CORA Cork Open Research Archive
Cartlann Taighde Oscailte Chorcaí

| | |
|---|---|
| Title | From Here to Eternity? Perpetuities reform in Ireland |
| Authors | Mee, John |
| Publication date | 2000-12-01 |
| Original Citation | Mee, J. (2000) 'From Here to Eternity? Perpetuities Reform in Ireland', Dublin University Law Journal, 22 (1), pp. 91-111. |
| Type of publication | Article (peer-reviewed) |
| Rights | © 2000 The Authors and Dublin University Law Journal. © 2000. This is a pre-copyedited, author-produced version of an article accepted for publication in the Dublin University Law Journal following peer review. The definitive published version [Mee, J. (2000) 'From Here to Eternity? Perpetuities Reform in Ireland', Dublin University Law Journal, 22 (1), pp. 91-111.] is available online on Westlaw IE |
| Download date | 2026-11-16 09:53:40 |
| Item downloaded from | https://hdl.handle.net/10468/15840 |



UCC
University College Cork, Ireland
Coláiste na hOllscoile Corcaigh

# FROM HERE TO ETERNITY?: PERPETUITIES REFORM IN IRELAND

By John Mee*

It is high time that something was done about the rule against perpetuities. In Ireland it exists in a state of nature, untouched by the reformer's hand for hundreds of years. The problems with the rule as it stands are fairly well-known and do not require detailed rehearsal in the present context. Many of these difficulties stem from the fact that, when considering whether a disposition may vest outside the perpetuity period, one must look at the position when the gift takes effect and must take into account all possibilities, however remote. The fact that one is not allowed to "wait and see" how things turn out leads to a number of traps famously caricatured by Leach.1 Another difficulty with the rule is that, as matters stand, there is nothing to stop it from extending itself into the world of commerce and invalidating transactions which were never intended to come within the scope of the rule.

But what precisely is to be done? Almost every jurisdiction in the common law world has chosen to retain and reform the rule. So far, only Manitoba has plucked up the courage to abolish the rule completely.2 In its recent report on *The Rule Against Perpetuities and Cognate Rules*,3 the Law Reform Commission (henceforth, "the LRC") has invited us to join our Manitoban cousins in contemplating the flat tranquillity of a "perpetuities-free world".4 This article assesses the radical proposals contained in the Report in respect of the rule against perpetuities and cognate rules. It will be concluded that the Report is a stimulating and important contribution to the debate and that, although it somewhat understates the argument for a reformed version of the rule, it does put a reasonable case for abolition (even if more cautious spirits might still prefer to choose radical reform over abolition). Issue will be taken with the Report, however, on a number of specific points, notably in relation to the question of retrospectivity and the Report's view that the common law remainder rules should be retained.

---

* BCL, LLM (NUI); LLM (Osgoode); PhD (Trinity); BL; Senior Lecturer, Law Faculty, University College Cork.

1 "Perpetuities: Staying the Slaughter of the Innocents" (1952) 68 LQR 35. See also Mee "The Return of the Fertile Octogenarians" (1992) 14 DULU (ns) 69. *Cf* Deech's provocative comment ("The rule against perpetuities abolished" (1984) 4 OJLS 454, 455) that "on reflection, the influential criticisms of the rule made by Professor Leach amount to no more than reiterated castigation of a few hard cases imaginatively titled."

2 See the Perpetuities and Accumulations Act, 1983, available as Chapter P33 of the consolidated statutes of Manitoba at www.gov.mb.ca/chc/statpub/free/pdf/p033.pdf. See also Deech note 1 *supra*.

3 LRC 62-2000 (available at www.irlgov.ie/lawreform/publications/Perpetuities.htm and (on BAILII) at www.bailii.org/ie/other/IELRC/2000/3.html). The first two chapters of the Report deal with the historical development and current operation of the rule against perpetuities. Although this is probably not a consolation which its authors had in mind, it must be said that even if the Report were to be unsuccessful in bringing about legislative abolition of the rule, these chapters would at least serve as a useful aid to teaching the complexities of the rule in its present form.

4 See the English Law Commission report on *The Rules Against Perpetuities and Excessive Accumulations* (Law Com No. 251) (London: Stationery Office, 1998) p. 22 (referring in fact to Scotland, where there has never been a rule against perpetuities).

