gift to the children of A at 21 but so that daughters take shares twice the size as those of sons is a class gift. However, it is not a class gift if the property is given in shares which are not variable with the number of takers. Thus, a gift of property to be divided equally between the five daughters of A gives each a one fifth share of that property.[14] It is a question of construction whether, for example, a gift to A and the children of B at 21 is a gift of one half to A and a class gift to B's children or a class gift to a class consisting of A and the children of B.[15]

5.17 It is also a question of construction whether a disposition contains more than one separate class gift. Take, for example, a gift to A for life, thereafter to A's widow for life, remainder in equal shares to A's children with a proviso that if any child dies in the lifetime of A or his widow (if any), leaving children living at the death of the survivor of A or his widow (if any), the children (A's grandchildren) shall take their parent's share. The gift to the children of A has been construed as a class gift separate from the class gift to the children of each dead child.[16]

Vesting of gifts to a class in individual members

5.18 Where a disponor makes a gift to a class of persons, each potential member of the class acquires a vested interest only on satisfying all the specified conditions attached to the gift. However, the vested interest enjoyed by those members of the class who have satisfied the necessary conditions is described as "subject to open", that is, subject to the possibility of other potential members of the class satisfying the disponor's requirements in the future, thereby acquiring vested interests of their own and reducing the proportion of the gift which will ultimately be distributed to the qualifying beneficiaries.

[13] (1880) 5 App Cas 714, 723.

[14] *Re Smith's Trusts* (1878) 9 ChD 117.

[15] Compare *Porter v Fox* (1834) 6 Sim 485; 58 ER 676; with *Re Harper* [1914] 1 Ch 70.

[16] Cf *Goodier v Johnson* (1881) 18 ChD 441.

5.19 For example (and leaving aside any question of perpetuities), a testator makes a gift of the residue of his estate to A for life, then on A's death to such of A's children as shall attain the age of 21. At the date of the testator's death, A has two infant children. Subsequent to the testator's death, A has a third child, then himself dies. This reduces the potential share of the two older children from one-half to one-third. When the eldest child attains 21, he or she will acquire an interest vested but subject to open, that is, to the possibility that his or her siblings may also attain 21 and acquire vested interests of their own.

Validity of class gifts under the common law rule against perpetuities

5.20 At common law, the rule regarding the validity of class gifts under the rule against perpetuities is simple but harsh: a class gift cannot be part good and part bad.[17] The gift is only valid if the interest of every potential member of the class is certain to vest (if at all) within the perpetuity period. The whole gift will fail if the interest of any single potential member of the class could possibly vest outside the perpetuity period. In that case, the vested interests of those members who have already satisfied the conditions attached to the gift are defeated and they take nothing.

5.21 To illustrate this rule, the example may be given of a gift to such of A's children as shall become barristers. If A is alive at the relevant date, the whole gift is void. A might have a future born child. A and all the other lives in being might then die and that future born child might become a barrister more than 21 years later. Therefore, it is not certain that all A's children to become barristers must do so within the perpetuity period. If, on the other hand, A is dead at the date of the gift, survived by three children, the gift as a whole would be valid. The children are themselves the relevant lives in being and each of them must become a barrister (if at all) within their own lifetimes. In addition, as shall be explained below, if one of A's children is already qualified as a barrister at the time of the gift, it would be valid by virtue of the "class closing" rules.

Saving class gifts at common law: the "class closing" rules

The class closing rules: introduction

5.22 The class closing rules - also known as the rule in *Andrews v Partington*[18] - are not in themselves a part of the rule against perpetuities. Indeed, they developed quite independently of that rule and (as will be illustrated below) were in fact intended to assist trustees in the administration of the trust.

5.23 The class closing rules operate in the following manner—

(1) when one potential member of a class attains a vested interest and becomes entitled to receive his or her share of the gift, then

[17] See the dicta of Lord Selborne in *Pearks v Moseley* (1880) 5 App Cas 714, 723: "the rule is that the vice of remoteness affects the class as a whole, if it may affect an unascertained number of its members".

[18] (1791) 3 Bro CC 401; 29 ER 610.

(2) the class is artificially closed to prevent potential members as yet unborn from being taken into consideration. Even if those excluded members should in fact satisfy all the necessary conditions for acquiring a vested interest, they are still excluded by the trustees in their distribution of the property in question.

5.24 To illustrate the first limb of this rule, the following two gifts may be contrasted—

(1) to such of A's children as shall attain 21. The class closing rule will come into effect when the first of A's children reaches 21, since that child will then acquire a vested interest and is without more entitled to receive his or her share; and

(2) to A for life, then to such of A's children as shall attain the age of 21. Here, the class closing rules will operate only when the first child of A has attained 21 *and* A has died, whichever occurs later, since only on the cumulative occurrence of both these events will the child become entitled to his or her share.[19]

5.25 The second limb of the rule can be illustrated by a gift to such of the children of A as shall attain the age of 21. At the date of the will, A has two children: B aged 20 and C aged ten. B reaches 21 and demands his share of the property. If the trustees pay him out one-half of the property, what happens if A has future born children who later attain 21 and demand payment: do the trustees try to recover a proportionate share of the property from B and C? Instead, when B reaches 21, he or she attains a vested interest and has satisfied all the necessary preconditions for the receipt of his or her share. The class closing rules therefore operate so as to exclude from the class of potential beneficiaries any future born children of A, even if they do in fact reach 21. C is the only remaining potential beneficiary under the disposition. The trustees may therefore distribute to B his or her one-half share of the property. Future events, such as the death of C before attaining 21, can only increase, not reduce, his or her entitlement.

5.26 It should be noted, however, that the class closing rules are rules of construction only and can be displaced by a sufficient expression of contrary intention, though this must be express.[20]

The class closing rules and the rule against perpetuities

5.27 Although the class closing rules are not directly related to the rule against perpetuities, they do indirectly interact with it. If there is a class gift where some interests are sure to vest within but others may possibly vest outside the perpetuity period, that gift would be void at common law. But if, at the date of the gift, one member of the class satisfies all the preconditions for the acquisition of a vested interest and is entitled to receive his or her share of the gift, then the class closing

[19] Cf *Re Bleckly* [1951] Ch 740.

[20] See, eg, *Re Tom's Settlement* [1987] 1 WLR 1021. In that case, the draftsman of the trust deed had made express provision for the class to close on a particular date. This was held to oust the class closing rules. There is a valuable summary of the principles by Browne-Wilkinson V-C at p 1025.

rules come into effect. It is then possible that the class closing rules may, albeit in an arbitrary fashion, exclude from consideration all of those potential members of the class whose interests were not certain to vest within the perpetuity period. In this manner, the class closing rules may prevent a disposition from being rendered void at common law by cutting off that portion of the class which is "bad".

5.28 The example may be given of a gift to such of A's children as shall become barristers, where A is alive at the relevant time. As has been seen above, such a gift would be void at common law because of the possibility that A's future born children might become barristers (if at all) outside the perpetuity period. But if at the date of the gift A already has a child who is a barrister, the class closing rules will operate to exclude the future born children of A from consideration. It is then certain that all A's living children must become barristers (if at all) within their own lifetimes. The gift therefore complies with the rule against perpetuities and is valid at common law.

Class gifts under the 1964 Act

5.29 In respect of instruments taking effect after 15 July 1964,[21] the 1964 Act significantly alters the operation of the common law rule in relation to class gifts. This is achieved by the interaction of two provisions.

"Wait and see" and class gifts

5.30 The first is through the application of the section 3 "wait and see" provisions. For these purposes, the class closing rules still apply and indeed can increase the chances of the entire gift being validated within the statutory perpetuity period. Events which occur after the date of the gift but which would have been ignored at common law can now be taken into consideration under "wait and see". In this way the class can be closed.[22]

5.31 To illustrate, the example may be given of a gift by will to such of the children of A as shall marry, where A is alive at the testator's death with two unmarried children, B and C. At common law this gift would be void as a whole. It is possible that a future born child of A might marry outside the perpetuity period; and that future born child is not excluded by virtue of the class closing rules because they have not yet been activated. However, the Act requires the trustees to "wait and see". Soon after the testator's death, B marries. Under "wait and see", B acquires a vested interest in the property and under the rule in *Andrews v Partington* the class closes to cut off from consideration all future born children of A (even if they should in fact marry within the statutory period). Only C remains as a potential member of the class and C must marry (if at all) within his or her own lifetime.[23] The gift as a whole is therefore validated by a combination of "wait and see" and class closing. If C marries, he or she will be entitled to a half-share of the property. If not, B will be the sole beneficiary.

[21] See s 15(5).

[22] For a detailed analysis of the relationship between "wait and see" and the class closing rules, see Peter Sparkes and Richard Snape, "Class Closing and the Wait and See Rule" [1988] Conv 339.

[23] C is, for these purposes, a statutory life in being within s 3(5)(b)(i).

5.32 If these facts are varied so that, between the date of the testator's death and the time of B's marriage, A has another child, D, D is not excluded from the class of potential beneficiaries by the class closing rules because he or she was in existence when B married. There is no certainty that D will marry (if at all) within 21 years from the death of the last statutory life.[24] The trustees must therefore "wait and see" whether in fact D marries within the statutory perpetuity period. If so, D will acquire a vested interest and the entire gift is validated. If not, the gift as a whole must fail and the trustees will have to apply the class severance provisions of section 4 of the Act to exclude D and allow B and C to take their shares.

Severance of class gifts which are "part good, part bad": general

5.33 If "wait and see" cannot save the entire class gift, it may nevertheless be possible to rely on the provisions of sections 4(3) and (4) of the 1964 Act. They abolish the principle that a class gift cannot be part good and part bad and instead allow severance of the gift so as to exclude those potential members who would otherwise invalidate it. Section 4 makes provision for two situations:

Severance of class gifts under section 4(4)

5.34 The first situation is where the class gift is void at common law due to the possibility that the interests of certain potential members of the class may vest outside the perpetuity period, and their interests cannot be saved by "wait and see". Section 4(4) provides that—

> where... it is apparent at the time the disposition is made or becomes apparent at a subsequent time that, apart from this subsection, the inclusion of any persons, being potential members of a class or unborn persons who at birth would become members or potential members of the class, would cause the disposition to be treated as void for remoteness, those persons shall, unless their exclusion would exhaust the class, thenceforth be deemed for all the purposes of the disposition to be excluded from the class.

5.35 By way of illustration, the situation may be considered where there is a gift to A for life, then to such of A's children as shall become barristers, where A is alive and childless at the date of the gift. This is void at common law, and the class closing rules are of no relevance. A later dies, survived by two children: B, who is a barrister, and C, who is not. If C does qualify as a barrister within 21 years from the death of the last statutory life, the gift as a whole will be valid by virtue of "wait and see". But if the "wait and see" period expires and C is not a barrister, section 4(4) will apply to exclude C from the class and allow the gift to stand valid in relation to B.

Severance of class gifts under section 4(3)

5.36 The second situation is where the gift specifies two or more conditions which potential members of the class must satisfy if they are to acquire a vested interest,

[24] D, of course, cannot be a statutory life because he or she was not in being at the relevant date.

one of which conditions is the attainment of an age exceeding 21 years; and "wait and see" cannot save the gift. Section 4(3) states that—

> Where the inclusion of any persons, being potential members of a class or unborn persons who at birth would become members or potential members of the class, prevents the foregoing provisions of this section [sections 4(1) and (2) on age reduction] from operating to save a disposition from being void for remoteness, those persons shall thenceforth be deemed for all the purposes of the disposition to be excluded from the class, and the said provisions shall thereupon have effect accordingly.

5.37 The effect of this provision may be illustrated by a gift to A for life, then to such of A's children as shall become barristers and attain the age of thirty, where A is alive and unmarried at the date of the gift but later dies leaving two children, B, a barrister aged thirty and C, an infant of five. At common law the whole gift would be void because it is not certain that C will become a barrister within 21 years from A's death and the potential gift to C in particular would also be void because C is not able to reach thirty within that period. Section 4(1) of the Act can apply so as to reduce the age requirement to 26, removing one obstacle to validity. "Wait and see" may remove the other, if C in fact qualifies as a barrister within 21 years from the death of the last statutory life. But if C does not become a barrister within that time, section 4(3) will apply to exclude C from consideration, thereby validating the gift with B as its sole beneficiary.

Reduction of age, exclusion of class members, "wait and see" and section 4(5)

5.38 Section 4(5) provides that where section 4 has effect in relation to a disposition to which "wait and see" applies, the operation of section 4 does not affect the validity of anything previously done in relation to the interest disposed of by way of advancement, application of intermediate income or otherwise. Thus, the operation of the section does not displace the rules relating, *inter alia*, to intermediate income provided in section 3(1) of the Act.[25]

THE "UNBORN WIDOW"

The common law position

5.39 Another notorious case of the common law's pure but harsh logic is that of the "unborn widow".[26] Its effect may be illustrated by a gift to A for life, and after A's death to any wife A may marry for her life, then to their children as shall be living at the death of the survivor of A and such wife. The gift to the children is void at common law: A might marry a wife who was unborn at the time of the gift and therefore not a life in being; such wife could then survive A by more than 21 years and the interests of their children would not vest within 21 years of the death of A. The fact that this might never happen and is unlikely to happen is, as ever,

[25] See above, paras 4.49 - 4.50.

[26] See W Barton Leach, "Perpetuities: Staying the Slaughter of the Innocents" (1952) 68 LQR 35, 45.

irrelevant: the theoretical possibility of its occurrence is sufficient to invalidate the gift.[27]

The position under the 1964 Act

5.40 In the case of dispositions taking effect after 15 July 1964, the Act may save such a gift by one of two means. First, "wait and see" should be applied to determine whether in fact A marries and his wife dies within 21 years from the death of A. It is irrelevant whether A's wife was alive or unborn at the date of the disposition, since in neither case is she a statutory life in being for the purposes of calculating the applicable perpetuity period. If the wife does die within the perpetuity period, the gift is valid. If not, section 5 of the Act must be applied.

5.41 Section 5 provides that—

> Where a disposition is limited by reference to the time of death of the survivor of a person in being at the commencement of the perpetuity period and any spouse of that person, and that time has not arrived at the end of the perpetuity period, the disposition shall be treated for all purposes, where to do so would save it from being void for remoteness, as if it had instead been limited by reference to the time immediately before the end of that period.

5.42 Thus, in the above example, if A's wife does not in fact die within 21 years from the death of the last statutory life, the gift to the children is nevertheless saved by section 5. At the expiry of the perpetuity period, the living children will acquire interests vested in interest, ready to take effect in possession on the death of the wife.

[27] See, eg, *Re Curryer's Will Trusts* [1938] Ch 952.

PART VI
WHAT ARE THE CONSEQUENCES OF A BREACH OF THE RULE AGAINST PERPETUITIES? THE PRESENT LAW

6.1 In this Part, we set out the law relating to the consequences of a breach of the rule against perpetuities.

GENERAL EFFECTS OF A BREACH OF THE RULE

6.2 Where a purported disposition of a future interest in property is found to violate the rule against perpetuities and cannot be saved by one of the various common law or statutory gift-saving devices, it is rendered void. In the case of a disposition made before 16 July 1964 governed only by the common law, the interest will be void *ab initio*. In the case of other gifts governed also by the 1964 Act, the interest is rendered invalid only from the time when it becomes clear that it cannot vest before the expiry of the "wait and see" period.[1] In other words, the disposition is not void *ab initio*, only prospectively.

6.3 Once a limitation is rendered void for breach of the rule against perpetuities, the property in question will devolve as on the failure of a limitation for any other reason. Thus, in the case of a testamentary bequest the gift will fall into residue; or, if there is no residuary gift, or the property in question is itself the residue, the interest will pass to those entitled as on intestacy. In the case of an *inter vivos* disposition, the property will revert to the settlor or his estate on a resulting trust.

EFFECT OF A BREACH OF THE RULE ON SUBSEQUENT INTERESTS

The common law

6.4 Often an instrument will contain more than one limitation in succession. In principle, the perpetuity rule is applied to each separately. But it is also necessary to examine the effect of one limitation being void on the rest of the disposition.

The subsequent limitation itself suffers from a remote contingency

6.5 Where the subsequent limitation itself suffers from a remote contingency, whether the same or different from that affecting the earlier remote contingency, that subsequent limitation will be void.

Dependent limitations

6.6 Where the property is disposed of in such a way as to create a series of successive interests, each intended to take effect only upon the exhaustion or termination of all antecedent interests, and one of those interests is void for remoteness, all the subsequent interests are void.

[1] See the 1964 Act, s 3(1). In addition, as has been seen above (paras 4.49, 4.50), the trustees' application of intermediate income during the "wait and see" period is unaffected by a subsequent invalidation of the disposition.

6.7 Where a limitation which would be valid if looked at in isolation is nevertheless considered void because of its relationship to a prior void limitation, it is called a "dependent limitation". The reasoning behind this outcome was explained by Stirling J in *Re Abbott*[2]—

> It is settled that any limitation depending or expectant upon a prior limitation which is void for remoteness is invalid. The reason appears to be that the persons entitled under the subsequent limitation are not intended to take unless and until the prior limitation is exhausted; and as the prior limitation which is void for remoteness can never come into operation, much less be exhausted, it is impossible to give effect to the intentions of the settlor in favour of the beneficiaries under the subsequent limitation.

6.8 While this principle is clear, its application is not always straightforward. It is a matter of construction whether the limitations in question are "dependent" limitations governed by the rules now under consideration; or "alternative" limitations, governed by a separate set of rules considered below.[3]

6.9 The facts of *Proctor v Bishop of Bath and Wells*[4] illustrate this difference. Property is left to the first son of A who shall become a clergyman, but in case A shall have no such son, then to B in fee simple. By the time of his death, A has no children: can B take the property in fee simple? The answer would appear to be no. The limitation in favour of A's first son to become a clergyman is void because this contingency is not certain to occur within the perpetuity period. The gift to B in itself is not too remote, since it must vest (if at all) within B's own lifetime. However, B's interest is construed as being dependent on the prior void interest and therefore void in itself at common law. B's interest does not rest on two alternative contingencies, that *either* A should have no sons *or* that none of A's sons should become clergymen. If it did, B could claim the property because the first of these two alternative contingencies has in fact occurred and it was not void for remoteness at common law. In fact B's interest is construed as depending on a single contingency, that *A should have no son who becomes a clergyman*. This contingency is not satisfied by A having no sons at all.

6.10 The courts have declared themselves reluctant to rewrite the disponor's words to save the gift.[5] Yet it must be admitted that the difference between a dependent and an alternative limitation is one of mere (and fine) semantics. It seems unlikely that the disponor in a case like *Proctor* intended any distinction whereby B would acquire an interest where A had no sons who were clergymen but would be denied an interest where A had no sons at all.

