RENDERING THE RULE AGAINST PERPETUITIES LESS REMOTE

C. M. SAPPIDEEN, P. J. BUTT†*

> And may there be no moaning of the bar,
> When I put out to sea.
>
> Tennyson, *Crossing the Bar.*

Can one really bemoan the fact that some of the mystery of the common law is about to depart these shores? A spectre, in the shape of a report by the New South Wales Law Reform Commission on reform of the rule against perpetuities,[1] looms on the horizon. In such far-flung places as the United Kingdom, Queensland, Victoria, Western Australia, New Zealand and many of the American states this same spectre has enticed the Cinderella of the law to undertake the short journey across the Styx. For some, the passing of her pure pristine beauty has not been without regret; for others (students, testators and draftsmen alike), rejoicing in the demise of one they view rather as an ugly sister, there has been no sadness of farewell. For the time has come to cast off the encrusted paraphenalia of past ages and don the mantle of change. Fantasies are to be banished before our eyes: as if by the dawning of a new morality, fertile octogerarians and precocious toddlers are to be no more. Tales of magical wonders are to be dispelled: no longer will regenerative organs be miraculously restored, female centurians procreate, or gravel pits remain inexhaustible. Such dreams belong to a past age. We are bid descend from the clouds and plant our feet firmly on the ground. The law's prodigal progeny is to be demythologized.

We propose in this article to discuss the recommendations of the Commission for reform of the present rule against perpetuities. The discussion will be divided into two parts. Part I will deal with the general principles relating to the rule against perpetuities. Part II will deal with the application of that rule to various kinds of interests which have been held to be subject to it.

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* LL.B. (Melbourne), LL.M. (Sydney), Lecturer in Law, University of Sydney.

† B.A., LL.M. (Sydney), Lecturer in Law, University of Sydney.

[1] ***Report on Perpetuities and Accumulations***, Law Reform Commission, New South Wales, L.R.C.26 (1976) (hereinafter called the *Report*) with a Draft Bill, Perpetuities Act 1976 (hereinafter called the Draft Bill), annexed thereto.

PART I

The Rule Against Perpetuities

The statement of the rule has been made in a single sentence: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest".[2] The definition is Gray's; he described the rule as "well-established, simple and clear" although it has been noted that in the 1942 edition it took 833 pages to expound.[3] Central to the rule against perpetuities is the concept that a disposition must be tested for remoteness at the time the instrument creating it comes into operation. If at that time there is any possibility, however remote, that the interest may vest outside the perpetuity period, the interest is void from the outset. This has become known as the "initial certainty rule". Validity is measured by possible, rather than actual, events and it is irrelevant that the interest does in fact vest within the period; the benefit of hindsight is an impermissible luxury.

The Perpetuity Period

At common law, the perpetuity period within which interests are required to vest is the period of lives in being at the creation of the interest plus 21 years, together with any periods of actual gestation.

Legislation in the United Kingdom, Queensland, Victoria and Western Australia has retained the perpetuity period in this form, but has left it open to the draftsman to specify in the instrument that a maximum period of 80 years is the period within which the interest must vest.[4] This elective 80-year period is an attempt to woo conveyancers away from the use of "royal lives" clauses, often utilised in an attempt to postpone the vesting of interests for the longest period possible. It was common to provide that vesting be postponed until 21 years after the death of the survivor of all lineal descendants of Queen Victoria living at the testator's death. The eighty-year period provides a substantial and certain period, and runs none of the risks of uncertainty (nor of the potentially great expense) in determining the survivor.[5] The ability to select arbitrary lives and "royal lives" has not been abolished by the legislation in these jurisdictions, nor is it proposed to do so in New South Wales.

The New South Wales Law Reform Commission in its Draft Bill has not followed the British example in providing the 80-year period as

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[2] Gray, *The Rule Against Perpetuities* (4th ed., 1942), s. 201.

[3] W. Barton Leach, "Perpetuities Reform: London Proposes, Perth Disposes" (1964) 6 *Uni. of W.A. L.R.* 11 at 12.

[4] Perpetuities and Accumulations Act 1964 (U.K.), s. 1; Property Law Act 1974 (Q.), s. 209; Perpetuities and Accumulations Act 1968 (Vic.), s. 5; Property Law Act 1969 (W.A.), s. 101.

[5] See *Re Villar* [1929] 1 Ch. 243; *Re Leverhulme* [1943] 2 All E.R. 274; *cf. Re Warren's Will Trusts* (*The Times*, June 2, 1961, p. 10), noted in J. H. C. Morris and W. Barton Leach, *The Rule Against Perpetuities* (2nd ed., 1962), p. 61, n. 3. See also *Re Moore* [1901] 1 Ch. 936.

an *elective* period. The Commission has recommended that an *automatic* 80-year period apply, unless the conveyancer elects that the common law perpetuity period (as amended by the Draft Bill) apply. Such election must be specific, the Commission suggesting that the requirement may be satisfied by the following: "Section 7(2) of the Perpetuities Act, 1976 shall apply to any interest created by this settlement".[6] Consider the following devise: "To such of A's grandchildren who attain 21 within 21 years of B's death". Under the Draft Bill, the perpetuity period will be 80 years, as there is no specific election that the common law period apply. The interest, to be valid, must vest within 80 years of the testator's death. The result is that only such of A's grandchildren who in fact attain 21 within 21 years of B's death *and* within the 80-year period from the date of the testator's death will take. Similarly, consider this devise: "To the grandchildren of A who attain 21". If A survives the testator and has no grandchildren aged 21 at the testator's death (so that the class closing rules will not apply), at common law the devise would be void for remoteness. Under the proposed legislation, the devise will be valid if grandchildren of A in fact attain 21 within 80 years of the testator's death. This does not necessarily mean that all grandchildren will share in the gift. A number of grandchildren may be excluded for several reasons — they may attain 21 after the 80-year period,[7] or be excluded by operation of the class closing rules (discussed *infra*).

It must be remembered that the 80-year period is a perpetuity period, and the requirement remains that the gift "vest"[8] within this new period. If, therefore, there is a possibility that the interest may not vest within the 80-year period it will still be necessary to resort to other provisions of the Draft Bill to save it. For example, it may be necessary to "wait and see" whether the interest will in fact vest;[9] it may also require resort to the provisions allowing exclusion of some members of the class to save it.[10]

In speaking of the effect of the automatic 80-year period, the Commission said: "a draftsman may safely ignore many of the technical points of the rule against perpetuities. He has no need, for example, to consider the supporting lives which may be relevant to the disposition; he may disregard those sections of the Draft Bill which are directed to particular problems such as the unborn husband or wife . . . and presumptions as to parenthood . . . ; moreover he can assure his client at the outset that the disposition is not void for remoteness".[11]

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[6] Section 7, Draft Bill. See discussion in *Report*, pp. 26-29.

[7] As will be seen, the proposed legislation provides for reduction of age and exclusion of potential class members where this would validate the gift: see s. 11(1) and s. 11(4), and discussion *infra*.

[8] As to the meaning of the word "vest", see P. W. Hogg and H. A. J. Ford, "Victorian Perpetuities Law in a Nutshell" (1970) 7 *Melb. Uni. L.R.* 155 at 156-158.

[9] Section 10, Draft Bill, discussed *infra*.

[10] Section 11(4), Draft Bill, discussed *infra*.

[11] *Report*, para. 8.9.

We take issue with this in part. It is submitted that it will, in some cases, be necessary in applying the 80-year period to resort to presumptions as to parenthood; nor is it necessarily true that the draftsman will be able to assure his client (curative provisions apart) that the interest is valid from the outset.

Example 1:

> The testator devises property "to the grandchildren of A". At the testator's death, A has no grandchildren. At the end of the 80-year period, the following facts pertain — A (a female) is aged 90, and has one female child aged 55 and one grandchild. The presumptions of parenthood[12] may now be used to allow the lone grandchild to take beneficially, as it is now presumed that both grandmother and mother are incapable of childbearing. Were it otherwise, since the class closing rules do not apply to close the class in these circumstances,[13] it would, under the common law rule, be assumed that both mother and grandmother were capable of having further children, thus allowing the possibility that a grandchild may take outside the perpetuity period and so avoiding the gift to the whole class.

Consider also the following example:

Example 2:

> The testator devises property "to the grandchildren of A". At the testator's death, A has no grandchildren. At the end of the 80-year period the following facts pertain: A (a male) is aged 90, and has one son aged 50 and no grandchildren. The gift to the grandchildren is void for remoteness and any grandchildren subsequently born will not take. The presumptions of parenthood do not set any upper age limits for the procreative capacities of males.

No doubt cases of this kind will be rare. Perhaps we should bear in mind the comments of the Ontario Law Reform Commission, that the statute is intended to serve the *average* testator or settlor in promoting his reasonable desires in the disposition of his estate.[14]

It is the writers' view that no special advantage is to be gained from employing the 80-year period as an automatic period for perpetuities purposes. It is true that the draftsman need no longer be concerned with lives in being and extensions thereof; they become irrelevant, as they no longer provide the appropriate period by which vesting may be measured. It is also true that the 80-year period provides a time certain for vesting. But the adoption of the 80-year period does not, as the unwary might believe and the ignorant hope, abolish the

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[12] See s. 9, discussed *infra*. This section is applied before exclusion of members of a class: see s. 12.

[13] The class will remain open to include grandchildren whenever born: see Morris and Leach, *op. cit. supra* n. 5 at 112.

[14] *Report on Perpetuities and Accumulations*, Ontario Law Reform Commission, *Report No. 1* (February 1965), p. 6 (hereinafter called *"Ontario Report"*).

need for a basic working knowledge of the common law rule against perpetuities. In particular, a knowledge of class closing rules remains essential. This will be illustrated in subsequent paragraphs.

The common law period of a life in being plus 21 years works out, on the average, at 80 years, although situations can, of course, be devised where the common law period will be either considerably shorter or considerably longer than a period of 80 years. It should be noted, however, that where there is no life-in-being express or implied in the instrument, the period at common law is simply 21 years, substantially less than the 80 years proposed by the Draft Bill.

The Initial Certainty Rule

The perpetuity rule predicates that if, at the time the instrument comes into operation, there is any possibility, however remote, that the interest may vest outside the perpetuity period, it is void from the outset.[15] The Commission, following the approach taken universally in perpetuity reforms elsewhere, has recommended that this rule be abrogated. This is to be achieved by the introduction of a special rule governing the "unborn widow" situation, by medically based presumptions concerning capacity to have children, and by a "wait and see" rule.

"Unborn Widows"

Special provision is made for the "unborn widow" situation. A typical example of the common law problem posed by the unborn widow[16] is the following:

Example 3:

> The testator devises property to trustees upon trust "to A (a bachelor) for life, and then to any widow who may survive him for life, and then to such of his children as are living at the death of any such widow". At common law, the remainder to the children of A is void for remoteness, as their interest cannot vest until the death of the widow, which may be more than 21 years after the death of the only life-in-being, A. The widow cannot be a life-in-being, because (unless A predeceased the testator) A's widow may not have been alive at the testator's death. Even if A were married at the testator's death that wife might die and he might remarry a woman who was not alive at testator's death and who cannot therefore be a life-in-being.

Section 8 of the Draft Bill overcomes this problem by providing that the widow or widower of a person who is a life-in-being shall be deemed also to be a life-in-being. The section, of course, will only apply if the draftsman elects under s. 7(2) that the common law perpetuity

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[15] Appointments under special powers of appointment, gifts in default of appointment, and alternative contingencies, are exceptions to the rule: see Morris and Leach, *op. cit. supra* n. 5 at 152-154, 159-163, 181.