# PART ONE: ABOLITION OR REFORM OF THE RULE AGAINST PERPETUITIES?

In assessing the merits of the LRC's abolition proposal, it is important not to focus too much on the rule against perpetuities as it currently exists in Ireland. Given that the current position is indefensible, the real test of a reform proposal is not whether it would represent an improvement on the present position but whether it is superior to other reform options. In this regard, it will be useful to consider, alongside the LRC Report, the recent report of the English Law Commission on *The Rule Against Perpetuities and Accumulations*.5[5] The English Law Commission recommends, not abolition, but further radical reform and simplification of the rule (building on earlier reform in the English Perpetuities and Accumulations Act, 1964). The first section in this Part examines the case for the abolition of the rule (and the role to be played by variation of trusts legislation following abolition). The reforms proposed by the English Law Commission are then considered, before an attempt is made to assess which alternative is preferable.

## The Case for Abolition

*(i) The Policy Underlying the Rule*6

The heart of the LRC Report is Chapter 4, which is entitled "Abolishing the Rule Against Perpetuities". The conclusion of this Chapter is that there is no convincing rationale for the existence and retention of the rule. In order to establish this conclusion, the Report examines three possible policy justifications for the rule.

The first possible justification – that the rule prevents property from being withdrawn from commerce – is disposed of on the basis that, since the rule was first developed, the legal context has been revolutionised. Partly as a result of the Settled Land Acts 1882-90, there is generally a power to sell land or other property which is subject to a trust or settlement. This means that the only sense in which property subject to a trust or settlement is "tied up" is that the assets might only be available for investment in a conservative manner because of the limits on trustees' powers of investment.7 As a result, the argument in favour of the rule against perpetuities is diluted to the somewhat speculative contention that allowing (a comparatively small amount of) property to be tied up in this limited sense could reduce the amount of risk capital in the economy and so damage the common good.

Another argument considered in this Chapter is termed the "'Dead Hand' Justification". According to the Report, this is "the main plank on which any attempt to justify the rule, in modern terms, must rest".8 This argument is summarised as follows:

> This rationale is founded on the possibility of changes in family circumstances, laws of taxation, or society and the economy generally, which are beyond the settlor's power to forecast. As the dead hand cannot react to such changes posthumously, it is

5 Note 4 *supra*.
6 For a sophisticated discussion of this issue, see Gray *Elements of Land Law* (2nd ed, 1993) pp. 646-652.
7 See p. 48 of the Report.
8 *Ibid*, p. 49.

said to be well if the settlor is barred from dictating the devolution of his property too far into the future.9

This argument is countered in the Report on the basis that rule against perpetuities is not an efficient tool to address this type of concern. It is pointed out that "[t]he Rule focuses not on the suitability of the settlement as times change, (on which, indeed, it has nothing to say) but on the remoteness of vesting."10 It is argued that the most obvious solution to the problem of changing circumstances lies in the general area of variation of trusts. At present, under the rule in *Saunders* v. *Vautier*,11 it is open to the beneficiaries of a trust (if they are all *sui juris* and agree) to alter the terms of a trust. This is of no assistance, however, if some of the beneficiaries are unable to consent either because they lack full legal capacity, are unborn or cannot be identified because some contingency remains to be satisfied before vesting takes place. To deal with this kind of situation, the LRC suggests the adoption of variation of trusts legislation along the lines of the English Variation of Trusts Act, 1958. The case for such legislation is made fully in a second Report, published at the same time as the Perpetuities Report.12 It is concluded in the Perpetuities Report that "variation of trusts legislation would, undoubtedly, be a more finely tuned and comprehensive response" to the problem of changing circumstances than the rule which can be "a rather blunt instrument".13 It is interesting, however, that in England (where the proposed variation of trusts jurisdiction has long existed) this rationale for the rule is still regarded as persuasive.14 It is arguable that the LRC overestimates the impact of the variation of trusts jurisdiction in this context (given that any variation must be for the benefit of the person on whose behalf the court is consenting). This point will be revisited in the next subsection of this article.15