Independent limitations

6.11 Where there is a disposition of a future interest in property which must vest in interest (if at all) within the perpetuity period and the vesting of which in

[2] [1893] 1 Ch 54, 57.

[3] See paras 6.17 and following.

[4] (1794) 2 H Bl 358; 126 ER 594.

[5] *Pearks v Moseley* (1880) 5 App Cas 714, 719; *Re Hume* [1912] 1 Ch 693, 698.

possession is not dependent on the exhaustion of any prior interests created by the disponor, that future interest is valid and unaffected by the fact that one of those prior interests is void for remoteness.

6.12 The example may be taken of a gift of the residue of a testator's estate upon discretionary trusts of the income in favour of A for life, then after his death upon discretionary trusts of the income in favour of A's widow for life, then after her death on a non-discretionary trust for such of A's children as shall attain the age of 21. A is alive and unmarried at the date of the will. The gift to the widow is void at common law. A might marry a woman born after the relevant time and thus the discretion of the trustees, which is a condition precedent to the widow's right to receive any interest, might be exercised beyond the perpetuity period of 21 years from the death of A, the relevant life in being. However, the limitation in favour of A's children is valid. Their interests must vest in interest (if at all) within 21 years of A's death. Those interests are in no way dependent on whether the trustees' discretionary power to pay the income to the widow is or is not valid.[6]

Displacement of subsequent interest by void condition

6.13 Where property is given to beneficiaries subject to their interests being displaced by the exercise of a power or discretion which is invalid for remoteness, the beneficiaries are not affected by that invalidity. For example, property is directed to be held on trust for A absolutely, but subject to a discretion in the trustees to apply the property for the maintenance of a dwelling house. The discretionary trust for the maintenance of the house is invalid, since it may be exercised outside the perpetuity period. But the trust in favour of A is valid: A's interest was merely subject to divestment on the exercise of the trustees' discretion; since that discretion is void and cannot be exercised, A's interest is not and cannot be affected.[7]

The 1964 Act

6.14 Following criticisms that the common law "doctrine of dependency" was vague and difficult to apply,[8] section 6 of the 1964 Act alters the law in respect of instruments taking effect on or after 16 July 1964.[9] It provides that—

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

[6] See, eg, *Re Coleman* [1936] Ch 528.

[7] See, eg, *Re Canning's Will Trusts* [1936] Ch 309.

[8] See Sir Robert Megarry and Sir William Wade, *The Law of Real Property* (5th ed 1984) p 273 for criticisms that in several cases, the construction of limitations as "dependent" failed to give effect to the disponor's intentions and contravened the principle requiring gifts to be construed as vested wherever possible. Moreover, the Law Reform Committee said that it was not easy to discover from the cases any precise test for identifying "dependent" interests: see Fourth Report (1956) Cmnd 18, para 32.

[9] See s 15(5).

6.15 The effect of the first limb of section 6 is to *save* dependent limitations by abolishing the common law doctrine of dependency set out in cases like *Re Abbott*. Instead of holding an interest to be void merely because, on a construction of the instrument, it is dependent on an anterior limitation which is void for remoteness, each individual limitation is to be tested separately for compliance with the rule against perpetuities. The invalidity of one will not affect the validity of the others.

6.16 The effect of the second limb is to provide that remoteness of a prior interest is not to prevent the vesting of a subsequent interest from being *accelerated*. However, the subsequent interest will not be accelerated until any independent conditions attached to it have been satisfied.[10]

EFFECT OF A BREACH OF THE RULE ON ALTERNATIVE LIMITATIONS

At common law

6.17 At common law, where the disponor makes the vesting of a future interest in property dependent on one of two or more alternative contingencies, one of which is void for remoteness, the interest may still be valid if the contingency which is not too remote is the one which in fact occurs. This is a rare example of the common law "waiting and seeing" which of two or more possible events takes place and determining the validity of an interest on that empirical, as opposed to prophetical, basis.[11]

6.18 The example may be considered of a gift to A if B should die without male issue; or if such male issue should die without issue.[12] A is alive and unmarried at the date of the gift. The second contingency is void for remoteness, since whether B's male issue have or fail to have issue of their own will not necessarily be known within 21 years of the death of the relevant lives in being. But if in fact B dies without male issue, the void contingency is rendered irrelevant and the gift may vest in A.[13]

6.19 However, whether two or more contingencies are alternative or dependent (and therefore prone as a group to being rendered void at common law) is a matter of construction of the instrument in question. As has been seen above, there may be a thin line between finding one or the other. Nevertheless, after the 1964 Act, the potential for inconsistency and injustice has been reduced. Section 6, by

[10] It is not clear whether this changed the law or merely clarified it, though it is probably the latter: see *Halsbury's Statutes* (4th ed 1997 reissue) vol 33, p 1058.

[11] The only other example of common law "wait and see" is in determining the validity of appointments under a special power: see above, para 4.31.

[12] As in *Longhead v Phelps* (1770) 2 Black W 704; 96 ER 414.

[13] See also *Re Curryer's Will Trusts* [1938] Ch 952. The testator directed that funds be held on trust for his grandchildren living on the decease of his last surviving child or on the death of the last surviving widow or widower of his children, whichever should last happen. The gift was construed as depending on two alternative limitations: the first was the death of the last surviving child of the testator; and the second was the death of the last surviving widow or widower of his children. A gift to the grandchildren living on the occurrence of the former contingency would be valid, but, one on the occurrence of the latter contingency, would be void. It was therefore necessary to "wait and see" whether in fact the last surviving child died before the last surviving widow or widower.

abolishing the common law doctrine of dependency, would allow the potential beneficiary under a limitation which has been construed as dependent to rely on the occurrence of the valid contingency and to ignore the void one.

Under the 1964 Act

6.20 The only change in the law affected by the 1964 Act was the introduction of "wait and see". This will be of assistance primarily in relation to the contingency which is void for remoteness at common law.[14] This can be illustrated by the example, given above, of a gift to A if B should die without male issue or if such male issue should die without issue, where B dies leaving sons. The trustees would "wait and see" whether those sons died childless within the perpetuity period. If so, A could take his interest in the property even though this alternative limitation was void at common law.[15]

ENFORCEABILITY OF CONTRACTUAL AND OTHER RIGHTS IN CASES OF REMOTENESS

Enforceability of contractual and other rights in cases of remoteness at common law

6.21 At common law, the rule against perpetuities had no application as between the parties to contracts creating personal obligations and rights.[16] However, the rule does apply to contracts creating interests in property limited to take effect at some time in the future. Many such contracts also create personal obligations and rights and even if the interests in property are void for remoteness, the personal obligations may be enforceable. Thus, in *Hutton v Watling*,[17] an action between the original contracting parties for specific performance of an agreement created by the exercise of an option succeeded notwithstanding the defence (on which the Court did not have to rule) that the option was void for remoteness. Jenkins J said—

> specific performance is merely an equitable mode of enforcing a personal obligation with which the rule against perpetuities has nothing to do.[18]

[14] *Halsbury's Laws of England* (1994 reissue) vol 35, para 1082.

[15] Similarly, on the facts of *Re Curryer's Will Trusts*, above, if "wait and see" applied, then even if the testator's last surviving child died before their last widow or widower, the gift to the grandchildren then living may be saved if the last widow or widower in fact dies within the perpetuity period.

[16] *South Eastern Railway Co v Associated Portland Cement Manufacturers (1900) Ltd* [1910] 1 Ch 12.

[17] [1948] Ch 26, affirmed [1948] Ch 398. This decision has been criticised: see J H C Morris and W Barton Leach, *The Rule Against Perpetuities* (2nd ed 1962) p 221, n 5.

[18] [1948] 26, 36. See also *Worthing Corporation v Heather* [1906] 2 Ch 532 (where a claim for specific performance of an agreement following the exercise of an option failed against the successors in title of the grantor but a claim for damages against the grantor's estate succeeded) and *South Eastern Railway Co v Associated Portland Cement Manufacturers (1900) Ltd* [1910] 1 Ch 12.

6.22 Whether a contract creates an interest in property depends on the terms of the contract. Contracts to purchase or lease land, if specifically enforceable, create equitable interests and, as estate contracts, they are binding not only on the original parties but also on their successors in title,[19] subject to the operation of the rule against perpetuities, which will render interests which may arise outside the perpetuity period void as against persons other than the grantors or their estates. Ordinary contracts for sale are valid even if there is no specific completion date, since a term that completion will take place within a reasonable time is implied.[20] But a contract for sale in, say, 22 years' time would probably be void as against persons other than the grantor or his estate, "for the purchaser's equitable interest, though it arises at once, cannot be truly vested until the time has expired".[21]

Avoidance of contractual and other rights in cases of remoteness under the 1964 Act

6.23 The 1964 Act makes an important change to the common law in relation to all *inter vivos* dispositions of property which take effect on or after 16 July 1964 and create interests in property. Section 10 provides that if a disposition is void as against a third party for remoteness, it is also void as between the original contracting parties. The effect is thus to subject both the personal obligations and the interests in property created by the contract to the same rule.[22]

6.24 If the *inter vivos* disposition in question is an option to acquire land for valuable consideration, the 21 year period specified in section 9(2) will be the perpetuity period. If it is another type of disposition, the rule against perpetuities will apply in the same way as it does to other dispositions. Thus, if A agrees to sell land to B contingent on planning permission being obtained, it is necessary to "wait and see" whether such permission is obtained within a period ending 21 years from the death of the survivor of A and B. If it is not, the contract will be void and no personal obligation arising from it can be enforced.

[19] Subject to compliance with registration requirements: Land Registration Act 1925, s 59; Land Charges Act 1972, s 4(6).

[20] See *Johnson v Humphrey* [1946] Ch 460.

[21] See Sir Robert Megarry and Sir William Wade, *The Law of Real Property* (5th ed 1984) p 289, referring to J C Gray, *Gray on Perpetuities* (4th ed 1942) § 330, n 2.

[22] Thereby reversing cases such as *Hutton v Watling* [1948] Ch 26 and 298.

PART VII
WHEN SHOULD THE RULE AGAINST PERPETUITIES APPLY? PROPOSALS FOR REFORM

INTRODUCTION

7.1 In Part III, we set out the circumstances in which the rule against perpetuities applies under the present law. In this Part, we consider the question of when the rule *should* apply. We summarise the defects in the present law and we set out both our objectives for reform and our recommendations.

DEFECTS IN THE PRESENT LAW

7.2 There are three principal defects in the present applicability of the rule against perpetuities—

(1) it applies in cases where the justification for it is absent;[1]

(2) its application to certain types of interests such as future easements and options can create practical problems, particularly in relation to the development of land;[2] and

(3) there is some uncertainty as to its application both to certain types of pension scheme and to nominations and advancements made under any pension scheme.

When does the rule presently apply?

7.3 The present application of the rule against perpetuities gives rise to two main concerns. The first is that the rule is not limited to family settlements, but applies to a variety of interests which generally arise in a commercial context. It does, for example, apply to future easements and to options to acquire for valuable consideration any interest in land. The second concern is that the exceptions to the rule are not always dictated by the policy of the rule. This is particularly so in relation to pension schemes, where it does not apply to those personal or occupational pension schemes which satisfy certain Revenue requirements. Those requirements have no connection with the policy of the rule.

Practical problems

7.4 Any reform of the rule must have regard both to its policy and its conceptual coherence. However, in formulating our approach, we have been guided primarily

[1] As we explained above, para 2.3, the common law rule against perpetuities belongs to the family of legal rules which were developed so as to prevent settlors or testators from tying up property in such a way that it was kept in their families permanently. The development of the rule did not reflect this underlying purpose, however, and it has become applicable to most types of future interests.

[2] See below, paras 7.7 and following.

by the points raised in response to the Consultation Paper. Many of the responses that we received were critical of the extent of the rule's application.

7.5 In the Consultation Paper, we suggested that certain types of dispositions should no longer be subject to the rule, namely pension schemes, future easements, options and contracts, rights of pre-emption and gifts to charity.[3] We also suggested that *all* commercial dispositions should be excluded from the rule. On consultation, there was support for all of these exclusions, though with varying degrees of enthusiasm. We examine these in turn, having particular regard to the practical problems that were raised in response to the Consultation Paper.

Pension schemes

7.6 The proposal to exclude all pension schemes from the rule commanded the widest support. Unapproved retirement benefit schemes are not at present excluded from the rule.[4] These schemes are no longer as fiscally disadvantageous as they used to be. They are also becoming more important. This is because of the earnings cap on the amount of remuneration which can be used under an exempt approved occupational pension scheme to qualify for benefits under it.[5] The main arguments in favour of the exclusion of all pension schemes are the following—

(1) the need to place limits on the extent to which one generation can control the devolution of property for the future has no relevance to pension funds which provide contractual benefits to members and their dependants;

(2) the reasons for exempting pension schemes from the rule apply to approved and unapproved schemes alike: there is no obvious reason why that exemption should not extend to schemes which happen to be unapproved, only because they do not meet certain criteria that have no connection with the rule against perpetuities; and

(3) those schemes to which the rule currently applies are prejudiced because they have to be wound up at a date that is wholly arbitrary. This may have a number of adverse consequences. For example—

(a) members and their dependants may be deprived of the increased pension that might otherwise have resulted;

(b) there may be adverse effects on a fund's investment strategy; and

(c) if such a scheme is not replaced, benefits may have to be purchased by insurance policies which is likely to be both costly and administratively onerous.

[3] Paras 5.80 and following.

[4] See above, para 3.55.

[5] We were informed on consultation that the possibility of setting up pension schemes without Revenue approval has greatly expanded since the Finance Act 1989.

Future easements

7.7 There was also wide support on consultation for the exclusion of future easements from the rule. The application of the rule often led to results that were both inconvenient and hard to justify as a matter of policy.

7.8 These difficulties can be illustrated by an example given to us on consultation. A landowner grants a lease of part of his land to a developer for a term of 99 years. He wishes to reserve the right to connect his retained land to services (such as sewers and drains) that might be constructed by the developer on the land which he has leased, thereby ensuring that the retained land will have the benefit of any future services on that adjoining land. If he includes the reservation of such a future easement in the lease, it will be valid only if the services are in fact constructed within the 80 year perpetuity period.[6] The anomaly is heightened if, as is customary, the reservation of the future easement is accompanied by the execution of a restrictive covenant in the landowner's favour by which no roads or services can be constructed without his consent. The restrictive covenant will continue in perpetuity even though the reservation of the future easement will be void if it does not take effect within the perpetuity period.[7] It comes as no surprise that landowners and developers find such anomalies both tiresome and incomprehensible.

7.9 Support for the exemption of future easements from the rule was not completely unanimous.[8] The main consideration identified by those who were opposed to the lifting of the restriction was the possibility that land could be rendered unsaleable by easements which had been granted to take effect at some future but uncertain date. However, one of the main concerns that underlay this objection had no connection with the rule. It was that easements once granted were very difficult to terminate, particularly as there is no procedure for their termination (as there is for restrictive covenants[9]). While we are well aware of these difficulties, we do not consider that the rule against perpetuities is the appropriate method of dealing with them.

Options and contracts

7.10 Doubts have been expressed on occasions in the past as to the desirability of extending the rule against perpetuities from family to commercial transactions such as options.[10] It was not therefore surprising that there was extensive comment in the responses to the Consultation Paper on the applicability of the rule to options. The balance of the responses was in favour of excluding such rights from the rule against perpetuities. The present 21 year perpetuity period

[6] We understand from HM Land Registry that the 80 year perpetuity period is generally used when granting future easements rather than "royal lives" clauses.

[7] It should be pointed out that the grant of a restrictive covenant to take effect at a future date is just as much subject to the rule against perpetuities as is the grant of a future easement. It is in practice rare for landowners to enter into such future covenants.

[8] Two of those who responded on the point were opposed to it.

[9] See Law of Property Act 1925, s 84 (as amended).

[10] See, eg J H C Morris and H W R Wade, "Perpetuities Reform at Last" (1964) 80 LQR 486, 522.

applicable to options undoubtedly inhibits the ability of landowners to enter into long-term agreements.[11] There are also difficulties in some cases which arise because of the mismatch between this 21 year limitation and the principle that an option contained in a lease, either to renew that lease or to purchase the freehold reversion,[12] is valid whenever it is exercised during the currency of that lease.[13]

7.11 On consultation, we were given a number of examples of difficulties that had arisen in practice, including the following—

(1) A grants a 125 year lease of some land to B, an adjoining landowner. B then grants a sublease of that and its own land to a developer. It is likely that buildings will be erected partly on one piece of land and partly on the other. On the termination of the lease (whether at the end of 125 years, or earlier, on the occurrence of certain events), it had originally been negotiated between A and B that there should be cross-options to purchase the freehold of part of any building straddling the boundary. The legal advisor had to advise that, although any option to renew the lease would not infringe the rule, this arrangement based on cross-options to purchase the freehold would be void.

(2) The 21 year limit causes problems where highway authorities purchase options to buy small strips of land which may be required for road improvement purposes at a later date. Such options safeguard the public interest in securing the availability of the land for road improvement at a future date without the land being put out of use for other purposes in the meantime. We were told that the 21 year limitation causes real difficulties when a road development scheme is delayed without being abandoned.

7.12 There was some support for the retention of an extended perpetuity period so as to prevent land becoming sterile and unsaleable. There could undoubtedly be difficulties in tracing the devolution of the benefit of options which were not restricted in time.[14] However, against this view, it was suggested that, as the grant of an option was the result of commercial negotiations, such rights should be wholly exempt from the application of the rule.

7.13 One consultee drew attention to a point that was only touched upon in the Consultation Paper, namely, the effect of paragraph 7(2) of Schedule 15 of the Law of Property Act 1922 in relation to options to renew leases. This paragraph provides that—

[11] We were told by one consultee that landowners and developers commonly wished to enter into such long-term agreements because of difficulties of planning and the general strategic control of land. Alternative devices, such as the use of trusts, companies or leases, were often considered to be unsatisfactory.

[12] Subject to certain limitations: see the 1964 Act, s 9(1).

[13] In the case of an option to purchase the reversion, the exemption extends to the case where the option is exercisable within a year of the determination of the lease: see the 1964 Act, s 9(1).

[14] This could mean that a landowner, wishing to sell or develop the land, might not be able to trace the person having the benefit of the option in order to secure its discharge.

> [a]ny contract entered into after [1st January 1926] for the renewal of a lease or underlease for a term exceeding sixty years from the termination of the lease or underlease, and whether or not contained in the lease or underlease, shall... be void.