[16] It has been noted that there is no reported case on the unborn widow situation: D. E. Allan, "The Rule Against Perpetuities Restated" (1964) 6 *Uni. of W.A. L.R.* 27 at 52. – there is one on the unborn widower, Harris v King, (1936) 56 CLR 17

period apply. Section 8 provides:

> Where —
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> (a) for the purpose of the rule against perpetuities, the life of any person is a life-in-being in relation to an interest created by a settlement; and
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> (b) the interest is to or may vest on or after an event during the life, or on or after the death, of a husband or wife of that person,
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> the life of the husband or wife shall, for the purpose of the rule against perpetuities and in relation to the interest, have effect as a life-in-being, whether or not the life of the husband or wife was a life-in-being at the time the settlement took effect.

The first pre-requisite for section 8 to apply is that the husband or wife be a life-in-being. Thus, the section would not apply in the following case:

Example 4:

> A testator devises property "to A's first son for life and then to any widow who may survive him for life and then to such of his children as are living at his widow's death". If at the testator's death A does not have a son[17] there is no relevant life-in-being to which the section can apply. The disposition remains prima facie void for remoteness.[18]

It is quite unnecessary to resort to this section if the gift to the children, although subsequent to the gift to the widow or widower, is not dependent on it.

Example 5:

> A testator devises property "on trust for A for life, then for any widow who may survive A for her life, and then to the children of A".[19] The gift to A's children is valid; vesting is neither postponed to, nor contingent on, the death of A's widow, but occurs on the death of A, because at that date all children of A are ascertained.[20]

Section 8 designates that the (potentially) unborn spouse is to become a life-in-being for the purposes of a gift to that spouse *and* for the purpose of any dependent gifts.

Example 6:

> A testator devises property "to A for life, then to any widow who may survive him if she attains 40 and then to such of A's children then living". Under the proposed s. 8, not only is the gift to the

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[17] Note that in New South Wales there is no longer the presumption that references to "children" in settlements refer to legitimate children only: see Children (Equality of Status) Act, 1976 (N.S.W.).

[18] It may, however, in the event be saved by the "wait and see" provisions: see *infra*.

[19] *Cf. Re Bullock's Will Trusts* [1915] 1 Ch. 493.

[20] Artificial insemination and sperm banking may, however, lead to difficulties in the future, as it could no longer be said that all children of a male are necessarily ascertained on his death. See *infra* n. 27.

children surviving the widow valid but also the gift to the widow is valid, because she is now a life-in-being.[21]

It should also be noted that the benefit of the section is not limited to the children of the life-in-being, but applies also to unrelated third parties.[22]

The wording of the New South Wales section is different from its counterparts in the other States[23] in one significant respect. The New South Wales section provides that the surviving spouse is to be considered a life-in-being where the "interest is to or may vest *on or after* an event *during the life*, or on or after the death, of a husband or wife of that person".[24] The Western Australian provision, for example, refers only to an interest vesting on or after the death of the surviving spouse. This will be of importance in a case where the remainder may take effect during the lifetime of the surviving spouse.

Example 7:

A testator devises property "to A for life and then to any widow who shall survive him until she remarries and then to any children of A then living".

It has been remarked in respect of the Western Australian section, and it is equally true of the New South Wales section, that if the unborn widow is deemed a life-in-being, then it might be argued that she is also a life-in-being for the purposes of s. 8(a), and thus *her* unborn widower is deemed a life-in-being within s. 8(b), and so on endlessly. The draftsman of the Western Australian legislation responded by saying that "having abolished so many fantastic possibilities, he is surely entitled to the luxury of creating just one more; and he would worry about this . . . when the facts actually occur".[25]

It is submitted for two reasons the deeming of an unborn widow to be a life-in-being is unnecessary. First, it has been pointed out that there is no reported case of dependent gifts in remainder failing by reason of the possibility of an unborn widow; presumably the incidence of the problem is rare. Second, since an automatic 80-year perpetuity period is recommended, it is surmised that no draftsman will elect the common law period unless he feels both confident in his ability to apply the common law rule and that special advantage is to be gained from utilizing it. Apart from the possibility that by careful selection of measuring lives the period might be extended beyond eighty years there appears no good reason for the election to be made. The "unborn widow" problem can be easily avoided. In any event, the "wait and see" rule will, it is suggested, suitably resolve the problem in many cases.

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[21] It would also validate discretionary trusts exercisable during the widow's life in her favour. *Cf. Re Coleman* [1936] Ch. 528.

[22] The New South Wales section applies generally to third persons and institutions. *Cf.* Vic. s. 10(b); Q. s. 214 (b); W.A. s. 108.

[23] Vic. s. 10(b); Q. s. 214(b); W.A. s. 108.

[24] Italics inserted.

[25] Allan, *supra* n. 16 at 53-54.

Fertile Octogenarians and Precocious Toddlers

"If the law supposes that", said Mr. Bumble . . .
"the law is an ass — an idiot".

(Dickens, *Oliver Twist*).

Evidence in support of Mr. Bumble's prejudices is to be found in the insistence by the perpetuity rule that a person of any age is capable of having children. Under the perpetuity rule, evidence of physical incapability is inadmissible. Dean, J., in the Victorian case *Re Fawaz*,[26] summed up the position neatly:

> The attitude of the law on this matter would scarcely commend itself to the intelligent layman. It is prepared to concede that a deceased person cannot have children but it will concede no more.[27] The fact that by a surgical operation a woman's organs of generation have been removed, or the fact that she is of an advanced age, will not, in the eye of the law, exclude the possibility of further children being born to her.

Professor Leach recounts[28] that when in *Jee* v. *Audley*[29] the court decided that a woman of 70 was conclusively presumed to be capable of child bearing, reliance was placed on a passage from the Bible telling how Sarah bore Isaac at age 90.[30] The court, however, conveniently overlooked a subsequent verse which records that upon reception of the news "Abraham fell upon his face and laughed".[31] At the other extreme, a person no matter how young is conclusively presumed to be capable of bearing children,[32] hence the term "precocious toddler".[33]

The N.S.W. Commission recommends, in line with other Australian and English legislation,[34] that these presumptions be abolished. The Draft Bill provides:

9. (1) In this section:
"beget" means beget so as to father a child.
"conceive" means conceive so as to bear a child.
(2) Subsections (3) and (4) apply where, in relation to the application of the rule against perpetuities to an interest created by a settlement, a question arises which turns on the possibility of a person having a child at a future time.
(3) It shall be presumed —

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[26] [1958] V.R. 426 at 431.

[27] With the advent of sperm banking this is no longer true: see W. Barton Leach, "Perpetuities in the Atomic Age: The Sperm Bank and the Fertile Decedent" (1962) *Am.B.A.J.* 942.

[28] *Id.*

[29] (1787) 1 Cox 324 [29 E.R. 1186].

[30] Genesis, XVII, vv. 15 *et seq.*

[31] *Id.* v. 17.

[32] *Re Gaites' Will Trusts* (1949) 65 T.L.R. 194; see criticism in Morris and Leach, *op. cit. supra* n. 5 pp. 85-86, and see now Children (Equality of Status) Act 1976 (N.S.W.).

[33] For an actual example, see report in Morris and Leach, *op. cit. supra* n. 5 p. 85, concerning a five-year-old mother.

[34] W.A. s. 102; Vic. s. 8; Q. s. 212; U.K. s. 2.

(a) that a male will not beget a child while under the age of 12 years;

(b) that a female will not conceive a child while under the age of 12 years or over the age of 55 years; and

(c) that a person will not become parent of another person, by adoption or otherwise, while the first person is under the age of 16 years or over the age of 55 years, except where the second person is a child or natural child of the first person.

(4) The question whether a living person will or will not be able to beget or to conceive a child at a future time shall be a question of fact and shall be determinable on the presumptions in subsection (3) (a) and (b) and on evidence accordingly.

It will be noticed that the section, whilst setting upper limits to a female's capacity to procreate, makes no similar provision for a male's, although evidence as to incapacity may be given under s. 9(4) (for example, where there is proven sterility). But in other cases, where there is no clear evidence, the effect of the "wait and see" rule (discussed *infra*) may require, where the capacity of a male to have children is in question, that the question of the validity of a gift remain in abeyance until the end of the perpetuity period. The intended omission of an upper limit on a male's capacity to have children is of importance in a different context. Although not discussed by the Commission, it is clear that with the advent of artificial insemination and sperm banking it may now be possible for a man to have children after his death. Problems engendered by sperm banking are more properly dealt with in specific legislation governing artificial insemination, but it is to be noted that the rule against perpetuities may have to grapple with the issue.[35]

The presumptions set up in s. 9 would be ineffective if it were possible for a person to become a parent by adoption outside the perpetuity period. Specific provision is made for this, under s. 9(3)(c), by supplying a presumption that a person under 16 or over 55 will not become a parent by adoption. This accords with the adoption procedures in New South Wales.[36] The presumption is declared not to apply where "the second person is a child or natural child of the first person". The Commission regarded it as unreal to presume that that person could not become the legal parent of the child or natural child, by, for example, legitimation.[37] It should now be noted that under the Children (Equality of Status) Act, 1976 (N.S.W.), an ex-nuptial child is given equality of status, and references to a child or children of any person are, unless there is a contrary intention in the instrument, to be construed as

[35] See article cited *supra* n. 27.
[36] See *Report*, para. 10.5.
[37] *Ibid.*

including ex-nuptial children.[38] For succession purposes, therefore, the status of the ex-nuptial child will be unaltered by legitimation.

It is noteworthy that the presumptions of incapacity, and any determination to the contrary, apply where "in relation to the application of the rule against perpetuities to an interest created by a settlement, a question arises which turns on the possibility of a person having a child at a future time". This provision is unique, as in other state legislation the presumptions are to apply only "in any proceedings" in which the issue arises.[39] Moreover, it is intended that the principle expressed in s. 9 will apply to cases concerning the right of any beneficiary to put an end to a trust or accumulation (the rule in *Saunders* v. *Vautier*[40]), the administration of trust estates or funds, and indeed any disposition, devolution or transmission of property.[41] A new s. 36E of the Conveyancing Act, 1919 has been proposed to effect this result.[42]

Another matter the Commission considered was what to do with the "impossible child", that is (in this context) a child whose parent is presumed, or has been accepted by evidence as being, incapable of procreating. The solution adopted follows the English pattern.[43] The proposed s. 9(5)-(7) provides:

> (5) Subsections (6) and (7) apply:—
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> (a) where a presumption under subsection (3) is applied, and the presumption is disappointed by the event; and
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> (b) where a determination is made under subsection (4) that a living person will not be able to beget or to conceive a child at a future time, and he does beget or conceive a child at that time.
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> (6) Subject to subsection (7), the Court may make such orders as it thinks fit for the purpose of putting the persons interested into the positions, so far as is just, that they would have held if the presumption had not been applied or the determination had not been made.
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> (7) The Court shall not make an order under subsection (6) affecting adversely the position of a person who claims by virtue of a purchase or other transaction for valuable consideration made in good faith and without notice of the application of the presumption or of the making of the determination.

This recommendation appears to allow as far as possible that justice to be done between the parties, and is much more satisfactory

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[38] Section 7.

[39] Q. s. 212; Vic. s. 8(1); *cf.* W.A. s. 102.

[40] (1841) 4 Beav. 115 [49 E.R. 282]; and see *McRae* v. *Walsh* (1927) 27 S.R. (N.S.W.) 290. See *infra* re accumulations.

[41] *Cf. Teague* v. *Trustees Executors & Agency Co. Ltd.* (1923) 32 C.L.R. 252.

[42] Draft Bill, s. 23 and 2nd Schedule.

[43] Section 2(2), Perpetuities and Accumulations Act, 1964 (U.K.).

than the English recommendations[44] (rejected by their legislature) which left the beneficiary to follow such rights as he might have to trace the trust property.