Unfortunately, having dispatched the two foregoing justifications for the rule,16 the Report deals in quite unconvincing fashion with what (in the current writer's view) is the most important justification – what is termed "Balance between generations". As the point is put by Simes, it is necessary "to strike a fair balance between the desires of members of the present generation and similar desires of succeeding generations to do what they wish with the property they enjoy".17 In principle there is a lot to be said for this argument and it is identified by the English Law Commission as the main rationale for the continued existence of the rule.18 Why should the manner in which certain property is to be owned today be dictated by the wishes of someone who died many decades or even centuries ago? If one's desire is to promote freedom to dispose of one's property (and this desire is clearly held by

9 *Ibid*, p. 50.
10 *Ibid*.
11 (1841) Cr & Ph 240.
12 *Report on the Variation of Trusts* (LRC 63-2000).
13 Page 51 of the Report.
14 See Law Commission *The Rule Against Perpetuities and Excessive Accumulations* note 4 *supra*, pp. 4-5.
15 See text to and following note 28 *infra*.
16 In fact the Report deals with the potential justifications in a slightly different order and this has been modified in the text for the sake of convenience.
17 *Public Policy and the Dead Hand*, p. 58; quoted on p. 49 of the Report.
18 *The Rules Against Perpetuities and Excessive Accumulations* note 4 *supra*, iii. Note, however, that in the body of the Report (p. 4), this rationale is blurred together with the previous argument (that the "dead hand" cannot react to changes in circumstances).

the LRC), it would make sense if possible to prevent one person from exercising this freedom so as to deprive future generations of a similar freedom.19

The Report's response to this argument is weak. As "a preliminary response", it is suggested that there is a "a very striking inconsistency" between the restrictive rule and the wide freedom of disposition generally allowed to a property-owner. It is pointed out that up until the Succession Act, 1965 there was no (other) restriction upon a testator's power to dispose of property "however imprudently, irresponsibly, excessively or ungratefully".20 It is concluded that "there seems no justification for singling out this particular area and saying that, in it alone, the law should interfere with the settlor's right to give the property to whomsoever they wish."21 But surely it is a little disingenuous to focus on the period *before* the Succession Act; in the current legal climate, the one in which the fate of the rule comes to be considered, the Succession Act does impose wide-ranging restrictions on freedom on testation. More crucially, even if the law were interfering in "one particular area" alone, it can be countered that this area is of a special quality – relating to dispositions which try to govern not just the immediate future of the property but also its longer-term fate. On the face of it, it is not (in any meaningful sense) a "striking inconsistency" for the law to restrict dispositions which are themselves of a restrictive nature.22

Beyond the "preliminary response" discussed above, which does not address the substance of the argument, the Report offers nothing to counter the "balance between generations" justification except the apparently tangential argument that the effect of the rule will often be to deprive the person whom the testator intended to benefit to the profit of some relative whom the testator may consciously have decided not to benefit. This may be true (though it is also of the essence of any rule which is intended to prevent certain intentions of a testator/settlor from being put into effect) but it is difficult to see how it relates to the point under discussion.23

Interestingly, later in the Chapter under discussion, it again becomes clear how little value the Report places on this idea of keeping a balance between generations. A "gift of £10,000 per year to any of my great grandchildren to become destitute" is given as an example of a "perfectly sensible" gift.24 It is stated that such a gift "may be described as excessively paternalistic, but this is not always a bad thing".25 Later, it is suggested that even if one adopted the English Law Commission's suggestion of a fixed statutory perpetuity period of 125 years, "a settlor with reasonable, if unusually paternalistic objectives may still fall foul of the rule".26 Surely, if a person is seeking to impose his or her will on property ownership more than 125 years into the future this can *ipso facto* be categorised as unreasonable in the eyes of the law - and use of the forgiving word "paternalistic" only

---

19 *Cf* Gray *Elements of Land Law* (2nd ed, 1993) p. 647: "In its fullest form, therefore, freedom to alienate implies the power to suspend or destroy freedom of alienation itself. The ultimate exercise of the power of free alienation is an abuse of that power – a breach of the inner morality of alienation" (footnote omitted).
20 Page 49 of the Report.
21 *Ibid*.
22 In general, the Report seems to see the rule against perpetuities as a straightforward attack on freedom of disposition, when (because it seeks to thwart restrictive dispositions) it could equally be seen as an attempted protection for that freedom.
23 Incidentally, it is also hard to agree with the suggestion in a related footnote that the rule may be contrary to the Constitution and/or the European Convention on Human Rights.
24 Page 51 of the Report.
25 *Ibid*.
26 *Ibid,* p. 56.