7.14 The limitation of renewals to 60 years does of course bear no relationship either to the present perpetuity period, or to the period of 125 years that we shall propose.[15] Nor is there any reason why it should do so. We have already explained our view that the justification for the rule against perpetuities is the need to place some limits upon the extent to which one generation can be permitted to dictate the devolution of property for the future.[16] On that basis, the limitation on renewals of leases to 60 years is outside the proper scope of the rule. It is in fact one of a number of rules that restrict or affect the grant or renewal of leases.[17] If these rules are in need of reform - about which we have insufficient information to express an opinion - they should be considered as a totality, as part of a separate and distinct exercise.[18]

Rights of pre-emption

7.15 We have already noted that there is some uncertainty as to the applicability of the rule against perpetuities to rights of pre-emption.[19] The majority of the consultees who addressed this issue considered either that the point should be clarified, or that rights of pre-emption should be wholly exempted from the rule.

Gifts to charity

7.16 There was limited but, on balance, overall support for the suggestion that all gifts to charity should be totally exempt from the rule against perpetuities.[20] The responses suggested that the present law did not cause much difficulty in practice, and some cogent objections were made to any such change. For example, it might be employed to compel a recipient to carry out a non-charitable purpose for an indefinite period, as where property was left to a corporation subject to divestment in favour of a charity if it did not make annual donations to a named political party.[21]

[15] See below, para 8.13.

[16] See above, para 1.9.

[17] These include the provisions on perpetually renewable leases found in Law of Property Act 1922, Sched 15, and the rule restricting the grant of future leases in Law of Property Act 1925, s 149(3).

[18] We note that a similar view was taken in relation to the United States Statutory Rule Against Perpetuities: see the Comment on § 4, Uniform Laws Annotated; Estates, Probate and Related Laws, Vol 8B, p 378.

[19] See above, paras 3.44 - 3.46.

[20] Six consultees were in favour of such a change and four were against. The case that was made for any change was muted: see the Consultation Paper, para 5.87.

[21] Cf *Re Tyler* [1891] 3 Ch 252; above, para 3.49. At present this result can be achieved only where there is a gift to one charity with a gift over to another charity on the occurrence of the contingency.

Exclusion of all commercial dispositions

7.17 In the Consultation Paper, we criticised the rule against perpetuities because it had been extended outside its original purpose to many commercial interests and contracts.[22] It could give rise to practical difficulties because, in the absence of relevant lives in being or where the fixed 80 year perpetuity period did not apply,[23] the perpetuity period might only be 21 years. It was also an unnecessary interference in the parties' freedom of contract. In the Consultation Paper there was no attempt to indicate precisely which kinds of transaction the Commission had in mind to exempt. Commercial contracts,[24] commercial dispositions,[25] contingent interests in property created in a commercial context[26] and commercial interests [27] were all mentioned.

7.18 Most of the respondents who addressed this issue considered that the rule should not apply to freely negotiated commercial transactions. Indeed this was identified as the principal objection to the present law. The real difficulty as we perceived it in the Consultation Paper[28] was to know how to define those commercial transactions or interests that should be excluded from the ambit of the rule. A number of those who responded doubted whether any workable definition was possible. As we explain below,[29] we have encountered a more fundamental difficulty in our attempts to reflect the wishes of consultees. It is that we are unable to identify the nature and uniting 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. Although we go on to consider a number of suggested definitions, we explain that these are not satisfactory for a number of reasons, but simply highlight the nebulousness of the concept that we seek to identify. We have therefore decided that it would be preferable to proceed in a different way to achieve a similar outcome by which the rule against perpetuities will not apply to most transactions or dispositions that could be regarded in some way as "commercial".

Uncertainty

7.19 It is not always clear whether the rule applies to a particular interest. While the 1964 Act substantially reduced the uncertainty of the common law,[30] questions as

[22] Para 4.13.

[23] Eg, in relation to options.

[24] Consultation Paper, para 4.13.

[25] *Ibid*, para 5.88.

[26] *Ibid*.

[27] *Ibid*, para 5.89.

[28] *Ibid*.

[29] Para 7.39.

[30] For instance, in relation to the application of the rule to possibilities of reverter.

to the rule's application remain. One area of doubt relates to pension schemes. As we noted in Part III,[31] there is some uncertainty as to how the rule applies—

(1) to those unapproved schemes that are not exempted from its application; and

(2) to nominations of benefits or advancements under any pension scheme (if it applies at all).

OBJECTIVES OF REFORM

7.20 In the light of responses to consultation, we have been persuaded that the application of the rule against perpetuities to certain types of property rights cannot be justified as a matter of policy. In the Consultation Paper, we proposed to achieve this result by widening the exceptions to the perpetuity rule.[32] However, in finalising our policy for this Report, we found that this approach gave rise to a number of serious difficulties. The first, which we have mentioned above[33] and shall explain in more detail below,[34] is that we were unable to formulate a workable exception that would encompass all commercial dispositions (whatever those might be). Secondly, and connected with this, there was a real risk that we might fail to exclude from the rule against perpetuities all rights and interests that were outside the mischief that it was intended to meet.[35] That rule is a restriction on an owner's freedom to dispose of property as he or she wishes. As we have indicated, we consider that the only justification for it is the need to place some limit on how far one generation can control the devolution of property for the future,[36] and that it should not apply where that justification is absent.[37]

7.21 In the light of these difficulties, we decided to adopt an *inclusionary* rather than an *exclusionary* approach. In other words, we decided to define those interests to which the rule should apply rather than those to which it should not. The only cases in which the need for dead hand control appeared to us to require the application of the rule against perpetuities was in relation to future estates and interests arising under trusts or wills.[38] This approach restores the application of the rule to the very situations for which it was created.[39] Because many pension

[31] See above, paras 3.52 and following.

[32] See paras 5.80 and following.

[33] Para 7.18.

[34] See para 7.38.

[35] It is noteworthy that it was thought necessary to enact Law of Property Act 1925, s 162 by which a very curious assortment of rights are declared not to be and never to have been subject to the rule against perpetuities. These rights include such matters as the power to distrain, and the grant of a right to enter land for the purpose of "inspecting, grubbing up, felling and carrying away timber and other trees, and the tops and lops thereof". The section was enacted to remove doubts about such rights. For the text of s 162, see Appendix B.

[36] See above, para 1.9.

[37] Above, paras 1.17, 7.2.

[38] See below, para 7.31, and Draft Bill, Cl 1.

[39] See above, paras 2.2 and following.

schemes take the form of trusts, there is an obvious danger that the rule would apply to them. This would run contrary to the wishes of many consultees.[40] To meet this, we propose to widen the existing exception to the application of the rule so that it encompasses virtually all (if not all) pension schemes.

7.22 The effect of these proposals will be to make the rule inapplicable to rights such as future easements, options in gross, rights of pre-emption and most commercial transactions. We are aware that, as a result, there may be risks in relation to the creation of open-ended options and future easements. However, we consider that these risks are best evaluated by the parties to the transactions, who will commonly be acting upon legal advice. Although not all of those who responded to the Consultation Paper would agree with us, we consider that it should be no part of the function of the rule against perpetuities to mend bad bargains. As we have explained,[41] on consultation, there was wide support for the exclusion from the rule of all freely negotiated bargains.

7.23 We are aware that we did not consult on the possibility of stating in statutory form the circumstances in which the rule against perpetuities should apply rather than listing the situations where it should not.[42] There are dangers in so doing. In particular—

(1) a statutory formulation "fossilises" the rule and thereby excludes any judicial development;

(2) one or more situations may be omitted from the definition that ought to be included in it; and

(3) new situations may arise where the rule ought in principle to apply.

However, we consider that these dangers, though real, can be minimised, and that they are, in any event, outweighed by the benefits of the approach that we propose.

7.24 First, the issue must be looked at in context and with a due sense of proportion. Our approach to the rule against perpetuities is that it should act as no more than a long stop to prevent unreasonable dispositions.[43] As we explain below,[44] we recommend that the perpetuity period should be a fixed period of 125 years. The difference between the rule applying and it not applying to a disposition will be immaterial in most cases.

7.25 Secondly, there comes a time when the exceptions to a rule become so great that it is both easier and more principled to state the rule positively and say when it does, rather than when it does not, apply. We consider that that position would be

[40] See above, para 7.6.

[41] Above, para 7.18.

[42] It was in fact suggested to us by a number of consultees either that we should do what we are in fact proposing to do or that the rule against perpetuities should be codified.

[43] See above, para 2.37.

[44] Para 8.13.

reached in relation to the rule against perpetuities, once the exceptions that we propose were introduced.[45]

7.26 Thirdly, our proposals have the advantage of clarity and certainty, considerations that are particularly important in relation to property dealings. There will be a comprehensive statement of the law in one statute. The ways in which future estates, rights and interests in property can be created under a trust or will have been firmly settled for many years and are generally very familiar and well-understood.[46] A practitioner who is asked to advise a client as to whether the perpetuity rule does or does not apply to a disposition should have no difficulty in providing the answer. If we had proceeded by listing the exceptions to the rule, the practitioner would not be able to have the same confidence. He or she would still have had to consult the textbooks to ascertain the common law exceptions to the rule. There might also be interests about which there was some doubt. Furthermore, if we were to include some form of exclusion for "commercial dispositions" there would inevitably be at least *some* margin of uncertainty in relation to many transactions.

7.27 Fourthly, although there is a risk that new kinds of property rights may arise, it should be possible to ascertain very readily from the legislation whether or not they fall within the rule. It should be noted that there is, in any event, an apparent statutory prohibition on the creation of novel equitable interests in land. They appear to be frozen as they were on 31 December 1925.[47] If some new right did arise that was within the rule, and this was thought to be undesirable, there would be a power to add it to the list of exceptions to the rule by statutory instrument.[48] It seems unlikely that any new rights might arise that were not within the rule, but where it was thought that they should be, given the length of the perpetuity period.[49]

7.28 Finally, the approach adopted ensures that the rule does not apply where the justification for it is absent. There could be no certainty of that had we proceeded by listing the exceptions to the rule.

[45] It is perhaps noteworthy that in its response to the Consultation Paper, STEP (the Society of Trust and Estate Practitioners) suggested that "all options, easements, and other future interests not arising under settlements should fall outside the rule. We do not think harm is likely to arise in practice".

[46] There is one exception to this. The doctrine of executory bequests of chattels that we explain below at para 7.31, is probably not known to most lawyers. We have included it from an abundance of caution to ensure that we have comprehensibly covered all possible ways of creating future estates, interests and rights under trusts and wills.

[47] See Law of Property Act 1925, s 4(1) (proviso).

[48] See below, para 7.52.

[49] See above, para 7.24.

PROPOSALS FOR REFORM

What is to be included within the rule?

The basic scheme

7.29 There are three elements in the scheme which we have devised to implement the objectives set out in the previous paragraphs—

(1) the only circumstances in which the rule against perpetuities should apply should be set out in statutory form;

(2) the basic principle would be that the rule should apply to future estates and interests; and

(3) that principle should be subject to certain clearly defined exceptions.

Each of these elements is explained more fully below.

Confine the rule to the situations listed by statute

7.30 We consider that it is in the interests of certainty that the only circumstances in which the rule against perpetuities would apply should be stated in statutory form. It would then be unnecessary to have regard to any case law about the applicability or otherwise of the rule, but only to the terms of the statute. **We recommend that the rule against perpetuities should not apply except as provided by statute.** (Draft Bill, Cl 1(1).)

The rule should apply only to future estates and interests

7.31 To restore the rule to the circumstances for which it was originally intended, we propose that it should, in essence, be restricted in its application to future estates and interests. It will generally apply only to interests created by or under a trust or a will. **We recommend that the rule against perpetuities should only apply—**

(1) to successive estates and interests in property, held in trust including an estate or interest which—

(a) is subject to a condition precedent; or

(b) arises under either a right of reverter on the determination of a determinable fee simple, or under a resulting trust on the determination of a determinable interest;

(2) where property is held on trust for an estate or interest subject to a condition subsequent, a right of re-entry (or the equivalent right in property other than land) that is exercisable on breach of that condition;

(3) to powers of appointment; and

(4) where a will limits chattels in such a way as to create successive *legal* interests in them under the doctrine of executory bequests, to those interests.[50] (Draft Bill, Cl 1(2) - (6).)

7.32 Subject to certain points of clarification, we intend the rule against perpetuities to apply to such interests in the same manner as it does under the 1964 Act, though in carrying forward this intention, we have not in all cases employed the same techniques as did the draftsman of the 1964 Act. It will (for example) be the case that where there is a determinable fee simple and it becomes clear that the determining event must take effect (if at all) outside the perpetuity period, the fee simple will become absolute,[51] just as it does under the 1964 Act.[52] There are, however, a number of small points of clarification that we propose. Only one of these is concerned with the applicability of the rule against perpetuities and is considered below. The others are as to how the rule applies and are considered in Part VIII.

Nominations under pension schemes

7.33 We have explained in Part III that there is some uncertainty as to whether the rule against perpetuities applies to nominations of benefits under a pension scheme, and if so in what manner.[53] At this point in the Report, we are concerned only with the former question.[54] As a nomination takes effect as a special power of appointment and will be exercised to create future interests,[55] we consider that the rule should be applicable, and that this should be so even though the pension scheme itself is not subject to the rule. As we have explained, the considerations that justify the exemption of the scheme itself do not apply to a nomination of benefits made by an individual member of that scheme.[56] Similar considerations apply to interests created by the exercise of a power of advancement under a pension scheme.[57] To clarify these matters, **we recommend that interests created either by instruments which nominate benefits under a pension scheme or by the exercise of a power of advancement under such a scheme should be subject to the rule against perpetuities in so far as these interests are subject to the rule by reason of the recommendations made in paragraph 7.31.** (Draft Bill, Cl 2(5).) For these purposes, the Draft Bill defines the pension schemes in question in terms that are wide enough to

[50] Although successive interests in land can only be created by means of a trust after 1925, it remains theoretically possible to create successive *legal* interests in chattels without a trust under the obscure doctrine of executory bequests: see E L G Tyler and N E Palmer, *Crossley Vaines' Personal Property* (5th ed 1973) pp 41 - 43; A P Bell, *Modern Law of Personal Property in England and Ireland* (1989) pp 75 - 76. The rule against perpetuities applies to interests created by such executory bequests: see *Re Backhouse* [1921] 2 Ch 51.

[51] See Draft Bill, Cl 10(1).

[52] See s 12(1); see above, para 3.11.

[53] See above, para 3.59.

[54] For the latter, see below, para 8.24.

[55] Eg, for the employee's spouse for life, thereafter to his or her children.

[56] See above, para 3.59.

[57] See above, para 3.62.

encompass virtually all (if not all) genuine pension arrangements.[58] This recommendation will apply to any nomination made after any legislation comes into force, even though the person making the nomination was already a member of the pension scheme at that date.

What is to be excluded from the rule?

The retention of present exceptions to the rule

7.34 With the possible exception of nominations of benefits under pension schemes, we do not propose to apply the rule to any future interests not presently subject to the rule. We expressly retain the exception by which a gift over from one charity to another on the occurrence of some event that may take place outside the perpetuity period is valid.[59] For reasons that we explain below, we do not recommend any extension of that exception.[60]

Future rights to which the rule will no longer apply

7.35 Because the estates, interests and rights to which the rule against perpetuities will apply are comprehensively listed in the Draft Bill, it necessarily follows that all other rights are automatically excluded from the application of the rule. There are two aspects of this that merit some comment. First, a number of existing statutory exceptions to the rule against perpetuities will become otiose, because they will simply be outside the ambit of the rule.[61] These include trustees' administrative powers,[62] and the miscellaneous rights excluded from the rule by section 162 of the Law of Property Act 1925.[63] Secondly, many rights over land will cease to be subject to the rule, particularly those of a "commercial" nature. The rule against perpetuities will no longer apply to any of the following—

(1) easements granted or reserved to take effect at a future date;

(2) restrictive covenants which are to take effect at a future date; and

(3) options and rights of pre-emption.[64]

This does, of course, give effect to the views of the majority of those who considered the application of the rule to future easements, options and rights of pre-emption, and reflects the widely-held feeling that it should not apply to bargains that had been freely negotiated.

[58] See Draft Bill, Cl 20(5).

[59] Draft Bill, Cl 2(2), (3).

[60] See para 7.37.

[61] Cf Draft Bill, Cl 4.

[62] See the 1964 Act, s 8; above, para 3.24.

[63] See above, para 3.29.

[64] A concomitant of this recommendation is, of course, that there would be no equivalent of either ss 9 (application of the rule against perpetuities to options) or 10 (avoidance of rights for perpetuity between the parties to a contract where those rights would be void as against third parties) of the 1964 Act. For those provisions, see above, paras 3.41 (s 9(1)); 3.42 (s 9(2)); and 3.40 (s 10).

Extension of the pensions exception

7.36 We have already explained the uncertainties as to how the rule against perpetuities applies to those pension schemes that are not approved schemes.[65] We have also criticised the existing situation by which certain schemes are subject to the rule simply because they do satisfy criteria that are unconnected with the rationale of the rule.[66] To resolve these difficulties, and to reflect the views expressed on consultation, we consider that the exemption from the rule of pension schemes should be widened. **We recommend that the rule against perpetuities should not apply to an interest or right arising under—**

(1) an occupational pension scheme;

(2) a personal pension scheme;

(3) a public service pension scheme; or

(4) a self-employed pension arrangement. (Draft Bill, Cls 2(4); 20(5).)

The definitions of these terms[67] are those given in the Pension Schemes Act 1993.[68] We understand that the effect of these exclusions will be to place virtually all (if not all) genuine pension schemes outside the ambit of the rule. However, as we have already indicated,[69] the exemption of a pension scheme from the rule does not carry with it interests created by any nomination of benefits made by a member of that scheme or by the exercise of a power of advancement by the trustees, to which the rule will apply under our recommendations.

Possible exceptions that we do not recommend

GIFTS TO CHARITY

7.37 There are two possible exceptions that were canvassed in the Consultation Paper that we do not recommend. The first was to exclude *all* gifts to charity from the ambit of the rule. In deciding not to pursue this exception we have been particularly influenced by two factors. The first is that there was little evidence on consultation that the present law was a cause of difficulty in practice or that a change in the law was considered to be a pressing need. Secondly, we are not persuaded that such a change would be desirable in any event. We have explained how, under the present law—

(1) there is a limited exception to the perpetuity rule that applies where there is a gift over from one charitable trust to another; and

[65] See above, para 3.53.

[66] See above, para 7.6(2).

[67] See Draft Bill, Cl 20(5).

[68] See ss 1 and 181(1) respectively. These provisions may be found in Appendix B.

[69] See above, para 7.33.