"Wait and See"

Perhaps the single most contentious reform recommended is the implementation of the "wait and see" principle.[45] At common law, a disposition must be tested for remoteness at the time of its creation; if at that time there is any possibility, however remote, that the interest may vest outside the perpetuity period, it is void from the outset.[46] It is to no avail to be able to show retrospectively that the interest has in fact vested within the perpetuity period. The Commission has recommended the abrogation of the initial certainty rule, and the introduction of a "wait and see" principle. Section 10(1) of the Draft Bill provides:

> 10. (1) Where a provision of settlement which creates an interest would, but for this Act, infringe the rule against perpetuities, the interest shall be treated, until such time (if any) as it becomes certain that it must vest, if at all, after the end of the perpetuity period, as if the provision did not infringe the rule, and its becoming so certain shall not affect the validity of any thing previously done in relation to the interest.

As the Commission in its Report notes, the disadvantage of the wait and see rule is that the initial certainty under the old rule is lost and interested parties may have to wait until the end of the period to see whether the interest in fact vests within the period.[47] This may not, however, be quite so onerous as first thought. For example, the "wait and see" provision applies only to dispositions *capable* of vesting within the perpetuity period, thereby excluding dispositions which must vest within the period, as well as dispositions which are incapable of so vesting. Additionally, many of the most common breaches of the perpetuity rule — the unborn widow, fertile octogenarian and precocious toddler — are dealt with by special provisions. Lastly, the class closing rules in a number of situations may make it clear that vesting must take place within the period.[48]

As an example of the situation in which the "wait and see" rule will apply, consider the following:

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[44] English Law Reform Committee's *Fourth Report* (*The Rule Against Perpetuities*) (Cmnd. 18, 1956) (hereinafter called the *"U.K. Report"*), p. 9.

[45] The reader is referred to a selection of learned articles on the subject: Lewis M. Simes, "Is the Rule Against Perpetuities Doomed? The 'Wait and See' Doctrine" (1953) 52 *Mich. L. Rev.* 179; W. Barton Leach, "Perpetuities Legislation: Hail, Pennsylvania" (1960) 108 *Uni. of Pa. L.R.* 1124; Lewis M. Simes, "Reform of the Rule Against Perpetuities in Western Australia" (1964) 6 *Uni. of W.A. L.R.* 21; Allan, *supra* n. 16; D. E. Allan, "Perpetuities: Who are the Lives in Being" (1965) 81 *L.Q.R.* 106; R. H. Maudsley, "Measuring Lives under a System of Wait-and-See" (1970) 86 *L.Q.R.* 357.

[46] See *supra* n. 15.

[47] *Report*, para. 11.6.

[48] Discussed *infra*.

Example 8:

A testator devises property "to the grandchildren of X". At the testator's death, X has no grandchildren.[49] The gift may, but need not necessarily, vest within the perpetuity period. Section 10 directs that the interest is to be treated as valid until such time as it becomes certain that it must vest, if at all, outside the perpetuity period.

As another example of the application of the "wait and see" principle, consider such a case as *Re Wood*,[50] where vesting was postponed until the occurrence of an extraneous event.

Example 9:

The testator devises gravel pits to trustees to work them until the pits are exhausted and then to sell the pits and divide the proceeds amongst the testator's issue then living. At the testator's death it is expected that the gravel pits will be worked out within four years. They are in fact exhausted in six years, before the matter comes to court. The gift at common law is void for remoteness, because at the time of the testator's death there was no certainty that the pits would be worked out within the perpeuity period. Under the proposed "wait and see" rule we may wait and see whether the vesting event does occur within the period. The interest will only fail if in fact it does not vest within the period. The result in *Re Wood* will be reversed.

The "wait and see" rule may also be used in conjunction with the child-bearing capacity presumptions.[51]

Example 10:

A testator devises property "to the grandchildren of X". At the testator's death, X, a female, is aged 40 and has no grandchildren. The "wait and see" rule will operate until X attains 55, when the presumptions under the proposed s. 9(3) will come into operation. Thus, if at that time X has had one child who has predeceased her, any grandchildren then alive will be entitled immediately. An earlier application could be made under s. 9(4) if there were evidence of X's incapacity to produce further children (for example, if X had had an hysterectomy).

In large estates a matter of considerable importance will be the disposition of income in the intervening "wait and see" period. Under s. 10, in the intervening "wait and see" period, the disposition is to be treated as presumptively valid. The Commission accepted the English view that no special rules ought to apply to the intermediate income.[52] Thus, according to the ordinary rules, if a gift carries the intermediate

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[49] If grandchildren were alive at the testator's death, the class would then close, excluding all grandchildren born subsequently.

[50] [1894] 2 Ch. 310; 3 Ch. 381.

[51] The following examples are taken from the *Report* pp. 34-35.

[52] *Report*, paras. 11.8-11.10.

income, then during the wait and see period the income will go to the person or class contingently entitled. If there is no person or class contingently entitled, the income is treated as if it were not disposed of.[53]

Lives-in-Being

Under the Draft Bill, there are only two areas where there is allowed an extension of the persons who at common law would be considered lives-in-being for the purposes of the rule against perpetuities. One is the "unborn widow" provision (discussed *supra*); the other is a provision allowing certain members of a class to become lives-in-being (s. 10(4), discussed *infra*). Further than that, the Draft Bill does not go. Section 10(3) of the Draft Bill provides:

> (3) Subject to subsection (4), this section does not make the life of any person a life-in-being for the purpose of ascertaining the period within which at common law an interest must vest unless that life would have been reckoned a life-in-being for that purpose if this section had not been enacted.

This provision, like its counterparts in other Australian legislation,[54] differs markedly from the English legislation, in which it was thought necessary to enumerate the classes of persons who would be lives-in-being for the purposes of the wait and see rule.[55]

The argument recognised by the English legislation is put this way: if, when the interest finally vests, it is possible to find any person at all who was alive at the time the instrument came into operation and who died not more than 21 years before the vesting of the interest, then the interest is valid, because it has in fact vested within 21 years of the death of some life-in-being at the time the instrument came into operation. The basis upon which this argument proceeds is that the perpetuity rule does not require that the lives-in-being be either referred to in the instrument or connected with the disposition. This view is illustrated by the following example.

Example 11:

> A testator devises property on trust "to the grandchildren of A" and elects that the common law perpetuity period apply. At the testator's death, A is alive with two children, B and C, but has no grandchildren. At common law this gift breaches the rule against perpetuities as grandchildren of A might be born more than 21 years after the death of A. Under the "wait and see" rule, how long do you wait: for 21 years after A's death, or for 21 years

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[53] For the present position, see s. 36B Conveyancing Act, 1919 (N.S.W.); G. P. Stuckey, *The Conveyancing Act 1919-1969* (2nd ed. 1970) pp. 77-79; F. C. Hutley, R. A. Woodman and O. Wood, *Cases and Materials on Succession* (2nd ed., 1975) pp. 523-524.

[54] Q. s. 210 (4); Vic. s. 6(4); W.A. s. 103(3).

[55] See Perpetuities and Accumulations Act, 1964 (U.K.) s. 3, and critical analysis by R. E. Megarry and H. W. R. Wade, *The Law of Real Property* (4th ed., 1975) pp. 221-225; J. H. C. Morris and H. W. R. Wade, "Perpetuities Reform at Last" (1964) 80 *L.Q.R.* 486.

after the death of A, B and C? The answer, of course, depends on the answer to the question: who are lives-in-being? On the English approach any person who was alive when the instrument took effect and who was either alive when the vesting occurred, or died within 21 years before vesting is a life-in-being. It is said that the common law does not restrict the persons who may be lives-in-being and that when a disposition is being tested for remoteness one keeps on trying different lives-in-being which satisfy the criteria until one is found which saves the gift. Numerous persons may satisfy this criteria. In the example given, the English view would require at least that A, B and C be regarded as lives-in-being. This view would regard as quite unsatisfactory the solution adopted by the Western Australian legislature, and contained in the Draft Bill s. 10(3), that only those persons who at common law would be considered lives-in-being are to be used to test whether the interest is void for remoteness in a wait and see situation.[56]

The draftsman of the Western Australian legislation,[57] which was the forerunner to both the English Act and the other state legislation, rejected the English view.[58] Along with the New South Wales Law Reform Commission,[59] it is our opinion that a person can only be a life-in-being if, expressly or by implication, his life governs the time of vesting.[60] Our view, with its ramifications in a wait and see situation, may be illustrated by the following example:

Example 12:

A testator devises property "to the grandchildren of A" and elects that the common law perpetuity period apply. At the testator's death, A is alive and has two children, B and C, but no grandchildren. In our view, A is the only life-in-being for the purposes of the "wait and see" rule, for his life governs the time of vesting of the *entire* gift. It is because he can have *further* children that the gift fails; for that reason also his existing children are not considered lives-in-being. It is submitted that B and C are not lives-in-being for purposes of the "wait and see" rule by virtue of s. 9(3) of the proposed statute, because whilst they may control the vesting of the gift to *their children*, they do not control the vesting of the gift to all *grandchildren*.[61] The life or lives-in-being which are selected for testing whether the gift initially complies with the perpetuity

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[56] D. E. Allan, *supra* n. 16 at 43-46. See also articles cited *supra* n. 45 discussing the issue.

[57] The Draft Bill s. 10(3) is similar to s. 103(3) of the Property Law Act 1969 (W.A.).

[58] Although we note (with some regret) that he now appears to consider, after agonised soul searching, that he was wrong: see Allan, *supra* n. 16 at 43-46.

[59] *Report*, pp. 41-42.

[60] See Megarry and Wade, *op. cit.*, *supra* n. 55 pp. 218-219, 221.

[61] *Cf.* Allan, *supra* n. 16 at 46, who thinks that the children would by virtue of the "wait and see" provision be considered lives-in-being. It is, however, to be noted that B and C would become lives-in-being by virtue of the proposed s. 10(4) (see *infra*).

rule are, it is submitted, the measuring lives under the "wait and see" rule.

The position has been neatly summed up by saying "the new doctrine does not alter the length or nature of the perpetuity period, but merely discards the certainty doctrine in favour of the 'wait and see' doctrine".[62] We think the New South Wales Law Reform Commission was correct in its view that the introduction of the "wait and see" principle does not require specification of lives-in-being for that purpose.

Lives-in-being and class gifts

Class gifts were, however, regarded as warranting special attention. The Commission recommended that there be an extension of the common law lives-in-being where class gifts are involved. The Draft Bill in s. 10(4) provides:

(4) Where —

(a) an interest created by a settlement is to be taken by a class of persons or by one or more members of a class; and

(b) the life of any person would be relevant for the purpose of ascertaining the period within which at common law the interest must vest in any member of the class if under the settlement the interest were to be taken by that person alone,

that life may be reckoned a life-in-being as regards every member of the class.

The object of the section is to further extend the period within which a class gift[63] may vest by providing further lives-in-being. It can, of course, be relevant only where the draftsman has elected under s. 7(2) of the Draft Bill that the common law perpetuity period apply. The section in this form was first introduced in the Victorian Act.[64] The Victorian Committee stated that its purpose was "to make it clear that in the case of class gifts, lives may count as 'lives-in-being' under the rule if relevant to the vesting of the disposition in any, although not all, of the potential members of the class".[65] Consider the following example, taken from the Victorian Report, of the operation of s. 10(4):

Example 13:

A testator devises property "to the first child of A to marry" and elects that the common law perpetuity period apply. At the testator's death, A is alive and has one unmarried child. At common law the gift is void for remoteness for that, or any after-born child of A, may marry outside the period. At common law, A would be con-

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[62] K. U. McKay, "Perpetuities Act 1964" (1965) 1 *New Zealand Universities L.R.* 484 at 497.

[63] See definition s. 4(3), Draft Bill.

[64] Perpetuities and Accumulations Act, 1968 (Vic.), proviso to s. 6(4).

[65] *Report of Sub-Committee of the Chief Justice of Victoria on "Reform of the Rules Against Perpetuities and Accumulations"* (November 1966), Notes on Draft Bill, pp. 2-3, where the effect of the proviso to s. 6(4) (Vic.) is discussed.

sidered the only life-in-being. The effect of the proviso, however, would be to deem A's living child (even though not married) a life-in-being, so that the relevant period for vesting becomes 21 years from the death of the survivor of A and the unmarried child.