clouds matters, in the same way as the use of the word "megalomania" on the other side of the argument.27

It is submitted that the aim of ensuring a fair balance between generations is in fact a reasonable one and one which the law should seek to promote if the costs of doing so are not too high (in terms such as complexity of law and adverse effects on commercial dispositions). The force of the Report, and the persuasiveness of the case it makes for abolition, is weakened somewhat by its refusal to accept this point. Of course, the fact that there is a valid argument in favour of trying to prevent gifts which trespass too much on the freedom of future generations does not automatically defeat the argument for abolition of the rule against perpetuities. There are many problems with the rule in its current form and arguably with a reformed version of the rule. It could well be that these problems mean that the best approach is to abolish the rule and live with the consequences. The point is simply that it is unfortunate that the report's discussion of reform totally discounts the most plausible reason for having a rule against perpetuities.

*(ii) The Role of Variation of Trusts Legislation After Abolition*

Much emphasis is placed in the Report on the fact that it should be read in conjunction with the *Report on the Variation of Trusts*28 (issued by the LRC at the same time). However, in neither report is there any detailed analysis of how the variation of trusts jurisdiction could be of benefit in the case of gifts which will vest in the remote future (which would be permissible if the rule against perpetuities were abolished). The variation of trusts jurisdiction proposed29 would simply allow the court to consent on behalf of beneficiaries who lack full legal capacity, are unborn or whose interest is contingent. Consent by the court can only be given if it is for the benefit of the person on whose behalf it is being given. Therefore, it is difficult to see how the variation of trusts jurisdiction proposed in the LRC report would be of any assistance in the case of at least some dispositions which breach the rule. Consider, for example, a gift which provides that, at some point in the future, the fee simple in the property will pass to some person (not presently identifiable) who satisfies a particular condition. It is unclear how it could be to this person's benefit for the court to vary the trust (even if this would greatly improve the position of others with an interest in the property). On the other hand, there are situations where one could imagine the variation of trusts jurisdiction working well in the general context under discussion and it would have been very interesting to see in either Report an attempt to tease out the possibilities in respect of variation of trusts and perpetuities.30 However, because the LRC dismisses the prevention of remote vesting as an issue (for the reasons discussed in the previous subsection), the only function it sees for variation of trusts is to facilitate the smooth running of very long-lasting (or perpetual) trusts given that circumstances are bound to change over a very long period.

---

27 See p. 51 for the suggestion that regarding those who break the rule as "megalomaniacs seeking to rule their posterity from beyond the grave" is a "sort of attitude [which] naturally tends to prejudice the discussion".
28 LRC 63-2000.
29 The proposed reforms in the Variation of Trusts report would address a serious deficiency in our law and are to be warmly welcomed. However, in the present context, consideration is being given only to the relevance of this report in the context of the reform of the law on perpetuities.
30 *Cf* the brief discussion in Deech "The rule against perpetuities abolished" (1984) 4 OJLS 454, 460 (in the context of the abolition of the rule in Manitoba). The Manitoban legislation covering variation of trusts is the Trustee Act (Chapter T160) available (in consolidated form) at www.gov.mb.ca/chc/statpub/free/pdf/t160.pdf. Although Deech refers in her discussion to a widening of the variation of trusts jurisdiction in Manitoba, the provision to which she refers is not found in the current legislation.

This was, for this reader, a disappointing aspect of the Report. It is obvious that, as things stand, the rule against perpetuities uses a sledgehammer31 to crack a nut. When the LRC suggested the abolition of the rule, emphasising strongly that this proposal was dependant on simultaneous recommendations on expanding the variation of trusts jurisdiction, one's hopes were raised that one would find a nut-cracker secreted somewhere in the latter recommendations. However, as explained above, this is not the case. There is no consideration of the possibility of, in some form, including remoteness as one of the grounds for varying a trust (which would involve a limited departure from the principle that the court could only consent to a variation if it was for the benefit of the parties on whose behalf the consent is being given). It is quite possible that there is no workable proposal along these lines but it seems clear that the LRC did not see the need to examine the idea.