(2) that exception has been employed as a means of enforcing a non-charitable purpose trust in perpetuity.[70]

If *any* gift to charity were to be outside the perpetuity rule, there would be much greater scope for abuse, as a number of those who responded to the Consultation Paper were at pains to point out. We have already given one example of this: we have explained that the existence of such immunity could be utilised as an indirect means of creating non-charitable purpose trusts in perpetuity.[71] It might also enable a settlor to create what was, in effect, a perpetual trust in favour of his or her family. This might happen if A left property to B on condition that if B, or any person to whom the property devolved, attempted to sell or otherwise dispose of the property to any person who was not a descendant of A, the property should pass to the X charity.

COMMERCIAL DISPOSITIONS

7.38 The second possible exception that we have decided not to pursue is a broad one in favour of "commercial dispositions".[72] We consider that, as a matter of principle, transactions of a commercial character ought not to be impeded by the operation of the rule against perpetuities. However, we have decided not to create such a general exception. The principal reason for this lies in the difficulty of defining the transactions that we would hope to exclude, which we explain in the following paragraphs.[73] Although we would not suggest that it is impossible to devise an exception that would include most of the transactions that would generally be regarded as commercial, we consider that it would be difficult. In our view, it is better to proceed as we have recommended, by defining when the rule against perpetuities should apply rather than by listing the exceptions to it. We have already outlined the advantages of this approach.[74]

Uncertainty of concept

7.39 There are really two aspects of the uncertainty which we have mentioned in the previous paragraph. First, and most fundamentally, we have been unable to identify the very concept of "commercial dispositions".[75] We are uncertain as to which forms of activity are meant to fall within this expression. The term "commercial" is not a term of art, and its meaning depends upon the context in

[70] See above, para 3.49.

[71] See above, para 7.16.

[72] As we have explained above, para 7.18, the Consultation Paper was itself very vague, speaking variously of "commercial dispositions", "contingent interests in property created in a commercial context", "commercial transactions" and "commercial interests": see paras 5.88, 5.89 of that Paper.

[73] One respondent to the Consultation Paper commented that "the complications of definition would be absolutely horrendous". In a commentary on the Consultation Paper, Carl Emery observed that "it could be argued that the difficulty of a watertight definition of 'commercial' outweighs the benefits of this broad brush approach" [of excluding all commercial dispositions]: "Do We Need a Rule Against Perpetuities" (1994) 57 MLR 602.

[74] See above, paras 7.21 and following.

[75] It came as no surprise that the responses on consultation provided little enlightenment.

which it is used, whether in a statute or otherwise.[76] While it can be said with certainty that some types of transaction are indubitably commercial, there are many others about which there can be either a doubt or two opinions.

7.40 This uncertainty is likely to be acute in some areas where the rule against perpetuities might be highly relevant, as two examples will demonstrate. The first concerns the activities of a family business or arrangements reached within a family.[77] Lord Loreburn LC once observed that—

> [t]he fact that the transaction was a family arrangement is not inconsistent with its being also a purchase for full consideration in money or money's worth.[78]

This duality makes it very difficult to know whether a transaction is "commercial" or not, as where A settles a sum of money on trust for any grandson of his who attains the age of 25, in consideration of his son B taking over the assets and assuming all the liabilities of the family business. Any view as to what is "commercial" is largely subjective.

7.41 Another situation where the point arises is where there is a transaction with some element of bounty in it. For example, X Plc has a charitable foundation, X Foundation. That Foundation transfers the freehold reversion on a commercial development to the University of Wessex against an undertaking that the University will retransfer the property when sufficient money has accrued from the rents to fund the X Plc Professorship of Business Studies.[79] Part of the duties of any Professor will be to provide business advice to X Plc. Once again, it is very difficult to know whether that transaction could be regarded as a "commercial disposition".

7.42 The real reason for exempting commercial transactions (whatever they may be) from the rule against perpetuities is that they are outside the mischief which the rule seeks to contain. The need to control the dead hand "in order to manoeuvre in the light of new tax laws, changes in the nature of the property and in the personal circumstances of the beneficiaries"[80] simply does not arise in the commercial context. If there is a defining characteristic that we seek to capture

[76] For a neat illustration, see *IRC v Goodwin* [1974] 1 WLR 380, 386. The issue was whether something had been done "for bona fide commercial reasons" within Finance Act 1960, s 28. Walton J observed that "[n]either Mr Potter nor Mr Nolan [the counsel before him: the latter is now Lord Nolan] was willing to attempt a definition of the vital word 'commercial'. After some initial inclination to restrict the word to buying and selling, Mr Potter finally plumped for the parameters of the word 'commercial' being found in the market place. Mr Nolan would paraphrase the word as equivalent to 'business'".

[77] This point has arisen in a number of tax cases. For example, in *Brown v A-G* (1898) 79 LT 572, the issue was whether a partnership deed by which a son was brought into his father's business was in the nature of a family arrangement (and therefore liable to succession duty) or a sale of a business. The House of Lords held it to be the former. See especially the comments of the Earl of Halsbury LC at 574. Cf *A-G v Boden* [1912] 1 KB 539.

[78] *Lethbridge v A-G* [1907] AC 19, 24.

[79] There are obviously a number of devices that could be used to carry out this intention.

[80] Ruth Deech, "Lives in Being Revived" (1981) 97 LQR 593, 594, quoted above, para 1.9.

therefore, it is to identify those transactions where the justification for the rule against perpetuities is absent, rather than to seek to determine whether they are in some sense "commercial". As we have already indicated, we believe we have achieved this in our proposal to restrict the rule to estates, interests and rights arising under wills and trusts.

Possible models

7.43 Secondly, notwithstanding the difficulties explained above, we did examine carefully a number of possible models that could be employed as a way of excluding commercial transactions and which might, in themselves, provide some guidance as to concept. First, in the Consultation Paper we drew attention to § 4 of the United States Uniform Statutory Rule Against Perpetuities.[81] This provides that the rule against perpetuities does not apply to a long list of interests which include—

> (1) a nonvested property interest or a power of appointment arising out of a nondonative transfer, except a nonvested property interest or a power of appointment arising out of (i) a premarital or postmarital agreement, (ii) a separation or divorce settlement, (iii) a spouse's election, (iv) a similar arrangement arising out of a prospective, existing, or previous marital relationship between the parties, (v) a contract to make or not to revoke a will or trust, (vi) a contract to exercise or not to exercise a power of appointment, (vii) a transfer in satisfaction of a duty of support, or (viii) a reciprocal transfer;

7.44 This provision is neither particularly clear nor simple. The crucial element in it that leads to the exclusion of a disposition from the rule is that it is a "nondonative transfer", a term which is left undefined. It is clear from the accompanying Commentary on § 4, that a transfer can be outside the "nondonative" exemption even though it is supported by consideration.[82] What makes a transfer donative or nondonative is the intention of the transferor. We consider that this test is far too uncertain to be useful. It does not enable a practitioner to know, simply by examining a disposition, whether or not it is subject to the rule. He or she must investigate the donor's intentions, something that, with the passage of time, will become increasingly difficult. According to the Commentary on § 4, the example given above in paragraph 7.40 of a settlement made by A for a consideration moving from a third party, B, would *not* be regarded as a "nondonative transfer" and *would* be subject to the rule against perpetuities.[83] However, we would have considerable difficulty in deciding whether the example given in paragraph 7.41 of a transfer of a freehold reversion to the University of Wessex was or was not a "nondonative transfer". Nor could we confidently predict the outcome of transactions that are or may be at an undervalue, as where A grants his daughter B an open-ended option in consideration of £1 under which she may purchase his farm at half the market value of the property on the date of the option.

[81] Uniform Laws Annotated: Estate, Probate and Related Laws, Vol 8B, p 377.

[82] *Ibid*, p 378.

[83] *Ibid.*

7.45 A second possibility would be to define commercial transactions as those made at arm's length for money or money's worth. As we indicate below, whether or not a transaction is at arm's length will not always be easy to determine and may be uncertain.[84] However, there is a fundamental objection to such a definition. It would be very easy to dress up an essentially gratuitous settlement that ought properly to be subject to the rule against perpetuities by executing it for a small but not nominal money payment.[85] There would have to be some form of anti-avoidance provision to deal with this.

7.46 A rather more promising model which addresses exactly this problem is found in section 10 of the Inheritance Tax Act 1984. Inheritance tax is not payable on a "transfer of value" and section 10 provides that—

> (1) A disposition is not a transfer of value if it is shown that it was not intended and was not made in a transaction intended, to confer any gratuitous benefit on any person and either—
>
> (a) that it was made in a transaction at arm's length between persons not connected with each other, or
>
> (b) that it was such as might be expected to be made in a transaction at arm's length between persons not connected with each other.

At first sight this comes close to encapsulating what could be regarded as a "commercial disposition". However, on a closer analysis, there are at least two elements in the definition that make it too uncertain in our view to employ as the basis of an exclusion from the rule against perpetuities.

7.47 The first is that it depends upon the intention with which the transaction was made. If there is any possibility that there may be an element of gratuitous benefit, it is necessary to investigate the motives of the maker. For example, if a testator provided in his will that his son might purchase his farm at any time during the lifetime of his widow at "the agricultural value thereof determined for probate purposes",[86] would the exercise of that option be a transfer of value? The doubt arises because "[p]robate valuations are commonly on the economical side",[87] and even if they are increased after discussion with the district valuer, it is possible that they may still not be at a full market price. Is it necessary to investigate whether the testator knew that, and if it is, how would that be done?

7.48 The second element in the definition that leads to uncertainty is the concept of an arm's length transaction. In its revenue context, that element may cause no practical difficulty. Doubts can be resolved by a dialogue with the Inland Revenue against a background of established practice. That context will be absent when a practitioner has to advise a client on whether the rule against perpetuities is or is not applicable. The issue cannot be determined simply from the character of the

[84] See para 7.48.

[85] Cf *Midland Bank Trust Co Ltd v Green* [1981] Ac 513, 532.

[86] Cf *Re Malpass, dec'd* [1985] Ch 42.

[87] *Ibid* at p 50, *per* Megarry V-C.

transaction. It is necessary to investigate the circumstances under which it was made, perhaps many years after the event, and even if this is done, there may be no certainty.[88] The likelihood of such issues arising is high, particularly in the context of dispositions which involve a family business.

7.49 There is one final drawback to the definition in section 10. It may not be wide enough to exclude from the rule against perpetuities all those transactions of a commercial character in which the justification for its application is absent. This is because some commercial transactions may involve an element of gratuitous benefit, but one which is compensated for by more intangible gains.[89]

7.50 We did consider other possible definitions, such as those employed in certain Canadian states which apply a perpetuity period of 80 years to "a contract whereby for valuable consideration an interest in real or personal property may be acquired at a future time".[90] Our concern is that definitions of this kind would be too limited for the purposes that we intend, because we can foresee commercial arrangements that might not fall within them, such as the immediate grant of a future right over land.

7.51 We doubt that our decision not to exclude all commercial transactions from the rule will have much practical effect in the light of the other recommendations that we have made. First, the rule will cease to apply to many commercial transactions where its application presently causes difficulties, such as options, rights of pre-emption and future easements. Secondly, a number of those who responded on consultation suggested that certain other arrangements of a commercial character, such as employee benefit trusts, should be excluded from the rule against perpetuities. These would still fall within our recommended reformulation of the rule against perpetuities. However, further inquiry suggested that the application of the rule against perpetuities did not cause undue difficulty in practice. We note that some of the examples involving commercial transactions that we received on consultation were situations where the rule against perpetual non-charitable trusts, rather than the rule against perpetuities was the cause of the difficulty. Such cases lie outside the scope of the project. Thirdly, even where the rule continues to apply, the fixed perpetuity period will be substantially longer than it is at present.[91]

The power to specify exceptions

7.52 It is quite conceivable that situations may arise in future, perhaps from the development of new types of financial instrument, where the rule against

[88] This highlights the dangers of borrowing a definition from one statute in circumstances where it performs a different function from the one intended.

[89] The sort of transaction given above in paragraph 7.41 of a transfer of income-producing property for a period of time is a case in point. As we there indicate, that transaction could be carried out in a number of different ways. If a trust were used, then under the recommendations made in this Report, the rule against perpetuities would apply. If this was thought to be undesirable, it would be possible to achieve the same result via a contractual solution, which would not be subject to the rule.

[90] Alberta Perpetuities Act, RSA 1980, c P-4, s 18(1). See too the British Columbia Perpetuity Act, RSBC 1979, c 321, s 18(1).

[91] See below, Part VIII.

perpetuities would apply, but where that might be undesirable. To meet this possibility, and to obviate the need for primary legislation in those circumstances, **we recommend that the Lord Chancellor should have power to specify further exceptions to the rule against perpetuities by statutory instrument.** (Draft Bill, Cl 3.) Such a statutory instrument would require an affirmative resolution of both Houses of Parliament.[92] This means that any order could not be brought into operation unless approved by resolution of both Houses.[93]

COMMENCEMENT

7.53 We can see obvious objections to the retrospective application of the recommendations that we have made in this Part. To abrogate the applicability of the rule to certain types of right and interest might have the effect of validating dispositions that had been treated either as void *ab initio* or as spent through the effluxion of the perpetuity period. It would also almost certainly interfere with commercial bargains that had been concluded on the basis of the present law. The only justification for retrospective reform would be to make the law simpler and to obviate the need to know the former law. We are not satisfied that any viable scheme having retrospective effect would meet those goals, because of the need to preserve the effect of concluded or void transactions. **We therefore recommend that the restrictions on the scope of the rule against perpetuities that we propose in this Part should only apply to instruments taking effect on or after the date on which any legislation is brought into force.** (Draft Bill, Cls 15(1), (3), 22.)

[92] Draft Bill, Cl 3(5).

[93] Some statutory instruments are subject to annulment and do not require affirmative resolution. These are brought into operation after a lapse of time unless annulled by a resolution of either House.

PART VIII
WHAT SHOULD THE RULE AGAINST PERPETUITIES BE? PROPOSALS FOR REFORM

INTRODUCTION

8.1 In Part IV - VI of this Report, we explained the present law which governs—

(1) the content of the rule against perpetuities;

(2) some of the problems that arose at common law and the statutory responses to them; and

(3) the effect of a breach of the rule.

In this Part, we summarise the defects in the present law, outline our objectives for reform and make recommendations accordingly.

DEFECTS IN THE PRESENT LAW

Introduction

8.2 The principal defects in the present law derive from the continued and widespread reliance on the concept of lives in being as a means of determining the duration of the perpetuity period, both at common law and under the 1964 Act. The introduction by the 1964 Act of the power for disponors to specify their own fixed perpetuity period of up to 80 years was intended to reduce such reliance. However, this has not been the case in practice. It was clear from responses on consultation that in many cases the 80 year perpetuity period is not sufficiently long to persuade disponors to abandon the traditional common law perpetuity period of a life in being plus 21 years and, in particular, the use of "royal lives" clauses. This is so, even though the 80 year period was introduced "in an attempt to wean conveyancers away from the 'royal lives' clause".[1]

Lives in being at common law

8.3 The use of lives in being at common law gives rise to a number of practical difficulties. In the Consultation Paper we identified a number of these,[2] and the responses on consultation revealed others.

"Royal lives" clauses

8.4 The first problem concerns the continued existence and use of "royal lives" clauses, which are employed by disponors to maximise the duration of the perpetuity period. There are two principal problems with such clauses. The first

[1] J H C Morris and H W R Wade, "Perpetuities Reform at Last" (1964) 80 LQR 486, 488.

[2] See the Consultation Paper, particularly para 4.6.

is the risk, already mentioned, that the measuring lives may be so numerous that it may be impractical to ascertain who they are, and therefore impossible to say when the period of 21 years may commence.[3] If that is the case, it appears that the trust will be void for uncertainty.[4] The second, related problem is that, even where it is not impracticable to ascertain the identity of all the measuring lives, it is in practice very difficult.[5] The existence of this difficulty was confirmed on consultation, and we were told by one well-known firm of solicitors that its partners treated "royal lives" clauses as if they were a fixed number of years, that number being of necessity arbitrarily chosen.[6]

Where no measuring lives have been expressly chosen

8.5 We have explained that the principle of "wait and see" applies only where a disposition is void at common law,[7] and it is therefore necessary to identify the measuring lives in being. Where the disponor does not expressly select these, there can be some uncertainty as to their identity. It is rather surprising to discover that there is no universally accepted test for determining which lives are to be employed.[8] We have referred to the well-known division of opinion between those who consider that the measuring lives must be those which are in some way causally connected with the gift and those who take the view that the only relevant lives are those which validate the gift.[9]

Lives in being under the 1964 Act

8.6 The provisions of section 3 of the 1964 Act, in particular subsections (4) and (5), are unclear, difficult to apply and a cause of uncertainty. For example, we have seen how the commentators are divided over whether the wording of section 3(4) excludes the use of "statutory lives plus 21 years" when calculating the "wait and see" period where the disponor has selected a fixed perpetuity period under section 1.[10] We have also seen how the requirement in section 3(4)(a) that the statutory lives be "in being and ascertainable" has given rise to a number of problems of interpretation, namely, which lives are to be disregarded for uncertainty and on what grounds lives may be disregarded.[11]

[3] Cf *Re Moore* [1901] 1 Ch 936, 938. See above, paras 4.13 - 4.14; and R H Maudsley, *The Modern Law of Perpetuities* (1979) pp 89, 90.

[4] See *Re Moore*, above. Cf *Re Villar* [1928] Ch 471 (Astbury J); [1929] 1 Ch 243 (CA).

[5] Such information is not readily accessible. Such sources as there are, eg *Debrett's Peerage and Baronetage* (1995), do not appear annually, but only periodically (quinquennially in the case of *Debrett's*). Thus, even though the identity of the measuring lives may be known at a given date, it is still necessary to make enquiries thereafter to discover whether any of them are still alive.

[6] The figure selected was 100 years, but we have learned informally that other firms of solicitors use different figures.

[7] See the 1964 Act, s 3(1); above, para 4.37.

[8] See above, paras 4.16 - 4.17.

[9] See above, paras 4.16, 4.40.

[10] See para 4.39.

[11] See above, paras 4.43 - 4.45.

Inconsistency between common law and statutory lives in being

8.7 As has been seen above,[12] the relevant lives in being under the common law and under the "wait and see" provisions of the 1964 Act may differ even in relation to the same disposition. This is likely to be the case especially when an instrument uses a "royal lives clause" to measure the duration of the perpetuity period at common law. Although unlikely to produce problems in practice, this nevertheless results in an unnecessary degree of complexity and creates the potential for confusion.