It will be noted that the gift in *Example 13*, "to the first child of A to marry", is not a class gift. A "class gift" has been defined as "a gift of property to all who come within some description, the property being divisible in shares varying according to the number of persons in the class".[66] Section 10(4) refers to an interest "to be taken by a class of persons or by one or more members of a class". Presumably the term "class" is not used in the technical sense of "class gift", and, in the example given, the "class" to which the section applies is A's children. The operation of the section in relation to class gifts proper is illustrated in the following example, also taken from the Victorian Report.

Example 14:

A testator devises property "to such of A's grandchildren as attain 21", and elects that the common law perpetuity period apply. Where A survives the testator, his children would not at common law be considered lives-in-being, but under the Victorian section and s. 10(4) of the New South Wales Draft Bill, the common law period would be extended to 21 years from the death of the survivor of A and his children living at the testator's death. Presumably also if there were grandchildren alive at the testator's death and under the age of 21, they could be considered lives-in-being under this section. At common law, if there was at least one grandchild aged 21 at the testator's death, the class closing rules would operate to make them lives-in-being, and so save the gift.

The desired object of the proposed s. 10(4) is evident. It is to extend the perpetuity period so as to allow as many potential beneficiaries as possible to share. It would be of special assistance in *Example 14*, if for instance, A were aged 23 at the testator's death and had a child aged 1. The period would be extended to 21 years from the death of A's child. But is it worthwhile protecting gifts of this description when the benefit is directed to a future generation and the draftsman could have utilized the automatic 80-year period? We think not. It is timely to remember, as we have already pointed out, that the purpose of legislation of this description should be to protect the *average* testator or settlor in achieving his reasonable desires in the disposition of his estate.

Cy-Pres — Reduction of Age and Exclusion of Class Members

Professor Leach, one of the chief protagonists for reform, has advocated two major reforms of the rule against perpetuities. His first recommendation was for legislation requiring the court to wait and see how events turned out and to determine the validity of the interest having regard to actual rather than possible events (a recommendation adopted

[66] Megarry and Wade, *op. cit. supra* n. 55 p. 228.

in the Draft Bill). His second recommendation was that if the rule were breached, the terms of the limitation should be altered on a *cy-près* principle, so as to give effect so far as possible to the settlor's or testator's intentions.[67] Leach's ideal found voice in the Vermont legislation, which provides:

> Any interest in real or personal property which would violate the rule against perpetuities shall be reformed, within the limits of that rule, to approximate most closely the intention of the creator of the interest. In determining whether an interest would violate said rule and in reforming an interest the period of perpetuities shall be measured by actual rather than possible events.[68]

The New South Wales Law Reform Commission, along with its Australian and English counterparts, has not recommended that the courts be given a *general* power to modify void dispositions so as to comply as far as possible (within the parameters of the perpetuity rule) with the testator's or settlor's intentions. The reason for rejecting a general *cy-près power* was that it would leave the situation vague and uncertain: it would be difficult to foretell how the power would be exercised in a particular case.[69] Instead of a general power to modify void dispositions, the Commission has recommended that certain specific classes of dispositions which would otherwise breach the perpetuity rule should be reformed. The reform is to be effected by the following means: first, by provision for reduction of age where appropriate; second, by excluding potential members of a class where their inclusion would render the gift void. The object is to give effect to the testator's or settlor's intentions as far as possible, but short of a general *cy-près* power.

Reduction of Age

Section 11(1) of the proposed legislation provides:

> 11 (1) Where —
>
> (a) a provision of a settlement creates an interest and the vesting of the interest depends on the attainment by any person of a specified age; and
>
> (b) it becomes apparent that the provision would, if this section had not been enacted, infringe the rule against perpetuities but that it would not infringe the rule if the specified age had been a lesser age,
>
> the interest shall, for all purposes, be treated as if, instead of its vesting depending on the attainment by the person of the specified age, its vesting depends on the attainment by the person of the greatest age which, if put in place of the specified age, would escape the infringement.

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[67] W. Barton Leach, *supra* n. 45 at 1127.

[68] Vt. Stat. Ann. tit. 27, ss. 501-03 (1959).

[69] *U.K. Report, supra* n. 44, pp. 16-17. But see K. U. McKay, *supra* n. 62 at 504 for the view that it does not lead to uncertainty.

A simple illustration will indicate the interaction of the reduction of age provision and the "wait and see" rule.

Example 15:

> Testator devises property "to A's children if they attain 25" and elects that the common law perpetuity period apply. At the testator's death, A is alive and has no children. A is, therefore, the only life-in-being and the relevant period during which the interest must vest is A's lifetime plus 21 years. If on A's death all his children are over the age of 4 and the eldest is 21, the interest must of necessity vest within the period. No age reduction is necessary. But if a child of A were aged 2 it may be necessary at the end of the period to reduce the age to 23 so that the gift might be saved. If, however, a child of A attains 25 before A's death, the class will close and include all children then born, excluding after-born children. The effect of the class closing rule may be to make it clear that all members of the class will take within the period. Thus, for example, if the class comprised three children of ages 10, 15 and 25, the interest is valid, as all must attain 25 within 21 years of A's death. Children born after the closure of the class are excluded.[70]

Example 15 has been taken from the Victorian Report. The Victorian Committee, in the example given, applied the age reduction provisions at A's death.[71] This is to be contrasted with the position in New South Wales. Section 12 of the Draft Bill directs that the "wait and see" rule is to be applied before reduction of age and exclusion of class members. This has the effect that in *Example 15* it may be necessary to wait until the end of the perpetuity period before the age reduction provisions are applied. Thus, if at A's death, there are children aged 2, 4 and 23, it would not be correct to reduce the age qualification to 23 years at A's death, for the 2-year-old may die within six months of A's death or, in the extreme case, within 20 years of A's death. If all other children of A at A's death were over 4, no age reduction would be necessary.

It is submitted in the light of *Example 15* that there is no special advantage to be gained by allowing the entire wait and see period to run before utilizing age reduction provisions. In the example given (the testator having elected the common law perpetuity period), beneficiaries may have to wait a further 20 years before capital can be distributed. Alternative provisions such as those contained in the Victorian perpetuities legislation (s. 9(1)) to the effect that reduction of age provisions are to be applied when "it is apparent at the time the disposition is made or becomes apparent at a subsequent time" that the disposition

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[70] For a discussion of the class closing rules, see *infra*.

[71] *Supra* n. 65, notes to Victorian Draft Bill p. 4. The Victorian Act of 1968 (*supra*, n. 4) contains no equivalent to s. 12 of the N.S.W. Draft Bill, but ss. 6 and 9 of the Victorian Act leave open the construction adopted by the Victorian Committee.

would, age reduction provisions apart, be void for remoteness, would seem to provide a better solution. Although the Victorian provision may give rise to some uncertainty in application, it appears to us, from situations such as *Example 15*, that certainty may be bought at too high a price.

The proposed s. 11 differs from its counterparts in other states. There, the provision applies only where an interest depends on the attainment by a person of a specified age exceeding 21 years, and where in addition the disposition is void for remoteness but would not be so if the specified age were 21.[72] Section 11, by contrast, will apply in the following situation:

Example 16:

> The testator devises property "to the grandchildren of X who attain the age of 18 years". At the testator's death X has neither children nor grandchildren. At the end of the perpetuity period the following facts pertain: X and his children have died, leaving three grandchildren aged 16, 14 and 4. Under s. 11 the age is to be reduced as far as is necessary to save the interest. In this case the age will be reduced to 4 for all grandchildren.[73]

It is also to be noted that s. 11 applies where vesting of the interest depends on the attainment by *any* person of a specified age: it is not restricted to the beneficiary himself. This is shown by the following example.

Example 17:

> A testator devises property "to A's eldest grandchild living when B's first grandson attains 25 years". If at the end of the perpetuity period, B's first grandson is aged 21 years, by s. 11 the age of 25 years will be reduced to 21 years, thus validating the gift to A's eldest grandchild.

The reduction of age provision may effect acceleration of an interest. Where it does so, the Commission recommended that the acceleration should not adversely affect an existing interest.[74] Where an instrument specifies different ages in respect of different persons the age reduction provision is still applied, but each age is to be reduced only as far as is necessary to save the gift.[75]

Exclusion of members of a class

One of the most important reforms recommended is the abolition of the "all or nothing rule" under which, if one member of a class may possibly take a vested interest outside the perpetuity period, then the gift

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[72] Vic. s. 9; W.A. s. 105. The prescribed age is 18 in Queensland; see Q. s. 213. Section 36 of the Conveyancing Act 1919 (N.S.W.) is to be repealed.

[73] Under the doctrine of *Permanent Trustee Co. of N.S.W.* v. *Richardson* 1948 S.R. (N.S.W.) 313, if the age of any member of a class is read down it must be read down for all members of the class.

[74] Section 11(2), Draft Bill. See discussion in *Report* para. 12.7, where a rather curious example is given.

[75] Section 11(3).

to the entire class fails, even in respect of those members of the class whose interests would otherwise be valid. The Commission's proposal (to be applied as a last resort only[76]) is to preserve the gift as far as possible by excluding those members of the class who may take a vested interest outside the perpetuity period. The reform is effected by s. 11(4), which provides:

> (4) Where a provision of a settlement creates an interest which is to be taken by a class of persons and it becomes apparent that the inclusion of a person, being a member of the class or an unborn person who at birth would become a member or potential member of the class, would, but for this sub-section —
>
> (a) cause the provision to infringe the rule against perpetuities; or
>
> (b) prevent subsections (1) [reduction of age] or (3) [reducing age where different ages specified] from operating to save the provision from infringing that rule,
>
> then, upon its becoming so apparent, that person shall, unless his exclusion would exhaust the class, be treated in relation to the interest as if he were not a member of the class, and, where sub-sections (1) and (3) apply, those sub-sections shall thereupon have effect accordingly.

Exclusion of class members will occur in two differing situations.[77] In the first place, s. 11(4) will be applied where there is a gift to members of a class without any age contingency attached, but where inclusion of potential members of the class would render the entire gift void. The effect of the section here is to validate the gift by allowing the exclusion of those class members whose inclusion avoids the gift, unless this in effect exhausts the class.

Example 18:

> A testator devises property "to A for life and then to A's grandchildren". At the testator's death, A is alive but has no grandchildren.[78] Subsequently, A dies leaving children but no grandchildren. Under s. 10 we must "wait and see" whether vesting will occur within the period. If at the end of the period there are grandchildren alive and a possibility of further grandchildren being born (such possibility causing the gift to fail at common law), any further grandchildren will be excluded under s. 11(4), leaving the gift to the existing grandchildren valid.

The second situation is one of greater complexity as it involves the interaction of the exlusion of class member provisions with the reduction of age provisions.

Example 19:

> A testator devises property "to A for life and then to such of A's

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[76] Section 12, Draft Bill.
[77] Examples are taken from the New South Wales *Report*, para, 12.10.
[78] The class closing rules therefore have no application.

children as shall attain 25 and the children of such of them as shall die under 25 leaving children who shall attain 25, such children to take the share their parents would have taken". This is a gift to a composite class composed of two generations, and as such at common law is void for remoteness, as it is evident that either a child or grandchild may attain 25 outside the perpetuity period.