# Radical Reform: The English Proposals

In considering the reform of Irish law, the first instinct is often to see whether one could profitably copy (perhaps in suitably modified form) ideas that have been developed in England. The English law on perpetuities was comprehensively reformed by means of the Perpetuities and Accumulations Act, 1964. This Act introduced a "wait and see" regime, whereby a disposition would only be invalid if it actually did vest outside the perpetuity period (calculated by reference to a fixed list of statutory lives in being). In addition, specific provisions were introduced to deal with common traps and a statutory perpetuity period of 80 years was introduced as an alternative to the device of a "royal lives clause".

One option for reform in Ireland, then, would be simply to adopt a variation on the current English legislation. However, while this would represent a step forward from the current Irish position, it would probably constitute too modest a reform. Although the English legislation has been relatively successful, it has been in existence for a number of decades now and various problems have been identified with its operation. The matter was examined in detail by the English Law Commission in its 1998 report on *The Rules Against Perpetuities and Excessive Accumulations*32 and further radical reforms were proposed. This report was not universally welcomed in England, with at least one commentator feeling that the Law Commission was wasting time (and taxpayers' money) tinkering with an area of limited practical importance which was already covered by well-understood legislation.33 However, whatever the practical merits of further reform in England, there would be a lot to be said in the Irish context for leapfrogging the current English position and implementing the kind of second-generation reforms discussed by the Law Commission.

The Law Commission's proposals, although not quite as straightforward as those of the LRC, do represent a considerable simplification of the current English position. In place of the somewhat complex scheme under the 1964 Act (involving a list of statutory lives in being and an alternative statutory period of 80 years), the Commission proposed that the perpetuity period would simply be 125 years in all cases. This figure was selected because it

31 Or, more accurately, a wheezing and absurdly elaborate nut-cracking contraption which in a previous generation would have graced a Heath Robinson cartoon (and might today be seen in a "Wallace and Gromit" film).
32 Note 4 *supra*.
33 Jessel "Perpetual Property Law Reform" [1998] Conv. 243.

was seen as representing the maximum length of time which could be achieved under current English law (and also partly out of a desire to give some recognition to the views of those advocating outright abolition of the rule). The advantage of this change would be that one would no longer have to concern oneself with the arcane concept of "lives in being" and the perpetuity period would be fixed and easy to understand. This reform would also provide an answer to the argument (strongly relied upon in the LRC report) that the rule against perpetuities can easily be avoided by careful drafting and that it is only those who are badly advised who fall foul of its terms.34 The blanket perpetuity period would be available in all cases, so that (irrespective of drafting skill) a gift would only fail if it had not vested within 125 years.

The other major aspect of the Law Commission's proposal relates to the question of excluding commercial interests from the scope of the rule. As it stands, the rule casts doubt on the validity of various commercial transactions such as agreements to create future easements, certain options to purchase land or shares and nominations and powers of advancement under pension schemes.35 Since the Law Commission found it impossible to come up with a satisfactory definition of a "commercial interest", it encountered some difficulty in giving effect to its desire to create an exception covering such interests. To get around this, the Law Commission suggested an "*inclusionary* rather than an *exclusionary* approach",36 which would take the form of a legislative provision designed to ensure that the rule against perpetuities would apply only to future estates and interests arising under trusts or wills. The effect of this would be that, although these interests would not be listed in the legislation, the rule would no longer apply to easements, restrictive covenants, options or rights of pre-emption (and a separate provision would clarify that the rule was to have no application to pension schemes). In the view of the Law Commission, it was "quite conceivable that situations may arise in the future, perhaps from the development of new types of financial instrument, where the rule against perpetuities would apply, but where that might be undesirable."37 To deal with this, the Lord Chancellor would be given power to specify further exceptions to the rule by statutory instrument.