The existence of three different perpetuity periods

8.8 The co-existence of three different methods of computing the perpetuity period, added to the potential interaction of those methods, creates complexity and promotes uncertainty. The perpetuity period in relation to any particular disposition may have to be calculated by reference to either—

(1) the common law formula of "a life or lives in being plus 21 years", where the interest is valid at common law without more; or

(2) the common law formula of "a life or lives in being plus 21 years", followed by the statutory formula of "statutory lives plus 21 years", where the interest is void at common law and "wait and see" is applied; or

(3) a fixed period of up to 80 years, if specified under section 1 of the Act.

In addition, a number of interests, such as options to acquire for valuable consideration any interest in land, have their own perpetuity period.[13]

THE PERPETUITY PERIOD: OBJECTIVES OF REFORM

8.9 Our objectives in reconsidering the perpetuity period are two-fold. The first is to produce a period that is rational. The common law period of a life in being plus 21 years is directly related to the origins of the rule against perpetuities in the family settlement.[14] The point has been cogently made that the period now bears no resemblance to those roots.[15] The lives in being can be expressly chosen from persons wholly unconnected with the gift "to stretch the permissible area of donor-control as far as possible into the future",[16] and the period of 21 years, originally linked with an actual minority, has long since lost that bond. Our second objective is to produce a perpetuity period that strikes the appropriate balance between the respective freedoms of the present generation and those to come to dispose of property as they wish, but does so with a far greater degree of simplicity than does the present law. We have therefore decided to recommend that there should be one perpetuity period and that it should be for a fixed term of years. This approach enjoyed widespread support on consultation.

[12] At para 4.47.

[13] In this case, of 21 years: see the 1964 Act, s 9(2). See above paragraphs 4.36 and 4.48.

[14] See Ruth L Deech, "Lives in Being Revived" (1981) 97 LQR 593, 595.

[15] *Ibid*, at pp 595, 596.

[16] *Ibid*, at p 595.

The approach adopted

8.10 At least two methods have been suggested of selecting an appropriate perpetuity period by replacing the common law period of a life in being plus 21 years with a fixed period. The first method would be by "searching through wills to discover the average reach into the future of the average testator, if there is such a person".[17] This research has never been undertaken.[18] Even if it were, it would almost certainly reveal that very few testators made anything like the full use of the perpetuity period in the dispositions that they made.[19] If adopted, this approach would produce a perpetuity period that was very much shorter than the present, because it would have the effect of making the average the maximum. Very few of those who responded to the consultation paper would favour such a reduction in the period.[20] There is a danger that, if it were introduced, it could lead settlors in this country to set up their trusts in other jurisdictions.

8.11 Another approach was that adopted by the National Conference of Commissioners on Uniform Laws in the United States of America. In formulating a Uniform Statutory Rule Against Perpetuities, the approach adopted was to ascertain "the period of time that would, on average, be produced by the traditional method of identifying and tracing a set of actual measuring lives and then tacking on a 21-year period following the death of the survivor".[21]

8.12 The approach which we have adopted has been strongly influenced by the responses to consultation. It is to have regard not to the *average* length of a life in being and 21 years, but to the *maximum* length of that period. We are mindful that a very distinguished minority of those who responded favoured the abolition of the rule without replacement and that a similar number favoured a fixed perpetuity period in excess of the present 80-year one. If a "royal lives" clause is taken as the paradigm, it is clear that a life in being plus 21 years *could* exceed a period of 120 years.[22]

[17] *Ibid*, at p 596.

[18] *Ibid*.

[19] Compare the position in Scotland: above, paras 2.36, 2.37.

[20] We note that a significant minority of consultees wished to see the rule abolished altogether rather than tightened up.

[21] Lawrence W Waggoner, "Wait-and See: The New American Uniform Act on Perpetuities" [1987] CLJ 234, 235. This statistical study suggested that the youngest measuring life was, on average, 6 years old, and that the remaining life expectancy was 69, hence the period of 90 years: *ibid*.

[22] Relevant royal lives include persons who have lived to be more than 100. According to our reading of *Debrett's Peerage and Baronetage* (1995), the oldest living descendant of Queen Victoria at the date of its publication was HH Prince Wolfgang Moritz of Savoy, who was born in 1896. However, we are uncertain whether a "royal lives" clause based on Queen Victoria's descendants would have been employed prior to her death. Outside the sphere of "royal lives", we have noted from the announcement of deaths in *The Times* a number of recent instances of exceptional longevity. For example, Lady Coxen died on 13 May 1997, aged 107. She was the widow of Sir William Coxen, who himself died as long ago as 7 April 1946. His will was the subject of the well-known decision in *Re Coxen* [1948] Ch 748.

The recommended perpetuity period: its length and commencement

8.13 We make the following recommendations. First, **we recommend that there should be one fixed perpetuity period of 125 years.** (Draft Bill, Cl 5(1).) Although on consultation the period that attracted the most support was 100 years, we have decided on balance in favour of the longer period of 125 years for two reasons—

(1) it is probably the longest period that can be obtained under the present law;[23] and

(2) the adoption of a long perpetuity period gives some recognition to the views of those who considered that the rule should be abolished altogether.

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.

8.14 Secondly, **we recommend that the 125-year period should be overriding and should apply whatever the instrument creating the estate or interest may provide.** (Draft Bill, Cl 5(2).) It would not therefore be possible to contract out of the period. Nor would it be necessary to specify a perpetuity period in the instrument: the 125-year period would apply in any event. This would have the desirable incidental effect of shortening many trust instruments. It should be emphasised that although the perpetuity period would be overriding, there would be nothing whatever to prevent a settlor or testator providing for a trust to terminate after a much shorter period of years than 125. Indeed we foresee that this might in practice become quite common.

8.15 Thirdly, **we recommend that the perpetuity period should commence when the instrument creating the estate, interest, right or power to which the rule applies takes effect.** (Draft Bill, Cl 6(1).) Although this may, on the face of it, appear to be obvious, its application in two cases might occasion some difficulty which we make subsidiary proposals to resolve.

8.16 The first of these concerns special powers of appointment. We have explained that, under the present law, when a special power of appointment is exercised, the perpetuity period governing any estates or interests created by that exercise is that which is applicable to the instrument creating the power of appointment.[24] We can see no good reason to depart from that rule. **We therefore recommend that, in relation to any estate, interest or right created by the exercise of a special power of appointment, the perpetuity period should commence when the instrument creating the power takes effect.** (Draft Bill, Cl 6(2).)

8.17 The second subsidiary proposal concerns one type of special power of appointment, a nomination of benefits under a pension scheme. We have

[23] One experienced practitioner who responded to the Consultation paper made the point that 125 years might well be attainable under the present law by means of a "royal lives" clause.

[24] See above, para 4.28.

explained the uncertainties that presently surround the application of the rule against perpetuities to such nominations.[25] As a matter of principle, if such nominations are no more than one type of special power of appointment,[26] they should be subject to the same rules as special powers and the perpetuity period governing them should commence when the settlement under which they arise is created. However, we have seen that, in relation to pension schemes, there is some uncertainty as to the date on which the settlement can be said to arise.[27] Such authority as there is, suggests that it is when an employee becomes a member of the scheme.[28] We have also noted a similar uncertainty in relation to a power of advancement under a pension scheme.[29] To remove any doubt, **we recommend that, in respect of interests created where a nomination or advancement is made under a pension scheme, the perpetuity period shall be taken to start on the date on which the person making the nomination became a member of the scheme.** (Draft Bill, Cl 6(3).)

8.18 Fourthly, **we recommend that, subject to two exceptions, the 125-year perpetuity period should only apply prospectively to instruments taking effect on or after the date on which any legislation is brought into force.** (Draft Bill, Cl 15(1).) The dangers of retrospective application are less acute in relation to the length of the perpetuity period than they are as regards the applicability of the rule.[30] However, there is a risk that if the new period were to apply to existing trusts it could defeat the intentions 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,[31] and the wishes of testators might be overridden and thereby frustrated or defeated. For this reason not only will the provisions not be retrospective, but there is also one category of instrument that will take effect *after* the legislation is brought into force to which the new provisions would *not* apply. Many testators will have executed wills on the basis of the law as it stood before the legislation was brought into force. In the light of this, **we recommend that the new perpetuity provisions should not apply to wills that were executed before the new legislation was brought into force, but where the testator died after that date.** (Draft Bill, Cls 15(1), 16.[32])

8.19 In two exceptional cases, the 125-year perpetuity period would apply in some sense retrospectively. We have explained that where the perpetuity period is in the

[25] See above, para 3.58 and following.

[26] See above, para 3.58.

[27] See above, para 3.60.

[28] See *Re Thomas Meadows & Co Ltd and Subsidiary Companies (1960) Staff Pension Scheme Rules* [1971] Ch 278, 284.

[29] See above, para 3.62.

[30] See above, para 7.53.

[31] For example, they may provide that powers of appointment or advancement may be exercisable for the "trust period" of 80 years, or that the property of the trust shall be distributed at the end of the "perpetuity period" of 80 years.

[32] Inserting a new s 15(5A) in the 1964 Act.

form of a royal lives clause,[33] there may be considerable uncertainty as to the date on which the perpetuity period actually terminates.[34] It is certainly conceivable that a similar uncertainty might arise where the lives of members of the settlor's family were employed, if the trust was of long-standing and the lives were numerous. We have endeavoured to find a way of alleviating this uncertainty. We have concluded that there should be an "opt-in" scheme by which trustees of trusts which are in existence at the time when the legislation is brought into force and who are confronted with uncertainty of this kind, should be able to elect to adopt the 125-year perpetuity period that we recommend. Obviously the circumstances in which this power to "opt-in" may be exercised need to be clearly defined. We consider that they should be confined to situations where it is difficult or impracticable to ascertain the existence or whereabouts of measuring lives in being. Furthermore, the power to "opt-in" would be a fiduciary power because it is given to trustees as such.[35] It is the case that—

> a trustee to whom, as such, a power is given is bound by the duties of his office in exercising that power to do so in a responsible manner according to its purpose.[36]

Before exercising the power, trustees would therefore have to consider the implications of so doing and the possible effects on the interests of beneficiaries, actual or potential.

8.20 **We recommend the following—**

(1) trustees of a trust that was in existence at the time when the legislation was brought into force should have a power to elect by means of an irrevocable deed that the trust should be subject to—

(a) the statutory 125-year perpetuity period; and

(b) those other provisions of the legislation in Clauses 7 - 12 of the Draft Bill that relate to the operation of the rule against perpetuities; and

(2) this power should be exercisable only if—

(a) the trust contained an express perpetuity period of lives in being plus 21 years; and

(b) the trustees believe that it is difficult or impracticable to ascertain the existence or whereabouts of the measuring lives in being so that they could not determine the date at which

[33] We have been advised that an express perpetuity period which employs royal lives as measuring lives, will often also employ the lives of members of the family of the settlor or of the beneficiaries.

[34] See above, para 4.14.

[35] Draft Bill, Cl 12(1).

[36] *Re Hay's Settlement Trusts* [1982] 1 WLR 202, 209, *per* Megarry V-C.

the perpetuity period would come to an end. (Draft Bill, Cl 12.)

8.21 The second exception concerns dispositions made *after* any legislation was brought into force under special powers of appointment that were created by instruments that took effect *before* that date. The application of the proposed legislation would be retrospective only in that very limited sense. We have already explained that—

(1) a special power is subject to the perpetuity period which governs the instrument creating it;[37] but

(2) there is some doubt whether it is possible to specify a *different* perpetuity period for the disposition under the power, but one which commences on the same date as that which governs the instrument which created the power.[38]

8.22 Given that this point was raised by a number of those who responded to the Consultation Paper, we consider it appropriate to clarify the matter in the interests of certainty. There are of course two ways of dealing with this problem, namely to stipulate either—

(1) that the perpetuity period governing the instrument creating the special power and any disposition under that special power should be one and the same; or

(2) that the perpetuity period may be different from that which governs the instrument creating the special power, but must commence on the same date.

8.23 In deciding in favour of the second, we have been influenced by the responses on consultation. If the law is to allow a 125-year perpetuity period for the future, we can see no good reason why this period should not be available in relation to dispositions made under existing special powers after any legislation is brought into force. It has the merit of providing a greater flexibility and may facilitate the better planning of the affairs of the objects of the special power. It also makes the law clearer and simpler: there is one rule applicable to all special powers exercised after the legislation is brought into force, regardless of when they were created. **We therefore recommend that, where a disposition is made under a special power of appointment, then whether or not that special power was created before or after the commencement of any legislation, the perpetuity period applicable to the disposition should be 125 years commencing on the effective date of the instrument which created the special power of appointment.** (Draft Bill, Cl 6(2).)

8.24 In this context, the position of nominations of benefits under pensions schemes needs to be specifically addressed. We have explained that—

[37] See above, para 4.28.

[38] See above, para 4.30.

(1) such nominations are at least akin to special powers of appointment,[39] and in our recommendations we have treated them as such; and

(2) it is not settled whether the rule against perpetuities applies to such nominations, though in principle it should, and we have proposed that it should in relation to nominations made after any legislation implementing our recommendations is brought into force.[40]

To be consistent with this, the perpetuity period applicable to *all* nominations made under pension schemes thereafter should be 125 years.[41] This ought to be the case even though the person making the nomination was a member of the scheme on or before the date on which the legislation was brought into force. **We therefore recommend that, for the purposes of the recommendation in the previous paragraph, a nomination of benefits made under a pension scheme should be treated in a similar way to a special power.** (Draft Bill, Cl 6(3).)

"WAIT AND SEE"

8.25 In applying the new 125-year perpetuity period, we do not propose to revert to the common law rule of initial certainty, by which a disposition was valid only if it was certain at the outset that it would vest within the perpetuity period. Although it lacks the certainty of the common law rule, we prefer the principle of "wait and see", introduced by the 1964 Act. It enables more dispositions to be upheld as valid and therefore accords more closely with the wishes of the disponor. **We recommend that, in relation to the 125-year perpetuity period, the principle of "wait and see" should apply to those estates, interests, rights and powers which are subject to the rule against perpetuities, in the same way as it does under the 1964 Act.** (Draft Bill, Cl 7.) The Draft Bill replicates the effect (but not the language) of the relevant provisions of that Act.[42]

8.26 The effects of these recommendations will be significant. First, both the statutory 80-year perpetuity period and the common law period of a life in being and 21 years will be swept away. Secondly, the 125-year perpetuity period will apply for the purposes of "wait and see": there will be no need to have regard to some separate and distinct period of statutory lives in being for that purpose. We consider that these reforms should both simplify—

(1) the law itself, and with it the drafting of trust instruments; and

(2) the administration of trusts and in particular the application of "wait and see".

[39] See above, para 3.58.

[40] See above, para 7.33.

[41] Estates or interests arising from the exercise of a power of advancement by trustees under a pension scheme will fall within the recommendations in para 8.24 because they are special powers of appointment.

[42] Cl 7(1), (2) applies to estates and interests; Cl 7(3), (4) applies to rights of re-entry (and the equivalent right in personalty); and Cl 7(5), (6) to general powers of appointment. The corresponding sections in the 1964 Act are s 3(1), (2) and (3).

EFFECT ON "GIFT-SAVING" DEVICES

8.27 Our recommendations have implications for some of the "gift-saving" devices that exist under the present law. A number of these will remain relevant and we recommend their retention. Others will become otiose because their existence is predicated on the existence of the common law perpetuity period of a life in being plus 21 years.

8.28 The following "gift-saving" devices will continue to be applicable under our recommendations—

(1) the common law rules on "class closing",[43] which are not primarily aimed at saving gifts that might otherwise be void for perpetuity, but may have that incidental effect;

(2) the provision, presently found in section 4(4) of the 1964 Act, by which one or more potential members of a class will be excluded if it either is or becomes apparent that their inclusion would cause an estate or interest to fail for remoteness;[44] and

(3) the provision for the saving and acceleration of expectant gifts where a prior gift fails for remoteness, presently found in section 6 of the 1964 Act.[45]

It may be added that the principle of "wait and see" is itself a form of "gift-saving" device. Indeed it is the most important. We have already explained that we intend to retain the principle that, where an estate or interest is determinable on the occurrence of an event that does not occur within the perpetuity period, that estate or interest becomes absolute and not void (as would probably be the case at common law).[46]

8.29 By contrast, the following provisions are not replicated because they are no longer necessary—

(1) the presumptions and evidence as to future parenthood contained in section 2 of the 1964 Act:[47] under our recommendations there will no longer be any question in relation to the operation of the rule against perpetuities "which turns on the ability of a person to have a child at some future time";[48]

[43] See above, paras 5.22 and following.

[44] See above, paras 5.34, 5.35. This provision is preserved by Draft Bill, Cl 8.

[45] See above, paras 6.14 - 6.16. This provision is preserved by Draft Bill, Cl 9.

[46] See above, para 7.32; and Draft Bill, Cl 10.

[47] See above, paras 5.5 - 5.7.

[48] The only merit in retaining these presumptions would be as a means to assist trustees in the administration of trusts, and in particular, to promote early vesting. That is a matter that lies outside the scope of a statute which is concerned with the rules against perpetuities and excessive accumulation. Furthermore, there might be other more useful and effective provisions to facilitate administration and early vesting. It is questionable whether these

(2) the age-reduction provisions contained in section 4(1) and (2) of the 1964 Act: with the abolition of the perpetuity period of a life in being plus 21 years, these cease to have any relevance;

(3) the class-splitting provision where age-reduction will not save the gift, contained in section 4(3) of the 1964 Act:[49] this provision is dependant on the age-reduction provisions and ceases to have any meaning when those provisions are abrogated; and

(4) the provision relating to a surviving spouse, presently found in section 5 of the 1964 Act:[50] this provision applies "[w]here a disposition is limited by reference to the time of death of the survivor of a person in being at the commencement of the perpetuity period and any spouse of that person", and the problem that it seeks to address does not arise in a world where the only perpetuity period is a fixed period of years.

NEW GIFT-SAVING DEVICES?

8.30 In preparing this Report, we considered whether we should introduce some form of cy-près system or provision for advances in reproductive technology. We have concluded that neither is needed.

Cy-près

8.31 In a majority of those systems that have retained the rule against perpetuities, a *cy-près* system has been introduced. Although such schemes take different forms, the essence of them is that the courts are given jurisdiction to reform contingent interests which would otherwise be void for perpetuity, so that they approximate as closely as possible to the intention of the disponor. In the Consultation Paper, we considered the desirability of adopting a *cy-près* system in addition to the existing gift-saving devices.[51] The response to this proposal was at best luke-warm. A number of difficulties were identified in adopting any such scheme. It would make the law still more complicated and at the same time less predictable. It was thought that it would rarely be used, and difficulties were anticipated in identifying the settlor's intention and in defining the court's jurisdiction. In the light of our other proposals, we have decided not to pursue further such a scheme.