The remedial provisions of the Draft Bill are to be applied in the following order.[79] First, we apply the "wait and see" rule in an attempt to save the gift; second, if that rule does not save the gift the age reduction provisions must be applied; finally, if the age reduction provisions do not save the gift we look to the exclusion of class members provision. This order of application of the remedial provisions may be illustrated by returning to

Example 19:

Consider the situation where at the end of the "wait and see" period A is dead and his three children are aged 23, 22 and 20. Under s. 11(1) the age will be reduced to the age appropriate to save the gift — in this case, 20. No longer is there a possibility that a child may die under 20 leaving children who may attain 20 outside the perpetuity period: the age reduction provisions validate the gift. If at the end of the wait and see period the facts are that A has died leaving two children aged 23 and 20, a third child having predeceased A leaving two children aged 1 and 4, s. 11(1) would reduce the age of all beneficiaries to 1.[80] No longer is there a possibility that a child may die under age 1 and have a child who may turn 1 outside the perpetuity period. It has been unnecessary to resort to the class reduction provisions. In contrast to the above two situations, consider the case where at the end of the wait and see period A (a male) is aged 81, having the two children aged 20 and 22. Here, neither reduction of age nor class exclusion applied on their own would validate the gift. A combination of both, however, would be effective for the following reasons. A (unless there were clear evidence to the contrary) would be capable of having further children. A's future children would be excluded under s. 11(4), and under s. 11(1) the age in the limitation read down to 20 for all beneficiaries,[81] with the result that the limitation would then read, in effect, "to such of A's children as attain 20, and the children of such of them as shall die under 20 leaving children to take the share their parents would have taken". A's future children are excluded under s. 11(4): there is no longer any possibility of

[79] Section 12, Draft Bill.

[80] We have not applied s. 11(3) in this example, because that provision only applies where *different* ages are specified in relation to *different* persons: here, the *same* age is specified. In this example 80 years was the appropriate perpetuity period.

[81] This is the effect of s. 11(4) (b) and the concluding words of the subsection.

a child dying under the age of 20 and leaving children who may attain the age of 20 outside the perpetuity period.

There has been considerable argument as to the order in which the "wait and see" and the age reduction provisions should be applied. The majority view of the English Law Reform Commission was that it was preferable to reduce the age first and avoid delay caused by the "wait and see" rule.[82] The New South Wales Law Reform Commission rejected this view,[83] providing in s. 12 of the Draft Bill the order of application of the remedial provisions. The section requires that the "wait and see" rule be applied before the age reduction provisions, on the assumption that this will more closely approximate to the settlor's or testator's intentions.

The practical effect of s. 12 of the Draft Bill, requiring the "wait and see" rule to be applied first before employing age reduction, has already been criticized. An additional criticism may be levelled at the age reduction provisions themselves. *Example 19* illustrates that the age of beneficiaries may be reduced below 18, if necessary to age 1. We doubt whether this is worthwhile. How can it be said that by reducing an age contingency to 1 you are more closely approximating a testator's intentions when the devise was, for example, "to such of A's grandchildren as attain 25"? We believe, in line with other legislation, that the age ought not to be reduced below the age of 18 years. On the other hand, if it is wished to allow as many beneficiaries as possible to share perhaps it may be preferable simply to dispense with the age requirement altogether where an age less than 18 would save the gift. In such a case the property would in any event be held in trust until the child attained majority.

Example 19 reveals how extremely complicated the application of the modified common law rule against perpetuities will become. It is submitted that the result is much more difficult to apply and much more likely to produce error in its working out than the old common law rule. We believe that the "wait and see" rule, the medical provisions relating to the ability to procreate, age reduction to 18 years and ability to exclude members of a class would have been adequate to ensure the protection of reasonable dispositions of property subject to the rule against perpetuities.

Class-Closing Rules

The evident and stated purpose of perpetuity reform is to give effect to the reasonable desires of the average testator or settlor. Subject to the criticisms made above, that purpose will generally be achieved under the Draft Bill; curious anomalies are removed and the draftsman should find that in most cases the Bill's curative provisions will save interests from the remorseless onslaught of the perpetuity rule.

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[82] *Supra*, n. 44, para. 27.
[83] *Report*, pp. 48-49.

One matter the Draft Bill does not consider is the frustration of a settlor's or testator's reasonable expectations by virtue of the operation of the class closing rules. The class closing rules, often known as the rule in *Andrews* v. *Partington,*[84] artificially restrict the number of potential beneficiaries who may share in a gift.[85]

The rule has been stated as follows:

> For the sake of convenience the courts have laid down the rule, often called the Rule in *Andrews* v. *Partington,* that a numerically uncertain class of beneficiaries normally closes when the first member becomes entitled to claim his share. If this were not so, it would be impossible to give him his portion without waiting until there could be no more members of the class. Therefore the settlor is presumed to have intended that the class should close as soon as the first share vests in possession; no one born subsequently can enter the class, but any potential member of it already born is included. Thus by closing the class against those born later, the maximum number of shares is fixed and the first taker can receive his share.[86]

A number of examples will demonstrate how the class closing rules thwart the reasonable expectations of a settlor or testator.

Example 20:

> The testator devises property "to my grandchildren". If at the testator's death there is a grandchild in existence the class will close to exclude all after-born grandchildren, leaving the lone grandchild to take to the exclusion of all others. If, however, the testator has no grandchildren at his death, all grandchildren whenever born are eligible to share.[87] This means that no grandchild will be entitled to his share until there is no possibility of further grandchildren being born.[88]

The rule is an attempt to strike a balance between giving effect to a testator's or settlor's desire to benefit all members of a class of persons and to allow early distribution to an entitled beneficiary. It is a rule of convenience, which proceeds on the assumption that the testator or settlor would prefer to exclude some potential beneficiaries rather than indefinitely delay distribution to the beneficiaries already entitled. Professor Morris[89] has suggested that other alternatives to exclusion by operation of class closing rules are available. Three possible alternatives are put

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[84] (1791) 3 Bro. C.C. 401 [29 E.R. 610].

[85] For an excellent discussion of the effect of the class closing rules, see J. H. C. Morris, "The Rule Against Perpetuities and the Rule in *Andrews* v. *Partington*" (1954) 70 *L.Q.R.* 61.

[86] Megarry and Wade, *op. cit. supra,* n. 55 p. 231.

[87] The suggested justification is that since no member of the class was in existence at the time of the distribution, the testator must have intended all members of the class whenever born to be included: see Morris, *supra,* n. 85.

[88] See s. 9, Draft Bill, on presumptions as to parenthood, and discussion, *supra.*

[89] Morris, *supra* n. 85, at 64.

forward in particular. First, the court might direct an inquiry as to how many more potential beneficiaries are likely to be born, and with that information in mind make a proportionate distribution to those presently entitled. He did not seriously recommend this solution because of its speculative nature. Second, the court might order payment of presumptive shares to entitled beneficiaries, at the same time taking a bond for repayment if further beneficiaries become entitled. The risk, of course, is that the existing beneficiaries may not have the capacity to repay when the time comes. Third, the court might withhold the capital until the parent dies or becomes incapable of having further children, and in the meantime order the payment of income on their presumptive shares to those beneficiaries already entitled. Although this solution allows payment of income only and not the capital, it has the benefit of making at least some funds available to the beneficiaries, and surely, as Professor Morris says, the temporary withholding of capital does no more violence to the testator's intention than the complete exclusion of potential beneficiaries.

With this third alternative we concur. Several examples will illustrate its effect.

Example 21:

> The testator devises property "to the children of A". If at the testator's death A is aged 30 and has one child aged 2, income would be paid to the two-year-old until a further child is born and then shared, the share decreasing proportionately with each child born. If A were a female, capital could be paid out when A reached 55 (the presumed age for incapacity to bear children[90]). If A were a male, capital could not be paid out until his death; this is no doubt inconvenient, but it is in any event the result reached by the present class closing rules where A has no children at the testator's death.[91]

Example 22:

> The testator devises property "to such of my grandchildren as attain 21". At the testator's death, the testator's children are still alive and there is one grandchild aged 21 and four grandchildren under that age. Two possibilities arise in applying the third view; either the grandchild aged 21 is entitled to all income until another grandchild becomes so entitled or he is entitled to one-fifth only, the balance to be accumulated.[92] As further grandchildren are born the shares of those entitled are proportionately reduced.

Interaction of Class Closing and Perpetuities

To return to the operation of the class closing rules under the present law, in a number of cases the effect of the rules will be to

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[90] Section 9, Draft Bill.
[91] Morris and Leach, *op. cit. supra* n. 5, p. 112.
[92] See *In Re Pilkington* (1892) 29 L.R. (Ir.) 370.

validate a gift otherwise void for remoteness.

Example 23:

> A testator devises property "to such of the grandchildren of A who attain 25". If at the testator's death there is one grandchild aged 25, the class closes on those then in *esse* and excludes all after-born grandchildren. Effectively, the existing grandchildren become lives-in-being and must, of course, attain 25 (if at all) within their lifetimes; the gift is valid.

The class closing rules may operate in conjunction with the "wait and see" rule.

Example 24:

> A testator devises property "to such of X's grandchildren as attain 30". At the testator's death, X is alive and has one grandchild aged 15. The gift at common law would be void for remoteness. Under the provisions of the Draft Bill we must wait and see whether the gift will in fact vest within the period. In this instance the class will close when the first grandchild attains 30. If at that time no other grandchildren have been born since the testator's death, the gift will be valid; all grandchildren born after the class closes will be excluded. If, however, there are two grandchildren born after the testator's death, and who are aged 14 and 2 when the class is closed, the gift remains void as the grandchild aged 2 may attain 30 outside the perpetuity period.[93] (This assumes that the appropriate period is the common law period, an express election in accord with s. 7(2) having been made by the testator). The reduction of age provisions may be applied to reduce the age to that appropriate to save the gift.

The example given is a modified version of an example taken from the *Report*. One difficulty not immediately apparent is the assumption that reduction of age can be made before the end of the "wait and see" period. In *Example 24*, the Commission assumed that the appropriate time to reduce the age was when the first grandchild attained 30. But on the facts given in *Example 24*, the 2-year-old may die within the perpetuity period, and since no further grandchildren can be eligible by virtue of the operation of the class closing rules, the age need not be reduced, as the 14-year-old must attain 30 within the period. If the Commission intended that the age reduction provisions should operate before the end of the "wait and see" period, it is unfortunate that this was not more clearly spelled out in the Draft Bill. To reduce age before the expiry of the period conflicts with the statutory order of application of curative provisions laid down in s. 12 of the Draft Bill.

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[93] Where the testator elected under s. 7(2) of the Draft Bill that the common law perpetuity period apply, the perpetuity period would be 21 years from the death of the survivor of X and the grandchild living at the testator's death: see s. 10(4), Draft Bill.

The present authors believe that no advantage is to be gained by retaining the class closing rules in a "wait and see" situation. If the exclusion of class members under the class closing rules would validate the gift, the same result can be achieved just as well by exclusion of potential members of the class under s. 11(4). Where the class closing rules do not validate the gift by excluding certain potential members of a class, to retain them simply thwarts the effectiveness of the wait and see rule.

PART II

We now turn from general principles to a number of specific interests in property to which the rule against perpetuities has been held applicable, and consider the proposals for reform recommended by the Commission.

Determinable Interests

1. *The present law*

The common law draws a clear distinction between a possibility of reverter and a right of entry for condition broken.

(a) *Possibility of reverter*

A possibility of reverter is the residual interest left in a testator or grantor after he has devised or conveyed a fee simple determinable: as in a devise "to A in fee simple for as long as the land is used for farming". It seems well established that the rule against perpetuities does not apply to possibilities of reverter.[94] In the example given, should the land at some time in the future (no matter how remote) cease to be used for farming, the property would pass to those entitled under the residuary clause in the will,[95] or, failing such clause, to the next-of-kin on intestacy.