Provision for advances in reproductive technology

8.32 The suggestion was also made in the Consultation Paper that provision might be included in any new scheme for advances in reproductive technology.[52] It is now possible for a child to be born after the death of one or both genetic parents,[53]

provisions were required under the 1964 Act, given "wait and see": see R H Maudsley, *The Modern Law of Perpetuities* (1979) pp 118 - 120.

[49] See above, para 5.36.

[50] See above, paras 5.40 - 5.42.

[51] Consultation Paper paragraphs 5.69 - 5.78.

[52] Consultation Paper paragraph 5.79.

[53] W Barton Leach refers to "posthumous" children in his entertaining article, "Perpetuities in the Atomic Age: the Sperm Bank and the Fertile Decedent" 48 American Bar Association

because sperm may be stored in sperm banks and gametes and embryos can be cryopreserved.[54] Many of the potential difficulties to which this gives rise are addressed by provisions of the Human Fertilisation and Embryology Act 1990.[55] However, that Act does not make it clear whether a cryopreserved embryo should be treated as equivalent to a child *en ventre sa mère*, so that it can be—

(1) a life in being for the purposes of calculating the duration of the perpetuity period;[56] and

(2) a beneficiary under a disposition;[57]

even before implantation *in utero*.

8.33 As regards the first of those issues, the suggestion made in the Consultation Paper, that it should not be possible for a cryopreserved embryo to be a life in being,[58] received substantial endorsement from those who responded. However, under the recommendations that we have made in this Part, that question becomes irrelevant, as lives in being will no longer be the measure of the perpetuity period.

8.34 The second issue remains an open one. However, whether or not property can vest in a cryopreserved embryo is not an issue for the law on perpetuities, but raises much wider issues of policy. It is, therefore, outside the scope of this Report and we make no recommendation in relation to it.

THE RULE AGAINST INALIENABILITY

8.35 We explained in Part I that we did not consult upon the rule, often referred to as the rule against inalienability or the rule against perpetual trusts.[59] By virtue of this rule, certain anomalous non-charitable purpose trusts may be validly created, but only for the duration of the perpetuity period. As the principle of "wait and see" does not apply to such trusts,[60] it must be clear at their inception that they will not exceed that period. Although the point is not wholly free from doubt, it is generally thought that only the common law periods of a life or lives in being, a life or lives in being plus 21 years, or 21 years alone, may be employed as the relevant

Journal 942 (1962). See also Carolyn Sappideen, "Life After Death - Sperm Banks, Wills and Perpetuities" (1979) 53 ALJ 311, 312 for an account of the resulting practical difficulties.

54 Cryopreservation is the process of preservation by way of freezing. Sperm banks operate in this way.

55 See, in particular, ss 27 - 29.

56 A child *en ventre sa mère* at the time of the instrument creating the disposition is a life in being: *Long v Blackall* (1797) 7 Term Rep 100; 101 ER 875; *Re Wilmer's Trusts* [1903] 2 Ch 411.

57 See J C Gray, *The Rule Against Perpetuities* (4th ed 1942) § 220; C Sweet, *H W Challis's Law of Real Property* (3rd ed 1911) p 182.

58 Consultation Paper, para 5.79.

59 See para 1.14.

60 See the 1964 Act, s 15(4).

perpetuity period, and not the statutory period of a specified number of years not exceeding 80.[61]

8.36 Because this rule was not the subject of consultation, its operation lies outside the scope of our recommended reforms. **We therefore recommend that the proposed legislation should not affect the rule of law which limits the duration of non-charitable purpose trusts.** (Draft Bill, Cl 18.)

[61] It is widely considered that the effect of s 15(4) of the 1964 Act is to take such trusts wholly outside the operation of that Act. For a different view, see R H Maudsley, *The Modern Law of Perpetuities* (1979) pp 177, 178.

PART IX
THE RULE AGAINST EXCESSIVE ACCUMULATIONS OF INCOME: THE PRESENT LAW

INTRODUCTION

9.1 In this Part, we explain what is meant by an "accumulation" and we set out the nature of the statutory rule against excessive accumulations of income. We examine the origins and justification for this rule and how it developed. We then give a short account of the present law.

THE MEANING OF AN "ACCUMULATION"

9.2 For the purposes of the rule, the meaning of the term "accumulation" is tolerably clear.[1] In the leading modern case, *Re Earl of Berkeley, dec'd*,[2] Harman LJ expressed the view that—

> Accumulation to my mind involves the addition of income to capital, thus increasing the estate in favour of those entitled to capital and against the interests of those entitled to income.

Where income was retained to meet potential obligations or liabilities, it did not lose its character as income, and had to be applied as such to the extent that it was not in fact needed.[3] Thus there is no "accumulation" where—

(1) a fund is charged with the payment of annuities and income is retained as a precaution against future deficiencies;[4] or

(2) money is retained against possible liabilities under a lease, for example in relation to repairs.[5]

THE NATURE OF THE RULE AGAINST EXCESSIVE ACCUMULATIONS OF INCOME

9.3 The rule against excessive accumulations places restrictions on the time for which income may be accumulated by prohibiting it beyond those periods laid down by statute. A direction to accumulate is invalid to the extent that it exceeds the

[1] For a discussion as to the meaning of an "accumulation", see B Clark and J G Ross Martyn, *Theobald on Wills* (15th ed 1993) pp 633 - 634.

[2] [1968] Ch 744, 772.

[3] *Ibid*.

[4] As in *Re Earl of Berkeley* itself.

[5] *Vine v Raleigh* [1891] 2 Ch 13. It is otherwise where money is accumulated for the *improvement* of property, such as for building houses on it: *ibid*, at p 26. See too *Re Mason* [1891] 3 Ch 467. It has been said that "a provision for accumulating income which goes no further than a prudent owner would go in the management of the property in question is not within the [legislation]": *Re Rochford's Settlement Trusts* [1965] Ch 111, 124, *per* Cross J.

relevant statutory period.[6] The rule is applicable to income derived from a settlement or disposition of any property whether made by instrument or not.[7] The reason for making the accumulation is irrelevant, unless it falls within one of the statutory or other exceptions to the rule.[8] As we shall explain, the rule is one of public policy, as that policy was perceived when the legislation was first introduced by the Accumulations Act 1800.

ORIGINS OF AND JUSTIFICATION FOR THE RULE AGAINST EXCESSIVE ACCUMULATIONS OF INCOME

9.4 The rule against excessive accumulations has always been statutory. At common law, the only restriction on a settlor's ability to direct trustees to accumulate the income of property held on trust was the rule against perpetuities. It followed that a direction to accumulate the income from some property for a period which did not exceed the perpetuity period was valid. The Accumulations Act 1800 was passed by Parliament as a direct response to the decision in the leading case of *Thellusson v Woodford*[9] in which a direction to accumulate for what was then the full perpetuity period[10] was upheld as lawful.

9.5 By his will dated 1796, Peter Thellusson, a well-known banker, made certain generous bequests to the various members of his family.[11] In relation to the remainder of his residuary estate which amounted to £600,000 after these bequests, he directed his trustees to accumulate the rents and profits at a compound interest. The period of accumulation was to cover the lives of all his sons, grandsons and great-grandsons living at the time of his death. On the death of the last survivor, the fund was to be divided between the three eldest male living

6 Cf *Baird v Lord Advocate* [1979] AC 666, 670, where Lord Fraser of Tullybelton, commenting on the equivalent Scottish legislation, observed that its purpose "was to forbid provisions being made in any will or settlement for accumulation of income beyond certain specified limits, and to declare that any provisions which might lead to such accumulation would *pro tanto* be illegal in the sense of ineffective".

7 Law of Property Act 1925, s 164(1).

8 See below, paras 9.28 and following.

9 (1799) 4 Ves 227; (1805) 11 Ves 112; 31 ER 117; 32 ER 1030. For accounts of the intriguing saga of the Thellusson will, see G W Keeton, "The Thellusson Case and Trusts for Accumulations" (1970) 21 NILQ 131; P Polden, "Panic or Prudence? The Thellusson Act 1800 and Trusts for Accumulation" (1994) 45 NILQ 13.

10 The chosen perpetuity period was the lives of the testator's living grandchildren. The perpetuity period of a life in being *plus 21 years* was not definitively settled until the decision of the House of Lords in *Cadell v Palmer* (1833) 1 Cl & F 372; 6 ER 956.

11 During her lifetime or until remarriage his wife was to receive the use of their residence in Plaistow, including all the lands, and furnishings. She was also to receive for her lifetime, silverware up to 1400 ounces in amount, as well as an annual income of £2,140, which was to be reduced if she remarried. Each of his sons was to receive £7,600 in addition to a previous advance made of £15,000 per son. His daughters were each to receive a trust of £12,000 as a life interest. Additionally, he directed that on the death or remarriage of his wife, £22,000 of bank stock which formed part of a trust for his wife, was to be distributed amongst his heirs. Each male heir was to receive £4,000, and each female heir £1,500, with an additional £5,500 to be distributed in equal shares between his children and their children, subject to his wife's consent. A second home was also left to his sons for a period of six years, which was then to be sold, the proceeds to be divided between each of the testator's sons.

descendants of his three sons. If there were no such descendants, the property was to pass to the Crown to reduce the National Debt.

9.6 When he died in 1797, Peter Thellusson's will, and, in particular, this direction for accumulation, was the subject of much contemporary criticism.[12] The will was challenged by his widow and children, on whose behalf Counsel submitted—

> Mr *Thellusson's* will is morally vicious; as it was a contrivance of a parent to exclude every one of his issue from the enjoyment even of the produce of his property during almost a century;[13] and it is politically injurious; as during the whole of that period it makes an immense property unproductive both to individuals and the community at large; and by the time, when the accumulation shall end, it will have created a fund, the revenue of which will be greater than the civil list; and will therefore give its processor the means of disturbing the whole economy of the country.[14]

9.7 These arguments were, however, rejected both at first instance and on appeal to the House of Lords. The trusts were valid. The testator had not postponed the vesting of the estate beyond the permissible perpetuity period. In the House of Lords, Lord Eldon LC rejected the argument that the accumulation was objectionable on the basis of what he saw as the policy of the rule against perpetuities—

> In truth there is no objection to accumulation upon the policy of the law, applying to perpetuities; for the rents and profits are not to be locked up, and made no use of, for the individuals, or the public. The effect is only to invest them from time to time in land: so that the fund is, not only in a constant course of accumulation, but also in a constant course of circulation. To that application what possible objection can there be in law?[15]

Furthermore, the fears that the accumulated fund might be so large so as to compromise the national state power proved to be grossly exaggerated.[16]

[12] In 1797, *The Gentleman's Magazine* estimated that if the accumulation were to continue for ninety years it would amount to £35 million. If it were to continue for a hundred and twenty years, it might amount to £140 million: see A B Schofield, "The Thellusson Millions" (1965) 62 L S Gaz 613.

[13] As has already been indicated, however, ample bequests were left to his issue, a fact often overlooked by commentators. Cf J H C Morris and W Barton Leach, *The Rule Against Perpetuities* (2nd ed 1962) p 267: "Peter Thellusson thus locked his treasure in a mausoleum and flung the key to some remote descendant yet unborn, regardless of the claims which his wife and children might have had upon his bounty".

[14] (1805) 11 Ves 112, 114; 32 ER 1030, 1031.

[15] (1805) 11 Ves 112, 147; 32 ER 1030, 1044, *per* Lord Eldon LC.

[16] At the time when the accumulation ended, the fund was quite modest due in part to poor management and the heavy legal and administrative fees incurred. According to A B Schofield, "The Thellusson Millions" (1965) 62 L S Gaz 613, 614, the persons entitled, Lord Rendlesham and Charles Sabine Augustus Thellusson, each received only about £300,000. For discussion of the argument that the rule is justified on account of the danger to society of the enormous concentration of wealth made possible by too liberal a

9.8 However, while the courts upheld the validity of the terms of the will, Parliament was sufficiently concerned to intervene.[17] The result was the enactment of the Accumulations (or "Thellusson") Act 1800. We have already explained that the reasons for this Act were political.[18] As the *Thellusson* case itself demonstrated, it could not be justified on economic grounds or, given the rule against perpetuities, because of the need to fetter the dead hand of a testator.

9.9 Although now replaced by section 164 of the Law of Property Act 1925,[19] the law on accumulations is still closely modelled on the 1800 Act. Its underlying principle is that if a person wishes to direct an accumulation of income, he or she must select one, and only one, of the accumulation periods permitted by statute. The effect of the rule is to restrict accumulations to periods that are shorter than the common law perpetuity period.

THE PRESENT LAW RELATING TO THE RULE AGAINST EXCESSIVE ACCUMULATIONS OF INCOME

Introduction

9.10 The effect of section 164 of the Law of Property Act 1925 and section 13 of the 1964 Act is that—

(1) subject to certain exceptions,[20] any direction that income should be accumulated beyond the six periods allowed by the two sections is void to the extent that it exceeds the permitted period; and

(2) any surplus income arising from an invalid direction to accumulate passes to the person who would have been entitled to it if there had been no such direction.

9.11 We examine in turn the following elements—

(1) the directions to accumulate that fall within the rule;

(2) the statutory periods of accumulation;

(3) the effect of an excessive accumulation;

(4) the destination of income where a direction to accumulate is void;

(5) exceptions to the rule; and

policy towards accumulation, see L M Simes, *Public Policy and the Dead Hand* (1955) pp 96 - 97.

[17] The fact that Mr Thellusson's three sons were all members of Parliament should not be overlooked: L M Simes, *op cit*, at p 86.

[18] See above, para 1.12.

[19] With two further periods added by the 1964 Act, s 13.

[20] See Law of Property Act 1925, s 164(2).

(6) terminating accumulations under the rule in *Saunders v Vautier*.[21]

Directions to which the statutory provisions apply

9.12 Section 164 of the Law of Property Act 1925 provides that—

> [n]o person may by any instrument or otherwise settle or dispose of any property in such manner that the income thereof shall, save as hereinafter mentioned, be wholly or partially accumulated for any longer period than one of the following...

9.13 The rule against excessive accumulations applies "to every case where the nature of the limitations is such that accumulation must take place, even though there is no express direction to that effect".[22] Therefore, the direction to accumulate may be express, implied or in the form of a power.[23] It also applies to a power to accumulate income produced by the investment of previous accumulations.[24]

9.14 The statutory rule against excessive accumulations of income applies only to those settlements or dispositions which are made by a "person". A corporate settlor is not a "person" for this purpose,[25] and may therefore direct accumulations regardless of the statutory restrictions. This significantly limits the application of the rule and highlights its essentially political rather than economic character.[26]

The statutory periods of accumulation

9.15 The accumulation of income may be lawfully directed provided that it is confined to one of the six permissible periods prescribed by statute.[27] Four of these periods are found in the Law of Property Act 1925 and two more were added by the 1964 Act. The latter are available only in respect of instruments which took effect after 15 July 1964.[28]

Law of Property Act 1925

9.16 Under section 164(1) of the Law of Property Act 1925 the periods are—

(1) the life of the grantor or settlor;

[21] (1841) Cr & Ph 240; 41 ER 482.

[22] J H C Morris and W Barton Leach, *The Rule against Perpetuities* (2nd ed 1962) p 274.

[23] See s 13(2) of the 1964 Act, which is no more than declaratory of the common law: see *Re Robb* [1953] Ch 459; *Baird v Lord Advocate* [1979] AC 666.

[24] The 1964 Act, s 13(2), which is, once again, declaratory of the law: see *Re Hawkins* [1916] 2 Ch 570; *Re Garside* [1919] 1 Ch 132, resolving an earlier conflict of authority.

[25] *Re Dodwell & Co Ltd's Trust Deed* [1979] Ch 301.

[26] See above, para 1.12. If there were any economic objection to accumulations, it would apply as much to accumulations by a corporation as to those by an individual.

[27] In relation to a direction to accumulate income for the purchase of land, Law of Property Act 1925, s 166 provides that the only applicable accumulation period is that in (4) below. See further, below, para 9.20.

[28] 1964 Act, s 15(5).

(2) a term of 21 years from the death of the grantor, settlor or testator;

(3) the duration of the minority or respective minorities of any person or persons living or *en ventre sa mère* at the death of the grantor, settlor or testator; or

(4) the duration of the minority or respective minorities only of any person or persons who under the limitations of the instrument directing the accumulations would, for the time being, if of full age, be entitled to the income directed to be accumulated.

9.17 There is a significant difference between the third and fourth of those periods. The third period allows the disponor to direct the accumulation of income for the minorities only of persons living at his or her death. The fourth period, however, includes the minorities of all those who *may* become entitled to an interest in the property in question. This enables the disponor to direct an accumulation of income for the minorities of persons not alive at the time of his or her death. Furthermore, it allows him or her to direct the accumulation of income during the *successive* minorities of those entitled to the income under the limitations contained in the instrument. This fourth period enables disponors to direct the accumulation of income for considerably longer than the other provisions of the section, which are restricted to the lives of persons *in existence* at the relevant date.

Perpetuities and Accumulations Act 1964

9.18 Section 13(1) of the 1964 Act, which implemented recommendations made by the Law Reform Committee,[29] added two more permissible accumulation periods to those set out in section 164 of the Law of Property Act 1925. These are—

(1) a term of 21 years from the date of the making of the disposition; and

(2) the duration of the minority or respective minorities of any person or persons in being at that date.

Choice of period

9.19 A disponor may select any one of the six statutory periods of accumulation, but cannot specify more than one of them.[30] In some cases, however, the disponor will not specify any period. In those circumstances, the court has to decide which of the six periods he or she "has seemingly selected, determining that question by reference to the language employed and the facts of the case".[31] This has been described as "an artificial and difficult test", because the disponor is unlikely to have had the rule against accumulations in mind at all.[32] In practice, the court simply has to do the best that it can.

[29] Fourth Report (The rule against perpetuities) (1956) Cmnd 18, paras 56 and 57.

[30] *Re Cattell* [1914] 1 Ch 177, 186.

[31] *Re Watt's WT* [1936] 2 All ER 1555, 1562, *per* Bennett J. See too *Jagger v Jagger* (1883) 25 ChD 729.

[32] *Re Ransome, dec'd* [1957] Ch 348, 361, *per* Upjohn J.

Accumulation for the purchase of land only

9.20 Where a settlor directs that income should be wholly or partially accumulated solely for the purchase of land, he or she is restricted to one accumulation period.[33] The fourth period specified in section 164 of the Law of Property Act 1925 applies,[34] namely, "the duration of the minority or respective minorities only of any person or persons who under the limitations of the instrument directing the accumulations would, for the time being, if of full age, be entitled to the income directed to be accumulated".

Periods of minority

9.21 We have explained that the statutory periods of accumulation apply where the settlor in some way expressly or impliedly *directs* an accumulation.[35] It is provided by section 165 of the Law of Property Act 1925 that these periods are in addition to any period of accumulation that will necessarily apply where, at the end of the accumulation period, a minor is entitled to a vested or contingent interest in the property in question. Where the infant has a *vested* interest, it had long been the practice of the court to order such an accumulation to prevent the minor disposing of his or her property.[36] For many years, there has also been a statutory power of accumulation in cases where a minor has either a *vested or contingent* interest in any property.[37] This power applies to income that is not required for the maintenance, education or benefit of the minor.

9.22 The effect of section 165 is to enable accumulations of income to be made for periods that are substantially in excess of the prescribed statutory periods. For example, if income was directed by a testator to be accumulated for 21 years and the property accumulated was then to pass to his granddaughter, who was aged 3 at the end of the period, the trustees would have power to accumulate any surplus income not required for the child's maintenance, education or benefit for a further 15 years, until she reached her majority.

Effect of an excessive accumulation

The effect

9.23 The effect of an excessive accumulation depends upon whether the direction merely breaches the rule against excessive accumulations of income or whether it also contravenes the rule against perpetuities. The latter has more serious consequences than the former.

9.24 First, a direction to accumulate that not only exceeds the relevant accumulation period but also contravenes the rule against perpetuities is wholly void. For example, a direction to accumulate income until the first grandchild of A reaches

[33] See Law of Property Act 1925, s 166 (a provision first introduced by the Accumulations Act 1892).

[34] See above, para 9.16.

[35] See above, paras 9.12, 9.13.

[36] See *Mathews v Keble* (1868) LR 3 Ch App 691, 696.

[37] Trustee Act 1925, s 31.

the age of 21, where A is alive and unmarried at the relevant date, is void for perpetuity at common law. It is not certain that the first grandchild of A to attain 21 will do so within 21 years of A's death. That grandchild might, for example, be the offspring of a future born child of A. In these circumstances, it appears that the common law test alone applies. It is far from certain that the 1964 Act extended the principle of "wait and see" to directions to accumulate.[38] If it has not, in the example given, the direction to accumulate income is wholly void, like any breach of the rule against perpetuities at common law.

9.25 Secondly, the direction to accumulate may comply with the common law rule against perpetuities but breach the statutory rule against excessive accumulations. An example would be a direction to accumulate income until the first child of A (who is alive and unmarried at the relevant date) should attain the age of 21. In those circumstances, the direction to accumulate is void only to the extent that it exceeds the appropriate statutory period.[39]

The destination of surplus income

9.26 The effect of section 164(1) of the Law of Property Act 1925 is that, where there is an excessive accumulation, the surplus income must be paid instead to the "person or persons who would have been entitled thereto if such accumulation had not been directed".[40] In other words, the surplus devolves in the same way as it would have done if the limitation had failed for any other reason.[41] Thus, in the case of a testamentary bequest, the excess will fall into residue. In the case of a residuary gift, the surplus income will pass to those entitled on intestacy. In the case of an *inter vivos* disposition, the surplus income will revert to the settlor or his estate on a resulting trust. However, subsequent interests are not accelerated as they are where the rule against perpetuities has been infringed.[42]

9.27 The point may be illustrated by the following example. A gives the residue of her property on trust to pay an annuity to B and directs that—

(1) if the income exceeds £1,500, the surplus should be accumulated; and

(2) after B's death, the capital and the accumulations of income should be given to a charitable organisation.

If B is still alive 21 years after the death of A, the accumulation must terminate. The surplus income would thereafter pass as on an intestacy until B dies. The charitable organisation would then be entitled to the capital (including the income that had accumulated in the 21 years following A's death).

[38] Sir Robert Megarry and Sir William Wade, *The Law of Real Property* (5th ed 1984) pp 304 - 305 consider that "wait and see" should, as a matter of policy, apply. However, as they acknowledge, this can only be achieved by a strained construction of s 3(3) of the 1964 Act. See R H Maudsley, *The Modern Law of Perpetuities* (1979) p 208.

[39] *Eyre v Marsden* (1838) 2 Keen 564, 574; 48 ER 744,749.

[40] Cf *Green v Gascoyne* (1865) 4 De GJ & S 565, 569; 46 ER 1038, 1039.

[41] See *Griffith v Vere* (1803) 9 Ves 127; 32 ER 550; *Longdon v Simson* (1806) 12 Ves 295; 33 ER 113.

[42] See, eg *Weatherall v Thornburgh* (1878) 8 ChD 261, 271, 272.

Exceptions to the rule against excessive accumulations

Section 164(2) of the Law of Property Act 1925

9.28 There are a number of exceptions to the rule against excessive accumulations. First, certain situations are expressly exempted by section 164(2) of the Law of Property Act 1925, namely any provision—

(1) for the payment of the debts of any grantor, settlor, testator or other person;[43]

(2) for the raising of portions for either any child, children or remoter issue of any grantor, settlor or testator; or, any child, children or remoter issue of a person taking any interest under any settlement or other disposition directing the accumulations or to whom any interest is thereby limited; or

(3) for the accumulation of the produce of timber or wood.[44]

The reasons for these exceptions is not now readily apparent, and they were abrogated in Scotland as long ago as 1914.[45]

9.29 Section 164(2) expressly excludes the application of the statutory rule against excessive accumulations, but says nothing about the rule against perpetuities. In relation to the exception for the payment of debts, an accumulation for the payment of the debts of the settlor or testator is valid even if it may exceed the perpetuity period. However, an accumulation to pay the debts of any other person (except the National Debt) must be confined within the perpetuity period.[46] The rule against perpetuities applies to the other two exceptions.[47]

9.30 The traditional explanation for exempting portions from the rule against excessive accumulations of income is that unless such accumulations were permissible, it would be necessary for owners of large land holdings to sell part of their estates so as to make provision for their younger children.[48] However, the scope of this exception is uncertain, and has been the cause of more litigation than any other part of the Act.[49] In *Re Stephens*, Buckley J commented that "the meaning of the word 'portion', as generally understood, is a sum of money secured to a child out

[43] For a review of the authorities on this exception, see *Re Rochford's Settlement Trusts* [1965] Ch 111, 122 and following.

[44] It seems that the purpose of this exemption was "to encourage the planting of timber at a time when native forests had been largely exhausted by naval demands during the American and Continental wars": J H C Morris and W Barton Leach, *The Rule against Perpetuities* (2nd ed 1962) p 289.

[45] Entail (Scotland) Act 1914, s 9.

[46] See Sir Robert Megarry and Sir William Wade, *The Law of Real Property* (5th ed 1984) p 308.

[47] *Ibid*, pp 308, 309.

[48] E H Burn, *Cheshire & Burn's Modern Law of Real Property* (15th ed 1994) p 332.

[49] J H C Morris and W Barton Leach, *The Rule against Perpetuities* (2nd ed 1962) pp 284 - 285.

of property either coming from or settled upon its parents".[50] However, its precise meaning in the section is by no means clear.[51] Portions are nowadays seldom (if ever) encountered and it is unnecessary to examine further the scope of this exception.

Administrative retention

9.31 Accumulation of income, which is subject to the statutory restrictions explained in this Part, must be distinguished from the administrative retention of income, which is not. In the leading modern case, *Re Earl of Berkeley*,[52] Widgery LJ explained the position in the following terms—

> The retention of income is justified only when the amount of the income, or the amount required to service the annuities, may fluctuate, and the pattern will then be one of retention in the fat years, followed by distribution of the retained income in the lean ones. In my opinion this kind of temporary retention of income as an administrative precaution against future deficiencies is not an "accumulation for a period" of the kind at which the Thellusson Act was aimed and is not within section 164 of the Act of 1925.[53]

9.32 By analogy, charities may retain income on an administrative basis provided that they can justify the retention. It is the underlying duty of charities to apply such income for its charitable objects within a reasonable period of receipt. The regime is intrinsically flexible. It can, for instance, be relied upon as the basis for creating long term repair and maintenance funds for buildings, where appropriate, in just the same way as it can be relied upon to justify the retention of income for short term operational needs. The Charity Commission requires charities to justify the retention of income, and has issued guidance as to when it is appropriate for them to build up reserves.[54] The position is different where the instrument creating the charitable trust contains an express power of accumulation. Although such powers have to be employed responsibly by trustees, and (if applicable) in accordance with the statutory restrictions on accumulation,[55] the income once capitalised forms part of the charity's endowment. It does not have to be applied in furtherance of the charity's purposes (as it would if it retained its character as income).

Certain commercial contracts

9.33 Section 164 applies in a case where a person seeks to "settle or dispose of any property in such manner that that the income thereof shall... be... accumulated...". In reliance upon these words, the courts have interpreted the legislation purposively and have excluded from its scope certain commercial transactions.

[50] [1904] 1 Ch 322, 327.

[51] Sir Robert Megarry and Sir William Wade, *The Law of Real Property* (5th ed 1984) p 308.

[52] [1968] Ch 744.

[53] *Ibid*, pp 780 - 781. See too *Re Coller's Deed Trusts*[1939] Ch 277.

[54] *Charities' Reserves* (1993) Charity Commission, CC 19.

[55] These apply only if the settlor was a "person" for the purposes of Law of Property Act 1925, s 164: see above, para 9.14.

Thus a person who makes an investment in a unit trust cannot readily be described as one who settles or disposes of property.[56] The unit trust is not therefore within the section even though, under its terms, any income that is not paid out to the unit holders is to be accumulated.[57]

9.34 The leading case is *Bassil v Lister*,[58] where the "dry question" that Turner V-C had to resolve,[59] was whether a direction in the testator's will that his trustees should pay out of the income of his residuary estate the premiums on a policy of insurance on the life of his son fell foul of the Thellusson Act. Turner V-C held that it did not. It was not the function of the legislation to strike at "bargains or contracts entered into for other purposes than the mere purpose of accumulation".[60] The payment of insurance premiums did not naturally fall within those words. Indeed, he did not consider that the payment of such premiums was an accumulation in any event, because the money became the property of the insurance company and could not be attributed to a particular premium. Turner V-C gave further illustrations of arrangements that fell outside the scope of the Act, such as partnership agreements and insurance policies on the lives of debtors; and a settlement of insurance policies with shares transferred to pay the premiums out of the dividends.[61]

9.35 In practice, many commercial contracts of this nature will be made by corporate settlors. As we have explained, these are outside the scope of the rule against accumulations in any event.[62]

Terminating an accumulation

The general rule

9.36 There is a well-known situation where an accumulation can be brought to an end. The principle was stated in *Re Trevanion*[63] by Joyce J—

> Where there is an absolute vested interest, it is well settled that the Court will not enforce a trust for accumulation in which no person has any interest except the owner of the property the rents of which are to be accumulated.

9.37 The leading case on this principle is *Saunders v Vautier*,[64] which has given its name to the wider rule stated in that case by Lord Langdale MR by which—

[56] *Re AEG Unit Trust (Managers) Limited's Deed* [1957] Ch 415.

[57] *Ibid*.

[58] (1851) 9 Hare 177; 68 ER 464.

[59] *Ibid* at 180; 68 ER at 465.

[60] *Ibid* at 181; 68 ER 464, 466.

[61] *Ibid* at 184; 68 ER 464, 467.

[62] *Re Dodwell & Company Ltd's Trust* [1979] Ch 301; above, para 9.14.

[63] [1910] 2 Ch 538, 546.

[64] (1841) 4 Beav 115; 49 ER 282; affirmed Cr & Ph 240; 41 ER 482. In that case, the testator directed his trustees to accumulate the dividends from certain stock on trust until V should

> where a legacy is directed to accumulate for a certain period, or where the payment is postponed, the legatee, if he has an absolute indefeasible interest in the legacy, is not bound to wait until the expiration of that period, but may require payment the moment he is competent to give a valid discharge.[65]

9.38 As a result, where one or more persons[66] of full age and capacity are absolutely and indefeasibly entitled to the capital and income of a gift under these circumstances, they may terminate the accumulation at any stage and require that the property be transferred to them, thereby overriding the direction to accumulate. Where the direction to accumulate contravenes the rule against perpetuities and is therefore wholly void, the rule in *Saunders v Vautier* cannot apply.

Section 14 of the 1964 Act

9.39 The usefulness of the common law rule in *Saunders v Vautier* was increased by section 14 of the 1964 Act in relation to instruments taking effect after 15 July 1964. This provided that section 2 of that Act should apply to any question as to the right of beneficiaries to put an end to accumulations of income under any disposition as it applies to questions arising on the rule against perpetuities. As we have explained,[67] section 2 introduced certain statutory presumptions as to future parenthood in relation to the rule against perpetuities. In this way, section 14 may enable beneficiaries to terminate an accumulation where the qualifying class would otherwise remain open because of a notional possibility that an elderly person or a young child might give birth to a child.

9.40 The relevance of section 14 may be demonstrated by contrasting the common law position and that which applies under the 1964 Act. The common law position is illustrated by the case of *Re Deloitte*.[68] In that case, a testatrix bequeathed a fund on trust to pay an annuity to a niece during her life, to accumulate the surplus income, and after the death of the niece to hold the fund and the accumulations of income on trust for that niece's children at 21. At the end of 21 years from the testatrix's death, the niece had had six children all of whom were well over 21 years old and the niece herself was 65 years old. It was held, however, that the court could not presume that the niece was past child-bearing in order to close the class. Thus, the existing children could not be treated as the only persons interested in the fund and were not entitled to stop the accumulations. As there was a direction for accumulation beyond the period prescribed by statute, the surplus income arising after the end of the statutory period fell into residue.

9.41 Had the 1964 Act applied to the disposition, the position would have been different. There would have been a rebuttable presumption that the niece could

attain the age of 25, and then to transfer both principal and income, to V. Having reached his majority, V applied for an immediate transfer of the stock. His action succeeded.

[65] (1841) 4 Beav 115, 116; 49 ER 282.

[66] "Persons", for these purposes, include a charity, whether corporate or unincorporate: see *Wharton v Masterman* [1895] AC 186.

[67] See above, para 5.5.

[68] [1926] Ch 56.

not have had any further children at the relevant time so that the niece's existing children could have taken under the rule in *Saunders v Vautier*.

PART X
THE RULE AGAINST EXCESSIVE ACCUMULATIONS: WHAT SHOULD THE LAW BE? PROPOSALS FOR REFORM

INTRODUCTION

10.1 In this Part we comment briefly on the consideration given to the rule against excessive accumulations by the Law Reform Committee in its Fourth Report of 1956 and the reforms to the law made by the 1964 Act that followed from it. We then summarise the criticisms of the rule that we made in the Consultation Paper, and the tenor of the responses that we received to that paper. We conclude that—

(1) the working of the rule is intrinsically unsatisfactory; and

(2) there is, in any event, no good reason for retaining it, except in one limited situation.

10.2 Hitherto, reform of the rule against excessive accumulations of income in England and Wales has been limited in its scope. By contrast, many common law jurisdictions never adopted the rule against excessive accumulations, preferring to leave the regulation of accumulations to the rule against perpetuities.[1] Of those jurisdictions which did enact the rule, the majority have repealed it and have reverted to the common law position.[2]

THE LAW REFORM COMMITTEE REPORT AND THE 1964 ACT

10.3 Although the Law Reform Committee[3] gave some consideration to the rule against excessive accumulations, it did not seriously question whether the rule was still required as a matter of policy. The view taken by the Committee of the "general scheme of the rules" was as follows—

[1] For example, in Jersey, Northern Ireland and many of the jurisdictions in the United States of America, no rule against excessive accumulations was ever enacted.

[2] For example: in Canada, the rule against excessive accumulations has been repealed by the provinces of Alberta (Perpetuities Act 1972, s 24), British Columbia (Perpetuity Act 1975, s 24) and Manitoba (Perpetuities and Accumulations Act 1983). Although abolition was recommended in Saskatchewan by the Law Reform Commission in 1987, the rule remains in force there, as it does in Ontario (Accumulations Act 1966). In Australia, the rule has been abolished in New South Wales (Perpetuities Act 1984, s 18), Queensland (Property Law Act 1974, s 222), Tasmania (Perpetuities and Accumulations Act 1992, s 22), Victoria (Perpetuities and Accumulations Act 1968, s 19) and Western Australia (Property Law Act 1969, s 113). It remains in force in South Australia (Law of Property Act 1936, ss 60 - 62). In the United States of America, most of the 13 states which had introduced a statutory rule against excessive accumulations, have repealed those restrictions. In New Zealand, the rule against excessive accumulations was repealed by Perpetuities Act 1964, s 21. See further Appendix D.

[3] In its Fourth Report (The rule against perpetuities) (1956) Cmnd 18.

> One view is that a direction to accumulate is evil *per se* in that it enables a settlor or testator to starve the living in order to augment the fund for posterity. Whatever may have been the position a century ago or more, we doubt whether this is a serious or insurmountable evil today. On the other hand, we know of no substantial argument why the periods should be extended. Certainly the two periods of minorities serve a useful purpose in enabling a fund to be built up to start children in life. On the whole, we consider that the general scheme of the statutory regulation of accumulation calls for no change.[4]

Even in the 1950s and early 1960s, however, the rule had influential critics. Two leading authorities, writing in 1962, concluded that the case for its repeal was overwhelming, and that there was no case, economic or otherwise, for restricting accumulations to any period less than the perpetuity period.[5]

10.4 The Law Reform Committee did make certain limited recommendations, which were implemented by section 13 of the 1964 Act.[6] As we have explained,[7] this added two new statutory accumulation periods, namely a term of 21 years from the date of the making of the disposition, and the duration of the minority or respective minorities of any person or persons in being at that date.[8] In addition, section 14 extended the presumptions as to future parenthood found in section 2 of the Act to situations where beneficiaries wished to determine accumulations under the Rule in *Saunders v Vautier*. This provision, which has already been explained,[9] was the result of a suggestion (rather than a recommendation) by the Law Reform Committee.[10]

THE CONSULTATION PAPER

Defects in the law

10.5 The law on excessive accumulations was considered by the Law Commission in the Consultation Paper. In it, we identified a number of defects in the present

4 *Ibid*, para 55.

5 See J H C Morris and W Barton Leach, *The Rule Against Perpetuities* (2nd ed 1962) pp 303 - 306 (the criticism did not appear in the first edition of the book which was published in 1955).

6 Fourth Report (The rule against perpetuities) (1956) Cmnd 18, paras 54 - 60.

7 Above, para 9.18.

8 In para 60 of its Fourth Report, the Law Reform Committee also recommended that two points as to the applicability of the rule about which there was some possible doubt should be set out in statutory form. See s 13(2) of the 1964 Act (above, para 9.13) confirming that the rule applies whether or not (i) there is a *duty* to exercise the power; and (ii) the power to accumulate extends to income produced by the investment of income previously accumulated.