A similar principle is applied to gifts of personal property for charitable or non-charitable purposes so long as a given state of affairs continues to exist: irrespective of how far in the future the state of affairs ceases to exist, the testator retains a perfectly valid interest which passed under his residuary bequest.[96] In effect, there is a resulting trust to the testator's estate: the interest is vested in interest *ab initio*, even if it cannot be predicted when it will become vested in possession. Because of the long period of time which may elapse before the specified event occurs, considerable difficulties of administration may arise,[97] leaving the

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[94] *A.G.* v. *Pyle* (1738) 1 Atk. 435 [26 E.R. 278]. The only decision to the contrary (*i.e.*, that the rule *does* apply to possibilities of reverter) is *Hooper* v. *Liverpool Corporation* (1944) 88 *Sol.J.* 213 (Bennett, V.-C.), a decision criticised in (1946) 62 *L.Q.R.* 222 and (1957) 21 *Conv.* (*N.S.*) 213, but supported by Morris and Leach, *op. cit. supra* n. 5, p. 212 n. 70.

[95] *Re Cooper's Conveyance* [1956] 1 W.L.R. 1096 at 1102.

[96] *In re Randell* (1888) 38 Ch.D. 213 at 218-219; *In Re Blunt's Trusts* [1904] 2 Ch. 767 at 772-773; *In Re Chardon* [1928] 1 Ch. 464 at 469; *In Re Wightwicks' Will Trusts* [1950] Ch. 260 at 266; *In Re Chambers' Will Trusts* [1950] Ch. 267 at 268.

[97] For a good example, see *Brown* v. *Independent Baptist Church of Woburn* (1950) 91 N.E. (2d) 922. The background to the case is told with nightmarish fascination by Leach, "Perpetuities in Perspective: Ending the Rule's Reign of Terror" (1952) 65 *Harv. L.R.* 721 at 741-745.

rule open to criticism.[98]

(b) *Right of entry for condition broken*

A right of entry for condition broken is the interest left in a testator or grantor who has devised or conveyed a fee simple subject to a condition subsequent: as in a devise "to A in fee simple provided that he shall forfeit the land if he ceases to use it for farming purposes". Now, it is apparent that the *substance* of this gift is the same as that considered in the above example of a possibility of reverter. In *form*, however, it is expressed as a gift subject to defeasance on a condition subsequent. The condition might occur outside the perpetuity period, with the result that the right of entry for condition broken is void.[99] The gift to A is thus left to take effect freed from the condition.

2. *Proposals for reform*

In the face of this incongruity in the existing law, the N.S.W. Law Reform Commission, in line with other bodies,[100] has recommended that possibilities of reverter and analagous interests in personalty, be made subject to the rule against perpetuities. Section 16 of the Draft Bill provides:

> (1) Subject to subsection (4), this section applies to an interest created by a settlement where the interest is, by a provision of the settlement, determinable on a contingency, and in this section that interest is called the particular interest.
>
> (2) Subject to subsection (4), the rule against perpetuities shall apply to render invalid the provision for determination of the particular interest in like manner as the rule would apply to render invalid a condition subsequent in the settlement for defeasance of the particular interest on the same contingency, to the intent that, where the rule does so apply—
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> (a) the particular interest shall not be so determinable;

The effect of this provision in the example discussed above ("to A in fee simple so long as the land is used for farming") is that the possibility of reverter will remain valid for 80 years (or, if s. 7(2) is invoked, for the common law period), but thereafter A's fee simple will become absolute and freed from the qualification.

Two other matters should be mentioned about s. 16. First, any subsequent interest, limited to take effect after the termination of the determinable fee simple, even though vested or otherwise not rendered invalid by the rule against perpetuities, is by s. 16(2)(b) postponed or

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[98] *Id.*

[99] In England, see *In re The Trustees of Hollis' Hospital and Hague's Contract* [1899] 2 Ch. 540 at 554-555; *In Re Da Costa* [1912] 1 Ch. 337 at 341-342. These cases have been followed in N.S.W.: *Perpetual Trustee Co.* v. *Williams* (1913) 13 S.R. (N.S.W.) 209 at 213-214 (overruled on appeal (1913) 17 C.L.R. 469 on other grounds; but see *dicta* at 485 *per* Barton, A.C.J. and 495 *per* Isaacs, J.). See also *In the Will of Brett* [1947] V.L.R. 483 at 488 *per* Herring, C. J.

[100] See *U.K. Report* (*supra*, n. 44) paras. 39-41; *Ontario Report* (*supra*, n. 14), pp. 32-35; D. E. Allan, *supra*, n. 16 at 61-63.

defeated to the extent necessary to allow the fee simple to become absolute after 80 years. The effect of the rule against perpetuities on subsequent interests is discussed in more detail *infra.*

Second, s. 16(4) provides that the rule against perpetuities "shall not apply to a gift over from one charity to another". The section preserves the rule in *Christ's Hospital* v. *Grainger.*[101] In accordance with general principles, where there is a gift over from a *non-charity* to a charity upon an event which may not happen within the perpetuity period, the gift over is void for remoteness.[102] Where, however, there is a gift over from a *charity* to a charity upon an event which may not happen within the perpetunity period, the gift over is valid.[103] This latter situation is an exception to the rule against perpetuities, and will be preserved by s. 16(4). The Commission has given no reasons for the preservation of the exception. Morris and Leach[104] have raised serious doubts about the justification for the rule in *Christ's Hospital* v. *Grainger.*[105] Ingenious draftsmen have utilized it as a means of imposing conditions and controls over property otherwise fully devoted to charitable purposes, and to validate indirectly gifts which would otherwise fail, such as gifts for the perpetual maintenance of a grave, not forming part of the fabric of a church.[106] In short, no adequate justification has been given for its existence. It is perhaps to be regretted that the Commission gave no reasons for maintaining it.

Options to Purchase

The applicability of the rule against perpetuities to options, although incongruous, is well settled. The rules need not be re-stated here.[107] What is of some interest, however, is the varying ways in which other jurisdictions have answered the question of whether or not time restraints ought to be placed on the exercise of an option to purchase. The policy reasons behind the various reforms are unanimous: options in leases to purchase the reversion ("leasehold options") stimulate the development of land by encouraging lessees to expend money and effort on the land; other options to acquire interests in land ("options in gross") may stifle the development of land by discouraging development on the part of

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[101] (1849) 1 Mac. & G. 460 [41 E.R. 1343].

[102] *In Re Johnson's Trusts* (1866) L.R. 2 Eq. 716 at 720; *In Re Bowen* [1893] 2 Ch. 491 at 494.

[103] In addition to *Christ's Hospital* v. *Grainger* (*supra*), see *Re Tyler* [1891] 3 Ch. 252 at 258; *Re Lopes* [1931] 2 Ch. 130; *Royal College of Surgeons* v. *National Provincial Bank* [1952] A.C. 631 at 644, 649-650, 660-667.

[104] *Op. cit. supra,* n. 5 pp. 192-194.

[105] *Supra,* n. 101.

[106] As in *Re Tyler* [1891] 3 Ch. 252; Dixon, C.J. apparently had misgivings about this case: see *The Royal Society for the Prevention of Cruelty to Animals, New South Wales* v. *Benevolent Society of New South Wales* (1960) 102 C.L.R. 629 at 641.

[107] Readers are referred to Morris and Leach, *op. cit. supra,* n. 5 pp. 219-227. For more recent judicial pronouncements on the nature of options, see *Webb* v. *Pollmount Ltd.* [1966] Ch. 584 at 596; *Price* v. *Murray* [1970] V.R. 782 at 785; *Laybutt* v. *Amoco Australia Pty. Ltd.* (1974) 132 C.L.R. 57 at 75; *Barba* v. *Gas and Fuel Corporation of Victoria* (1976) 51 A.L.J.R. 219 at 225.

owners who have contracted to sell for a fixed price.[108] But this unanimity has not been reflected in the various approaches to reform. Thus, the United Kingdom Law Reform Committee recommended that leasehold options be exempt from any perpetuities restrictions, but that options in gross which purport to be exercisable for a period exceeding 21 years should be valid for 21 years and then void.[109] In Alberta, options in gross are valid for 80 years.[110] In some Australian States and New Zealand, options in gross may be exercised for 21 years, and thereafter void, while leasehold options are valid so long as they are exercised during the currency of the lease (no mater how long its term) or within one year of its expiration.[111]

In the midst of this diversity of opinion, the New South Wales Law Reform Commission followed the suggestion of Morris & Leach,[112] and proposed that the rule against perpetuities should not apply at all to options, of whatever kind. Section 17 of the Draft Bill gives clear expression to this view:

> 17. The rule against perpetuities shall not apply to . . .
>
> (d) any option given for valuable consideration to acquire an interest in property.

The Bill thus allows the granting of options of unlimited duration.

Non-Charitable Purpose Trusts

It has often been said that charitable trusts are not subject to the rule against perpetuities.[113] That, however, is to over-simplify the position. What the law rather says is that the rule against perpetuities does not apply to an immediate gift of capital to a charity, even though the trust may last forever. This is simply an application of the fact that the rule against perpetuities is directed at the remoteness of vesting of interests, not at the duration of interests already vested. Where the gift, although for charitable purposes, is not immediately and unconditionally devoted to such purposes, it will be subject to the rule against perpetuities in the same way as any other gift. Thus, the rule will strike down for remoteness a gift to a charity contingent upon the happening of an event which may not happen until after the expiration of the perpetuity period.[114] Similarily, as has been pointed out earlier in the discussion on

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[108] See, *e.g.*, Allan, *supra* n. 16 at 60-61; Morris & Leach, *op. cit. supra* n. 5 pp. 224-225; *Report*, p. 60; *Ontario Report, supra* n. 14 pp. 28-31.

[109] *U.K. Report, supra* n. 44 paras. 35-38.

[110] The Perpetuities Act, 1972, s. 17.

[111] Vic. s. 15; W.A. s. 110; Q. s. 218; N.Z. s. 17. See also Perpetuities Act, 1964 (Ontario), s. 13.

[112] *Op. cit., supra*, n. 5, p. 226.

[113] See *A.-G.* v. *National Provincial Bank* [1924] A.C. 262 at 266 *per* Lord Haldane; *Goodman* v. *Mayor of Saltash* (1882) 7 App. Cas. 633 at 642; *Commissioners for Special Purposes of Income Tax* v. *Pemsel* [1891] A.C. 531 at 580-581.

[114] See *Chamberlayne* v. *Brockett* (1872) L.R. 9 Ch. App. 206 at 211; *Re Lord Stratheden and Campbell* [1894] 3 Ch. 265; *Re Wightwick's Will Trusts* [1950] Ch. 260; *Re Mander* [1950] Ch. 547; *Re Spensley's Will Trusts* [1954] Ch. 233. In Australia, see *Re Will of Nilen* [1908] V.L.R. 332; *Re Bullen* (1915) 17 W.A.L.R. 73; *Muir* v. *Archdall* (1918) 19 S.R. (N.S.W.) 10; *Re Finklestein* [1926] V.L.R. 240; *Re Dyer* [1935] V.L.R. 273.

determinable interests, a gift over from a non-charity to a charity upon an event which may not happen within the perpetuity period is void for remoteness (but not a gift over from a charity to another charity, under the rule in *Christ's Hospital* v. *Grainger*[115]).

There is a well established general principle that a trust is void unless for the benefit of an individual or a charity;[116] for there can be no trust without a *cestui que trust*: there must be somebody in whose favour the court can decree performance.[117] There are, however, three "non-charitable purpose trusts" which are exceptions to this general principle that there can be no trust without a *cestui que trust*.[118] They are: trusts for the erection or maintenance of monuments or graves,[119] trusts for the maintenance of particular animals,[120] and (although this exception is less well-established) trusts for the benefit of unincorporated associations.[121]

Now it is clear that the rule against perpetuities in its common law form is not applicable to non-charitable purpose trusts, simply because there are no individual beneficiaries in whom the property is to vest. There is, however, an analagous rule (often called "the rule against perpetual trusts", or "the rule against inalienability") which applies to non-

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[115] (1849) 1 Mac. & G. 460 [41 E.R. 1343].

[116] *Bowman* v. *Secular Society Ltd.* [1917] A.C. 406 at 441; *Re Astor's Settlement Trusts* [1952] Ch. 534 at 541-542; *In re Shaw* [1957] 1 W.L.R. 729 at 745; *In re Endacott* [1960] Ch. 232 at 246.

[117] *Morice* v. *The Bishop of Durham* (1804) 9 Ves. 399 at 405 [32 E.R. 656 at 658]; *A.-G.* v. *Brown* (1818) 1 Swans. 265 at 290 [36 E.R. 384 at 394]; *Bowman* v. *Secular Society Ltd.* [1917] A.C. 406 at 441; *Re Diplock* [1941] Ch. 253 at 259; *In Re Wood* [1949] Ch. 498 at 501; *Re Astor's Settlement Trusts* [1952] 1 Ch. 534 at 541; *In re Shaw* [1957] 1 W.L.R. 729 at 745; *Leahy* v. *A.-G.* [1959] A.C. 457 at 478-479, 484.

[118] Although the concept of non-charitable purpose trusts may be said to be still open to considerable doubt: see *Tidex* v. *Trustees Executors & Agency Co.* [1971] 2 N.S.W.L.R. 453 at 465.

[119] *Lloyd* v. *Lloyd* (1852) 2 Sim. (N.S.) 255 [61 E.R. 338]; *Trimmer* v. *Danby* (1856) 25 L.J. Ch. 424; *Pirbright* v. *Salwey* [1896] W.N. (Eng.) 86; *Re Hooper* [1932] 1 Ch. 38. In N.S.W., see *Pooley* v. *The Royal Alexandra Hospital for Children* (1932) 32 S.R. 459 at 463; *Public Trustee* v. *Nolan* (1943) S.R. 169 at 172 (trust for the erection of a memorial carillon not within the "monument" exception); *cf. In re The Trusts of the Will of Lambell* (1870) 9 S.C.R. (Eq.) 94 at 95. Of course, trusts for the erection or maintenance of monuments or graves within the fabric of a church are charitable (*Hoare* v. *Osborne* (1866) L.R. 1 Eq. 585; *Re Pardoe* [1906] 2 Ch. 184; *Re King* [1923] 1 Ch. 243), as are trusts for the maintenance of burial grounds associated with churches (*Re Vaughan* (1886) 33 Ch. D. 187; *Re Manser* [1905] 1 Ch. 68), but not trusts for the establishment of private burial grounds (*Chesterman* v. *Mitchell* (1923) 24 S.R. (N.S.W. 108). Trusts for the saying of masses for the dead appear to be charitable: *Bourne* v. *Keane* [1919] A.C. 815; Re *Caus* [1934] Ch. 162 (but *cf. Gilmour* v. *Coats* [1949] A.C. 426 at 454); *Re Harnett* (1907) 7 S.R. (N.S.W.) 463; *Nelan* v. *Downes* (1917) 23 C.L.R. 546.

[120] *Pettingall* v. *Pettingall* (1842) 11 L.J. Ch. 176; *Re Dean* (1889) 41 Ch. D.552.

[121] *Re Drummond* [1914] 2 Ch. 90; *Re Price* [1943] 2 All E.R. 505; *Re Denley's Trust Deed* [1969] 1 Ch. 373 at 382-388 (but *cf. Re Flavel's Will Trusts* [1969] 2 All E.R. 232). Of course, there is no problem if the purposes of the association are charitable (as to which, see *In re de Vedas, Deceased* [1971] S.A.S.R. 169 at 182-205), nor if the gift is in fact an immediate gift to the individual members of the association (as to which, see *Leahy* v. *A.-G.* [1959] A.C. 457 at 478, 485; *Re Grovenor (Dec'd)* [1965] N.S.W.R. 723; *Bacon* v. *Pianta* (1966) 114 C.L.R. 634 at 638; *Re Stone* (1970) 91 W.N. 704 at 710; *Re Goodson* [1971] V.R. 801 at 812-813).

charitable purpose trusts. It is directed rather to the *duration* of such trusts than to the *remoteness* of their vesting. Under this rule, "a trust for non-charitable purposes which may last longer than the perpetuity period is void, if by the terms of the trust the capital is to be kept intact so that only the income can be used for a period exceeding the perpetuity period".[122] The "perpetuity period" for the purposes of this rule (as for the rule against perpetuities, properly so called) is a life or lives-in-being plus 21 years. In practice, however, as there generally will be no life or lives-in-being express or implied in the instrument, the period is a straight 21 years.

The problem with the rule against perpetual trusts is not so much the existence of the rule as the judicially sanctioned devices by which its consequences may be avoided. For it has been held that if the testator expressly circumscribes the period of duration of the trust so that it cannot endure beyond the perpetuity period, the gift is valid. It will be sufficient if the trustees are to carry out the trust for "so long as the law permits"[123] or "so far as they legally can do".[124] But the testator must provide the restriction himself: the court will not read it into the terms of the will.[125] And, in the Commission's view, as most testators are only trying to do what is legally possible, "the validity of trusts for purposes which are not charitable should not . . . have to depend upon the use of a correct verbal formula".[126]

With this in mind, the Draft Bill provides in s. 18(3) that the perpetuity period for the purpose of the rule against perpetual trusts shall be 80 years from the date on which the settlement takes effect.[127] There is no power to elect the alternative common law period under s. 7(2),[128] and the 80-year period will apply automatically, without the

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[122] The statement of the rule is taken from Allan, *supra* n. 16, at 73. Allan cites no authority, but support will be found in numerous cases, including *Lloyd* v. *Lloyd* (1852) 2 Sim. (N.S.) 255 at 265 [61 E.R. 338 at 342]; *Rickard* v. *Robson* (1861) 31 Beav. 244 at 246 [54 E.R. 1132 at 1133]; *Fowler* v. *Fowler* (1864) 33 Beav. 616 at 619 [55 E.R. 507 at 508-509]; *In re Dalziel* [1943] Ch. 277 at 282; *In re Elliott* [1952] Ch. 217 at 220; *Muir* v. *Archdall* (1918) 19 S.R. (N.S.W.) 10 at 15; *In re Carson* [1956] St.R.Qd. 466 at 474-475 (F.C.) The distinction between the rule against perpetuities and the rule against perpetual trusts is well drawn by Dean, J. in *In re Cain* [1950] V.L.R. 382 at 391.

[123] *Pirbright* v. *Salwey* [1896] W.N. 86.

[124] *In Re Hooper* [1932] 1 Ch. 38 at 40.

[125] *Re Kelly* [1932] I.R. 255 at 261; *Re Compton* [1946] 1 All E.R. 117 at 120. It has been said that if the testator does use the correct formula, but then goes on to define what he means and thereby transgress the perpetuity period, the trust fails (see, *e.g.* Morris and Leach, *op. cit., supra* n. 5 p. 322 n. 64; and *Report*, para. 18.5); but the authority cited (*In Re Moore* [1901] 1 Ch. 936) would not seem to be appropriate—there, the gift was held void for uncertainty (lives-in-being too widely defined to be ascertainable), Joyce, J. expressly refraining from deciding whether the gift also transgressed the rule against perpetuities (*id.* at 938).

[126] *Report*, para. 18.5.

[127] *Cf.* the recommendations in the *Ontario Report*, *supra* n. 14 p. 41 (21 years). Of course, even under the N.S.W. Draft Bill, a testator can set up a trust of indefinite duration for the maintenance of a tomb by using the rule in *Christ's Hospital* v. *Grainger* (1849) 1 Mac. & G. 460 [41 E.R. 1343], discussed *supra* in relation to Draft Bill s. 16(4).

[128] See s. 18(2).

need for the use of any "correct verbal formula". Moreover, under s. 18(4), the "wait and see" principle is introduced into this area: that is, where but for the provisions of the section, the trust would infringe the rule against perpetual trusts, on the ground that it might last more than 80 years, it is to be treated as presumptively valid until such time as it becomes *certain* that it *must* last more than 80 years.

Finally, it should be noted that s. 18 does not apply to charitable trusts.[129] The principles of the common law concerning the relevance of the rule against perpetuities to charitable trusts (discussed above, in the opening paragraph of this section) will continue to apply, subject, of course, to such of the remedial provisions of the Draft Bill as are applicable (for example, the "wait and see" rule of s. 10).

Dependent Dispositions

The Commission in its *Report*, and by the provisions of s. 19 of the Draft Bill, has recommended important changes to the effect of the rule against perpetuities on successive limitations. Section 19 provides:

> (1) Where a provision of a settlement creates an interest, the provision shall not be rendered invalid by the rule against perpetuities or the rule against perpetual trusts by reason only that the interest is ulterior to and dependent upon an interest which is so invalid.
>
> (2) Where a provision of a settlement creates an interest which is ulterior to another interest and the other interest is rendered invalid by the rule against perpetuities or the rule against perpetual trusts, the acceleration of the vesting of the ulterior interest shall not be affected by reason only that the other interest is so invalid.

Under the law as it stands at the moment in New South Wales, where an instrument contains a series of limitations, the rule against perpetuities is applied separately to each. Three sub-rules may be discerned from the cases.[130]

First, a limitation is not void simply because it is followed by a void limitation.[131] This sub-rule will not be affected by s. 19.

Example 25:

> A testator devises property "to A for life, remainder to his great-grandsons". Assuming there are no great-grandsons alive at the testator's death (so that the class-closing rules cannot apply), the remainder to the great-grandsons is viod (subject to the wait and see provisions of the Draft Bill). That does not affect the gift

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[129] S. 18(7).

[130] See generally, Morris and Leach, *op. cit. supra* n. 5 pp. 164-84. An excellent short summary of the law will be found in Jacobs, *Law of Trusts in Australia* (4th ed., 1977) pp. 118-119.

[131] This sub-rule is so well recognised that it is assumed, rather than decided, in the cases discussed in the following paragraphs; but see *Garland* v. *Brown* (1864) 10 L.T. 292 at 294. Moreover, the sub-rule may not apply where the valid limitation is so closely interwoven with ulterior void limitations that the whole settlement is void: see *In re Abrahams' Will Trusts* [1969] 1 Ch. 463 at 484-485.

to A: he will get a valid life estate. On A's death, the property will pass under the residuary clause in the will, or on intestacy.[132]

Second, a limitation which follows a void limitation will be valid if it has its own independent date of vesting necessarily within the perpetuity period.[133] This sub-rule also will be unaffected by s. 19.

Example 26:

A testator devises property "to A for life, remainder for life to any widow of A, remainder for life to any husband such widow may marry, remainder to such of A's children as attain 21".[134] At common law, the life estate to A is valid, the life estate to any widow of A is valid, but as "any widow" is not a life-in-being (but see now s. 8, Draft Bill) the life estate to any husband of such widow is void. However, the remainder to the children is valid: it is in no way contingent or dependent on the void gift to the husband, but has its own independent date of vesting necessarily within the perpetuity period (all of A's children must attain 21, if at all, within 21 years of A's death).

Third, a limitation which is subsequent to and dependent upon a void limitation is itself void, even though it must vest (if at all) within the perpetuity period.[135]

Example 27:

A testator devises property "to the first of X's sons to become a clergyman, but if X has no such son, then to Y".[136] At the testator's death, X is alive and has sons, none of whom are yet clergymen. At common law, the gifts to the first of X's sons to become a clergyman is void: that event might not occur until more than 21 years after the death of X, the only life-in-being (the gift may now be saved by s. 10(1) ("wait and see") or s. 10(4) (additional lives-in-being)). And as the gift to Y is dependent on the prior void limitation (its vesting depending entirely on the gift to X's son not taking effect), the gift to Y is void also. This is so even though Y is a person specifically named and alive at the testator's death.

Clearly, as the law now stands, the characterisation of an ulterior limitation as "independent" or "dependent" may be crucial to its validity. Attempts have been made at defining the terms: thus, it has been said that a dependent limitation "is one intended to take effect only if the

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[132] The doctrine of "infectious invalidity", in vogue in some American states, by which it is assumed that the testator's intentions are better effectuated by holding all limitations void if one or more is found to be void, has not found favour in England and Australia (see Morris and Leach, *op. cit. supra* n. 5 pp. 170-171).