9 See above, para 9.39.

10 Fourth Report, above, para 14. The matter was outside the Law Reform Committee's terms of reference: see J H C Morris and H W R Wade, "Perpetuities Reform at Last" (1964) 84 LQR 486, 530.

law,[11] of which the following are the most important—

(1) The law is unnecessarily complicated and has spawned a case law that is out of all proportion to the rule's importance. The principal causes of this complexity are (or have been)—

(a) the provision of six alternative accumulation periods;

(b) the meaning of an accumulation for the purposes of the rule; and

(c) the precise scope of the statutory exceptions to the rule against excessive accumulations.

(2) The rule creates uncertainty. We identified three main areas that can give rise to uncertainty—

(a) where the court has to determine the relevant accumulation period in the absence of a selection by the settlor;

(b) the scope of the exception for certain commercial transactions which are considered to be outside the mischief of the legislation; and

(c) whether the rule applies to accumulations by pension trusts created by individuals.[12]

(3) There are inconsistencies in the rule, because (for example) it applies only to individuals and not to corporations.

(4) The rule may frustrate the reasonable wishes of the settlor because (for example) it may prevent him from directing an accumulation for a beneficiary to some age that is greater than 21.

(5) The retention of periods of 21 years in relation to the rule do not fit comfortably with an age of majority that has been reduced to 18.

10.6 We also questioned the applicability of the rule to charitable trusts. However, this was based on a misunderstanding of the practice, explained above,[13] by which the Charity Commission is willing to allow the administrative retention of income in certain circumstances. As we explain below,[14] we have revised our views as to whether charities should be subject to restrictions in making accumulations.

[11] See the Consultation Paper, paras 4.20 - 4.36.

[12] It does not apply to those created by corporations: see *Re Dodwell & Co Ltd's Trust Deed* [1979] Ch 301; above, para 9.14.

[13] See para 9.32.

[14] Para 10.20.

Options for reform

10.7 We offered three possible options for reform: to do nothing, to abolish the rule, or to reform it.[15] We did not favour leaving the law unchanged, but we expressed no preference as between abolition and reform. The principal suggestions for reform which we made were—

(1) to replace the existing accumulation periods with a single period;

(2) to substitute the period of 25 years in every case where the present legislation prescribes 21;

(3) to codify the present law in a single statute;

(4) to reform the exceptions to the rule; and

(5) to extend the "wait and see" provisions of the 1964 Act to directions to accumulate which might exceed the perpetuity period.

The response on consultation

The policy of the law

10.8 There were a number of comments from those who responded to the Consultation Paper on the policy for or against the rule against accumulations. Many considered that the factors that led Parliament to enact the Thellusson Act in 1800 were as relevant today as they had been then. They were concerned about the possibility of maverick testators who either had no dependants or who made sufficient provision for them to avoid any possible claim under the Inheritance (Provision for Family and Dependants) Act 1975, and who created accumulation provisions on the model of Peter Thellusson. Such conduct would attract public criticism and would be socially undesirable, particularly if the trust created a duty rather than a discretion to accumulate. They also considered that the present levels of taxation would not be a deterrent to the creation of such trusts. Against this, there were others who considered that the *only* justification for retaining the rule was the need to impose dead hand control and that this objective was better achieved by the retention of some form of perpetuity rule.

Defects in the law

10.9 Those who were opposed to the retention of the rule, either at all or in its present form, pointed to the practical difficulties to which it presently gives rise. We were given a number of examples of how the rule against excessive accumulations frustrates the reasonable wishes of many settlors, particularly in relation to their children or grandchildren after they had reached the age of 21, and as regards adults who were mentally handicapped or financially irresponsible. It was also acknowledged to be anomalous that pension trusts created by corporations could accumulate income without constraint, whereas those created by partnerships or individuals were subject to the constraints of the rule against excessive accumulations. Our attention was drawn to the "exquisite complications of trust

[15] See Part VI of the Consultation Paper.

drafting" that arose in consequence of the rule, and some examples of it were given.[16]

Options for reform

10.10 Almost all the responses favoured either the reform of the rule against excessive accumulations or its abolition. While a majority of the *individual* responses received were in support of the option of reforming the rule, the option of abolition was strongly supported by a number of influential and large composite groups of practitioners.[17]

OUR APPROACH TO REFORM

Introduction

10.11 We have concluded, both from our own analysis of the law and from the responses to the Consultation Paper, that the rule against excessive accumulations of income suffers from three principal defects—

(1) it no longer fulfils (if ever it did) any compelling policy objective not otherwise met by the law;

(2) its operation is needlessly complex and may (and often does) frustrate the reasonable wishes of settlors; and

(3) it can produce anomalous results, so that (for example) it will apply to a pension trust created by a partnership but not to one created by a corporation.

In the following paragraphs we consider the first of these objections in greater detail. Our conclusion as regards (1) has made further consideration of (2) and (3) unnecessary.

Why do we need a rule against excessive accumulations today?

10.12 We have already explained that the reasons for the introduction of the Thellusson Act 1800 were political and not economic and that the fears aroused by Peter Thellusson's conduct proved, in the end, to be unfounded.[18] The principal function of the rule against excessive accumulations today is as a form of dead hand control. Except in relation to charitable trusts (where other factors are relevant) that function is, in our view, more properly fulfilled by the rule against perpetuities. We have been unable to find any coherent reason for limiting accumulations to some shorter period than the perpetuity period. Although we are aware of the division of opinion between those respondents to the Consultation Paper who favoured reform of the rule and those who preferred outright abolition, we have, in the end, been persuaded by the latter. We have been fortified in

[16] Society of Trust and Estate Practitioners (STEP).

[17] Such as the Institute, STEP and the Chancery Bar Association.

[18] See above, paras 1.12 and 9.7.

reaching this conclusion by the fact that most jurisdictions have either never had such a rule or have abolished it.[19]

10.13 What are the dangers of abolition? First, could it have any adverse economic impact? This is very difficult to assess. One writer who has addressed this issue has commented in relation to the *Thellusson* case that—

> The prospect of an individual or group of individuals eventually enjoying such vast sums offended even eighteenth-century notions of distributive justice. The relevant economic question is rather whether major accumulations of this kind lead to a sub-optimal level of current consumption and whether constraints of the power of accumulation would, in contrast, encourage a sub-optimal level of savings. This is, unfortunately, yet another elusive question, for it appears that economists have been unable to agree on what is socially optimal in this area. Even if the question could be answered, it is not obvious that limiting the power of settlors is the most efficient solution; taxation might be the more viable alternative.[20]

The abolition (or non-existence) of the rule in most other jurisdictions suggests that if there are any adverse economic consequences, they are not readily apparent.

10.14 Secondly, would settlors seek to create trusts for the accumulation of income for the duration of the perpetuity period? We were told on consultation that the overwhelming majority of directions to accumulate take the form of a discretionary power and are not in the form, adopted by Peter Thellusson in his will, of a duty to accumulate. It was suggested to us that although the occasional eccentric testator might wish to follow Thellusson's example, such cases would be insufficiently frequent to justify the retention of a rule against accumulations. We are not aware of any notorious instances in jurisdictions which have no restrictions on accumulations. An analogy may be drawn with the position in Scotland where, although they have a rule against excessive accumulations, the restrictions on perpetuities are very limited.[21] As we explained, very few settlors in Scotland create trusts of long duration.[22]

PROPOSALS FOR REFORM

Abolition of the rule against excessive accumulations of income

10.15 As we have indicated, we do not consider that there is any case for the continued retention of the rule against excessive accumulations. **We recommend that, subject to an exception in relation to charitable trusts,[23] the statutory restrictions on accumulations should be repealed.** (Draft Bill, Cls 13 and

[19] See above, para 10.2.

[20] A I Ogus, *The Trust as Governance Structure* (1986) 36 UTLJ 186, 218.

[21] Above, para 2.34.

[22] Above, para 2.36.

[23] See below, para 10.20.

21.) In accordance with our recommendations in relation to perpetuities,[24] the reform would be prospective and, subject to one exception, would not affect existing instruments. **We recommend that the rule should cease to apply only in relation to instruments taking effect after any legislation was brought into force, subject to the exception explained in paragraph 10.16.** (Draft Bill, Cl 15(1).)

10.16 The one exceptional case where the abolition would, in one sense, have retrospective effect concerns special powers of appointment which were created by an instrument made before any legislation was brought into force, but which were exercised afterwards. As we have explained,[25] we intend any dispositions made in such circumstances to be subject to the new and not the old law. **The exercise of a special power of appointment would for these purposes be regarded as an instrument taking effect after any legislation was brought into force, even though the power was created prior to that date.** (Draft Bill, Cl 15(1).)

10.17 We note that, by abolishing the rule against accumulations, the law in England and Wales will diverge from the law in Scotland, where a similar rule against accumulations presently applies. However, as we have already explained, the rule against excessive accumulations is the principal means of dead hand control in Scotland.[26] It has no equivalent function in England and Wales. We do not anticipate that there will be any particular pressure for abolition of the rule in Scotland in consequence of its abrogation south of the border.

The rule against excessive accumulations of income and charitable trusts

10.18 In the Consultation Paper we questioned whether the rule against excessive accumulations should apply to charitable trusts.[27] Our provisional view was that it would be more convenient for charities and would ease their administration if they were able to retain surplus income outside the accumulation period, if only on a short-term basis, where such retention was not inconsistent with their charitable status. The response on consultation on this issue revealed that—

(1) most consultees agreed with our provisional view; but

(2) our exposition of the present law was incorrect because it is already the case that charities may be able to retain surplus income in the way in which we suggested by means of administrative retention. As we have explained, charities may retain income on an administrative basis provided that they can justify the retention to the Charity Commissioners.[28]

10.19 Where income is accumulated by charity trustees under an express power of accumulation contained in the instrument creating the trust, that income no longer has to be applied for the charitable objects of the charity, but is capitalised. It then

[24] See above, para 7.53.

[25] See above, para 8.23.

[26] See above, para 2.35.

[27] Consultation Paper, paras 4.35 and 6.28.

[28] See above, para 9.32.

becomes part of the permanent endowment of the charity. At present, the statutory restrictions on accumulations apply in the usual way to charitable trusts where the settlor is a person and not a corporation. Charitable trusts may of course be of perpetual duration as they are not subject to the rule against perpetual trusts (which applies to such non-charitable purpose trusts as may be validly created).[29] If our recommendations were implemented without any special provision, the only restraint on the trustees of any charitable trust created after the legislation was brought into force, would be their fiduciary obligation to exercise the power of accumulation in the best interests of the trust. Subject to that, it would be open to them to accumulate income indefinitely (as indeed is already the case with charitable trusts created by corporations). We do not consider this to be a satisfactory state of affairs. There is no effective mechanism for dead hand control: a settlor can direct long-term accumulations of income for the fulfilment of some charitable purpose of a grandiose kind that will not come about for many years. There will be no public benefit from the charity for this period, even though the trust will enjoy exemption from tax on the income accumulated.

10.20 We consider that some form of control should therefore exist in relation to charitable trusts, without precluding charitable trusts from building up reserves for some perfectly proper object. We have concluded that the correct approach is to impose a restriction on the period for which a charitable trust may accumulate income under a power of accumulation conferred by the instrument creating the trust. At the end of that period, the charity could no longer *accumulate* income and convert it into capital, but could still build up reserves of *income* by means of administrative retention. In so doing, the charity would have to satisfy the Charity Commission that its reasons for retaining income were reasonable ones. In this way, the public interest in the proper administration of charitable trusts would be protected, without defeating schemes for which substantial sums of money needed to be built up. We are aware that this conclusion will not be welcomed by all, but we consider that it strikes a fair balance between the wishes of settlors and the public interest.[30]

10.21 **We recommend that—**

(1) where an instrument confers a power or duty to accumulate on trustees of property that is held in trust for charitable purposes, the direction to accumulate should cease to have effect 21 years after the first day on which the income must or may be accumulated; (Draft Bill, Cl 14(1) - (3).)

(2) this limitation should apply whether the settlor was an individual or a corporation, but it would be applicable only to instruments taking effect after the legislation was brought into force; (Draft Bill, Cl 14(1), 15(1).) **and**

[29] See above, para 1.14.

[30] We wish to acknowledge the assistance that we have received from the Charity Commission in our consideration of this point.

(3) where the power or duty came to an end, the income should be applied for the persons or purposes for whom or which it would have been applicable had there been no power or duty to accumulate. (Draft Bill, Cl 14(4).)

PART XI
SUMMARY OF RECOMMENDATIONS

11.1 The rule against perpetuities should not apply except as provided by statute. (Draft Bill, Cl 1(1).)[1]

11.2 The rule against perpetuities should only apply—

(1) to successive estates and interests in property held in trust, including an estate or interest which—

(a) is subject to a condition precedent; or

(b) arises under either a right of reverter on the determination of a determinable fee simple, or under a resulting trust on the determination of a determinable interest;

(2) where property is held on trust for an estate or interest subject to a condition subsequent, a right of re-entry (or the equivalent right in property other than land) that is exercisable on breach of that condition;

(3) to powers of appointment; and

(4) where a will limits chattels in such a way as to create successive *legal* interests in them under the doctrine of executory bequests, to those interests. (Draft Bill, Cl 1(2) - (6).)[2]

11.3 Interests created by instruments which either nominate benefits under a pension scheme or by the exercise of a power of advancement under such a scheme should be subject to the rule against perpetuities. (Draft Bill, Cl 2(5).)[3]

11.4 We recommend that the rule against perpetuities should not apply to an interest or right arising under—

(1) an occupational pension scheme;

(2) a personal pension scheme;

(3) a public service pension scheme; or

(4) a self-employed pension arrangement. (Draft Bill, Cls 2(4); 20(5).)[4]

11.5 The Lord Chancellor should have power to specify further exceptions to the rule against perpetuities by statutory instrument. (Draft Bill, Cl 3.)[5]

[1] See above, para 7.30.

[2] See above, para 7.31.

[3] See above, para 7.33.

[4] See above, para 7.36.

11.6 The restrictions on the scope of the rule against perpetuities that we recommend in paragraphs 11.2 - 11.4 above, should only apply to instruments taking effect on or after the date on which any legislation is brought into force. (Draft Bill, Cl 15(1), (3), 22.)[6]

11.7 There should be one fixed perpetuity period of 125 years. (Draft Bill, Cl 5(1).)[7]

11.8 The 125-year period should be overriding and should apply whatever the instrument creating the estate or interest may provide. (Draft Bill, Cl 5(2).)[8]

11.9 The perpetuity period should commence when the instrument creating the estate, interest, right or power to which the rule applies takes effect. (Draft Bill, Cl 6(1).)[9]

11.10 In relation to any estate, interest or right created by the exercise of a special power of appointment, the perpetuity period should commence when the instrument creating the power takes effect. (Draft Bill, Cl 6(2).)[10]

11.11 In respect of interests created where a nomination or advancement is made under a pension scheme, the perpetuity period shall be taken to start on the date on which the person making the nomination became a member of the scheme. (Draft Bill, Cl 6(3).)[11]

11.12 Subject to two exceptions set out in the following paragraphs, the 125-year perpetuity period—

(1) should only apply prospectively to instruments taking effect on or after the date on which any legislation is brought into force; (Draft Bill, Cl 15(1).)[12] but

(2) should not apply to wills that were executed before that date, but where the testator died afterwards. (Draft Bill, Cls 15(1), 16.)[13]

11.13 The first exception is that trustees of a trust that was in existence at the time when the legislation was brought into force should have a power to elect by means of an irrevocable deed that the trust should be subject to—

(1) the statutory 125-year perpetuity period; and

[5] See above, para 7.52.

[6] See above, para 7.53.

[7] See above, para 8.13.

[8] See above, para 8.14.

[9] See above, para 8.15.

[10] See above, para 8.16.

[11] See above, para 8.17.

[12] See above, para 8.18.

[13] *Ibid*.

(2) those other provisions of the legislation in Clauses 6 - 11 of the Draft Bill that relate to the operation of the rule against perpetuities.

11.14 This power should be exercisable only if—

(1) the trust contained an express perpetuity period of lives in being plus 21 years; and

(2) the trustees believe that it is difficult or impracticable to ascertain the existence or whereabouts of the measuring lives in being so that they could not determine the date at which the perpetuity period would come to an end. (Draft Bill, Cl 12.)[14]

11.15 The second exception is that where a disposition is made under a special power of appointment, then whether or not that special power was created before or after the commencement of any legislation, the perpetuity period applicable to the disposition should be 125 years commencing on the effective date of the instrument which created the special power of appointment. (Draft Bill, Cl 6(2).)[15]

11.16 For the purposes of the recommendation in paragraph 11.15, a nomination of benefits made under a pension scheme should be treated in a similar way to a special power. (Draft Bill, Cl 6(3).)[16]

11.17 In relation to the 125-year perpetuity period, the principle of "wait and see" should apply to those estates, interests, rights and powers which are subject to the rule against perpetuities, in the same way as it does under the 1964 Act. (Draft Bill, Cl 7.)[17]

11.18 The legislation should not affect the rule of law which limits the duration of non-charitable purpose trusts. (Draft Bill, Cl 18.)[18]

11.19 Subject to the exception explained below, in paragraph 11.21, the statutory restrictions on accumulations should be repealed. (Draft Bill, Cls 13 and 21.)[19]

11.20 The rule would cease to apply only in relation to instruments taking effect after the date on which any legislation was brought into force, including any special power of appointment created before but exercised after that date. (Draft Bill, Cl 15(1).)[20]

11.21 Where an instrument confers a power or duty to accumulate on trustees of property that is held in trust for charitable purposes, the direction to accumulate

[14] See above, para 8.20.

[15] See above, para 8.23.

[16] See above, para 8.24.

[17] See above, para 8.25.

[18] See above, para 8.36.

[19] See above, para 10.15.

[20] See above, paras 10.15, 10.16.

should cease to have effect 21 years after the first day on which the income must or may be accumulated. (Draft Bill, Cl 14(1) - (3).)[21]

11.22 This limitation should apply whether the settlor was an individual or a corporation, but it would be applicable only to instruments taking effect after the legislation was brought into force. (Draft Bill, Cl 14(1), 15(1).)[22]

11.23 Where the power or duty came to an end, the income should be applied for the persons or purposes for whom or which it would have been applicable had there been no power or duty to accumulate. (Draft Bill, Cl 14(4).)[23]

(*Signed*) MARY ARDEN, *Chairman*
ANDREW BURROWS
DIANA FABER
CHARLES HARPUM
STEPHEN SILBER

MICHAEL SAYERS, *Secretary*
11 February 1998

[21] See above, para 10.21.

[22] *Ibid.*

[23] *Ibid.*