[133] *Re Canning's Will Trusts* [1936] Ch. 309; *Re Coleman* [1936] Ch. 528; *Macpherson* v. *Maund* (1937) 58 C.L.R. 341.

[134] This example is a variation on *Re Coleman* [1936] Ch. 528.

[135] Recent examples will be found in *Re Hubbard's Will Trusts* [1936] Ch. 275 at 284, 288; *Re Buckton's Settlement Trusts* [1964] Ch. 497 at 504-506 (declining to follow *Re Robinson* [1963] 1 W.L.R. 628).

[136] The example is taken from *Proctor* v. *Bishop of Bath and Wells* (1794) 2 Hy. Bl. 358 [126 E.R. 594].

prior gift does, or (as the case may be) does not, itself take effect", while an independent limitation "is one intended to take effect in any case, whether the prior gift takes effect or not".[137] The difficulty, however, is not to define the terms but to reconcile the cases. Thus, it has been held that a gift (after a void limitation) to persons "then living" introduced a dependent limitation[138] whereas a gift (after a void limitation) "subject thereto" [139] or "after the death of [the taker under the void limitation]",[140] or "subject as aforesaid"[141] introduced an independent limitation. At one stage it might have been possible to suggest that the modern trend of authority was to uphold ulterior limitations by categorising them wherever possible as "independent",[142] but in the light of more recent decisions it is doubtful whether the suggestion any longer holds good.[143] Section 19 of the Draft Bill, although directed at "dependent" limitations, does not attempt to define the term. That, however, is of no consequence, as the effect of the section is to abolish altogether the third of the categories considered above. The test for dependency (whatever it be) is removed. The effect of s. 19 is to assimilate the rule relating to ulterior and dependent limitations with that relating to ulterior and independent limitations. All ulterior limitations will be tested solely on the basis of their own independent validity for perpetuity purposes: no longer will they be liable to destruction at the hand of void limitations upon which they are dependent. The following example will illustrate the operation of the section:

Example 28:

> The testator devises property "to A for life, remainder to A's grandchildren, but if there are no such grandchildren then to B". At the testator's death, A has no grandchildren. At common law, the remainder to the grandchildren is void for remoteness, and the ulterior and dependent limitation to B fails also. Under the Draft Bill, we wait and see whether any grandchildren are born. If there are no grandchildren born within 80 years of the testator's death, the gift to the grandchildren fails. But s. 19 preserves the gift to B, because if it stood alone it would be valid. The gift to B will presumably be accelerated (s. 19(2)).[144]

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[137] Megarry and Wade, *op. cit. supra* n. 55 p. 239.
[138] *Re Backhouse* [1921] 2 Ch. 51.
[139] *Re Canning's Will Trusts* [1936] Ch. 309.
[140] *Re Coleman* [1936] Ch. 528.
[141] *Macpherson* v. *Maund* (1937) 58 C.L.R. 341.
[142] See Morris & Leach, *op. cit. supra* n. 5 pp. 177-178.
[143] See *Re Hubbard's Will Trusts* [1963] Ch. 275; *Re Buckton's Settlement Trusts* [1964] Ch. 497; *In re Leek* [1967] Ch. 1061 at 1078.
[144] Although this does not necessarily follow from s. 19(2), which is couched in negative terms only: ". . . the acceleration of the vesting of the ulterior interest shall not be affected by reason only that the [prior] interest is so invalid". It was deliberately expressed negatively rather than positively because there are reported cases where the prior limitation failed for reasons other than remoteness and yet acceleration did not occur (*e.g.* because the beneficiary under the ulterior limitation still had a contingent interest at the time of failure of the prior limitation: see *Re Townsend* (1886) 34 Ch. D.357, and *Re Taylor* [1957] 1 W.L.R. 1043 at 1045); see *Report*, para. 19.5.

With reference to s. 19(2), it seems to be an accepted rule that there is no acceleration of a subsequent interest where a prior interest is declared void for remoteness,[145] although the strength of the authorities has been called into question.[146] Section 19(2) would appear to be directed at abolishing this supposed rule, although some doubt is engendered by the equivocal fashion in which the Commission expressed its views as to the operation of the provision. In the words of the *Report*, the section "makes it clear that the vesting of an interest is *not prevented* from being accelerated on the failure of a prior interest by reason only that the failure arises because of remoteness" (emphasis added).[147] It is clear, however, from the way in which the precedents for reform upon which s. 19(2) is modelled have been regarded, that s. 19(2) does have the effect of abolishing the supposed rule in the sense that the court now has a *discretion* to accelerate the subsequent limitation if to do so would best effectuate the testator's presumed intention.[148]

Finally, the question of dependent limitations should not be left without reference to the "alternative contingency" exception to the rule against perpetuities. Under this principle, where a gift is made upon either of two expressed contingencies, one of which must occur (if at all) within the perpetuity period, and the other of which may not, the gift is valid if the first contingency actually occurs, but is invalid if the second contingency occurs.[149] The court will wait and see which contingency occurs.[150] The one important qualification to the "alternative contingency" rule is that the testator himself must have expressly provided for the gift to be subject to alternative contingencies: the court will not benignly imply them into a gift in order to save it by this device.[151] The Commission in its *Report* makes no reference to the "alternative contingency" rule. It is clear, however, that the "wait and see" provisions of the Draft Bill will render the alternative contingency rule obsolete. It will simply be a matter of waiting to see which of the contingencies in fact occurs within the perpetuity period.

Accumulation of Income

There are few areas of the law at first glance so disarmingly simple yet at closer acquaintance so infuriatingly complex as the rule against

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[145] *In re Coleman* [1936] Ch. 528; *Re Allan* [1958] 1 W.L.R. 220.

[146] See Morris and Wade, *op. cit. supra* n. 55 at 518 n. 86.

[147] Para. 19.5, and see *supra* n. 144.

[148] See Morris and Wade, *op. cit. supra* n. 55 at 518; Allan, *supra* n. 16 at 59; *U.K. Report, supra* n. 44, para. 33; McKay, *supra* n. 62 at 519-520; *Ontario Report, supra,* n. 14, pp. 20, 53, para. (j): and see Hogg and Ford, *supra,* n. 8 at 169.

[149] *Re Harvey* (1888) 39 Ch. D.289; *Harris* v. *King* (1936) 56 C.L.R. 177; *Re Curryer's Will Trusts* [1938] Ch. 952.

[150] This, along with the "second look" doctrine relating to appointments under special powers of appointment and gifts over in default of appointment, is one of the three exceptions to the rule that the validity of an interest is to be judged by possible, not actual, events.

[151] *Re Harvey* (1888) 39 Ch. D.289 at 298 *per* Cotton, L. J.

accumulations. Having its origin in the Thellusson Act of 1800,[152] and now to be found in the Conveyancing Act, 1919 (N.S.W.), ss. 31 and 31A, it has spawned a plethora of fine distinctions and agonising complexities. Morris and Leach, writing in 1962, calculated that there had been some 180 reported cases on the Thellusson Act.[153] This is not the place to even attempt to state the present law on prohibitions against accumulations; in any event, there are in existence a number of excellent studies in the field to which the reader may be referred.[154] It is relevant, however, to point briefly to the two divergent approaches to reform of the rule against accumulations taken in recent years by bodies engaged in considering its continued efficacy.

One view taken is that the existing rule against accumulations should be retained. Such was the opinion of the United Kingdom Law Reform Committee and the Ontario Law Reform Commission, although both bodies recommended a number of changes to widen the existing rule and clarify areas of doubt.[155] The other view, adopted in Western Australia, New Zealand, Victoria, Queensland and most of the American States, is to abolish the rule altogether, leaving accumulations to be controlled solely by the rule against perpetuities.[156] It is this latter approach which has been followed by the New South Wales Law Reform Commission.

Ultimately, whether to continue the existing rule or to abolish it is a matter of policy. The fears to which Peter Thellusson's testamentary eccentricities gave rise, and which were enshrined in the Thellusson Act, have today proved groundless.[157] So much so, that the Commission saw positive benefits in the abolition of the rule against accumulations: the law would be simpler — no longer would there be one law for capital (the rule against perpetuities) and one for income (the rule against

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[152] More properly, the Accumulations Act, 1800.

[153] *Op. cit., supra,* n. 5 p. 304.

[154] See Morris and Leach, *op. cit., supra,* n. 5 pp. 266-306; Megarry and Wade, *op. cit., supra,* n. 55 pp. 271-281; *Cheshire's Modern Law of Real Property* (11th ed., 1972) pp. 305-309; Jacobs, *op. cit., supra,* n. 130 pp. 125-128.

[155] *U.K. Report, supra,* n. 44 paras. 54-60; *Ontario Report, supra,* n. 14 pp. 42-44.

[156] W.A. s. 113; N.Z. s. 21; Vic. s. 19; Q. s. 222. For the position in U.S.A., see Morris and Leach, *op. cit., supra,* n. 5 p. 269.

[157] See Allan, *supra,* n. 16 at 71. The ire aroused by Thellusson's will amongst the legal profession of his day was quite remarkable (the more so, as it was the legal profession which eventually benefitted most from his dispositions). Lord Eldon said that "all the world would think this was a will that should have been put into the fire" (*Oddie* v. *Woodford* (1821) 3 My. & Cr. 584 at 596 [40 E.R. 1052 at 1056]. In the first of many reported cases to which the will gave rise, counsel described its direction to accumulate as "unnatural and absurd . . . impolitic and pernicious", and Lord Loughborough said he had "no difficulty in saying, the disposition is so unkind and so illiberal, that I think it no breach of duty in [Thellusson's family] to endeavour to set it aside": *Thellusson* v. *Woodford* (1799) 4 Ves. 227 at 238, 340 respectively [31 E.R. 117 at 122, 172]. And Lord Kent described the will as "the most extraordinary instance upon record of calculating and unfeeling pride and vanity in a testator, disregarding the ease and comfort of his immediate descendants for the miserable satisfaction of enjoying in anticipation the wealth and aggrandizement of a distant posterity" (4 Kent *Com.* p. 285).

accumulations); a death duty pitfall would be removed;[158] businessmen planning the disposition of their estates would have the option of directing accumulation of business profits for the full perpetuity period, allowing a far greater flexibility than at present for ploughing profits back into the development of businesses;[159] and beneficiaries might well enjoy certain income tax advantages if the settlor were able to direct accumulation for a considerably longer period than is possible at present.

Section 20(1) of the Draft Bill gives effect to the Commission's recommendations. It provides:

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

By s. 21 and Schedule 1 of the Draft Bill, ss. 31 and 31A of the Conveyancing Act, 1919 (N.S.W.) are repealed. The result is that accumulations of income will be governed solely by the rule against perpetuities (as modified by the Draft Bill). Thus, for example, the "wait and see" rule will be applied to accumulations: pending determination of the question whether the disposition of the accumulated income is void for remoteness, the direction to accumulate will nevertheless remain effective until the fund is seen either to vest or fail. Finally, it should be noted that s. 20(1) will not affect the operation of the rule in *Saunders* v. *Vautier*,[160] the power of the Court to maintain or advance out of accumulated income, nor any powers given to trustees under any Act of Parliament or the terms of any settlement.[161]

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[158] The reference is to s. 102(2) (a) of the Stamp Duties Act, 1920 (N.S.W.): see *Report*, para. 20.8, n. 11.

[159] The restrictive effect of the present law on the retention of business profits by way of accumulation (with a view to later development of the business) is explained by Dixon, J. in *Blair* v. *Curran* (1939) 62 C.L.R. 464 at 521-523.

[160] (1841) 4 Beav. 115 [49 E.R. 282].

[161] Draft Bill, s. 20(2).