What is wrong with these proposed reforms? At first inspection, the answer would appear to be: not very much. As well as simplifying the law, they also greatly reduce the scope of the rule against perpetuities, so that it would operate "as no more than a long stop to prevent unreasonable dispositions".38 In terms of objections to this kind of reform, the LRC report makes a number of points. The relevant section begins by putting the (somewhat idiosyncratic) argument that, even with a very long fixed perpetuity period, a settlor "with reasonable, if unusually paternalistic objectives may still fall foul of the Rule."39 Then, to some extent having it both ways, the report proceeds to argue that gifts which offend the reformed rule would be extremely rare and that the danger which is being guarded against is not sufficiently important to justify "a complicated and nuanced corpus of law".40 There

34 See pp. 52-53 of the LRC Report. The Report (p. 53) repeats the familiar point that no one has ever been known to take a successful action for negligence against a lawyer on foot of a disposition that breaches the rule. However, one wonders if the decision of the House of Lords in *White* v. *Jones* [1995] 2 AC 207– which allowed a disappointed beneficiary to sue a solicitor for negligence in respect of drawing up a will – might alter the legal context in relation to this point.
35 See *ibid*, p. 44.
36 Page 84 of the Law Commission report (original emphasis).
37 *Ibid*, p. 96.
38 *Ibid*, p. 22.
39 Page 56 of the LRC Report. See the comments on this argument in the text following note 23 *supra*.
40 *Ibid*.

appears to be considerable force in this latter point, in that if one accepts the view of the English Law Commission that this type of reform could not be retrospective in effect, one would be left operating "a dual regime: the present common law and the new statutory system".41 The Report rightly points out that the costs of an elaborate body of law, although not always recognised, can be substantial (and, as will be discussed shortly, the LRC seeks to avoid these costs by abolishing the rule with retrospective effect). A possible answer to this point is to argue that there is no strong reason why a radical reform of the rule could not, just as reasonably as outright abolition, be applied retrospectively. It is true that the English Law Commission took a different view but the different legal context to its proposals may have influenced this. First, the need for retrospectivity in England is arguably reduced by the fact that the rule in England has already been the subject of thorough legislative reform and so is not as objectionable as our current version. Secondly, the adverse consequences of retrospectivity which the Law Commission feared turned (at least in part) on the possibility that settlors might have relied on a specific aspect of the current English legislation (the statutory 80 year perpetuity period) which has never been relevant in this country.42 Finally, from the tone of the Law Commission's report, one might speculate that (unlike the LRC) the Law Commission would have regarded the arguments against retrospectivity as decisive also in relation to the abolition option.43

Another argument put by the LRC is that the treatment of commercial interests in the Law Commission's proposals is too elaborate. There might possibly be some element of misunderstanding of the English proposals here (resulting perhaps from the somewhat misleading presentation in the Law Commission report). The LRC Report refers to two "statutory lists",44 suggesting that the Law Commission "eventually formulated two lists: one was an exhaustive list of interests to which the Rule should continue to apply, and the other was a catalogue of specific commercial interests to which the Rule should not apply".45 However, a "catalogue" of commercial interests appears nowhere in the proposed English legislation; it is simply laid out in the body of the Law Commission report to indicate which interests would effectively be excluded by virtue of the exhaustive list of interests to which the rule would apply (which does appear in the proposed legislation).46 There is admittedly a clarification in s 2(4) of the Law Commission's proposed Bill which states that the rule shall not apply to "an interest or right arising under a relevant pension scheme" (which pension scheme is later defined); however, it is not easy to see how this one exception constitutes a "catalogue of specific commercial interests".47

---

41 *Ibid*.

42 Page 102 of the Law Commission report (a testator might have referred to the "perpetuity period" which would previously have meant 80 years and would now mean 125 years). The LRC report stresses (at p. 59) that the "essential difference" between the Irish and English proposals is that "we propose no new law; merely an absence of former restrictions". However, it is not made clear how, in fact, the retrospective introduction of a blanket 125 year perpetuity period in Ireland would interfere with the intentions of settlors in respect of past transactions any more than would retrospective abolition of the rule.

43 Note also the point (made on p. 96 of the Law Commission report) that retrospective reform would "almost certainly interfere with commercial bargains that had been concluded on the basis of the existing law".

44 Page 57 of the LRC Report.

45 *Ibid* (footnotes omitted).

46 See para 7.35 of the Law Commission report (where it is stated that because the rights to which the rule applies are comprehensively listed "it necessarily follows that all other rights are automatically excluded" and some of the rights automatically excluded are then listed, including certain easements, covenants, options and rights of pre-emption).

47 In footnote 42 on p. 57 of the LRC Report there is a citation to para 11.4 of the Law Commission report, which contains a list of four varieties of pension scheme. This suggests that either this list is what the LRC

In any case, whether or not the LRC Report inadvertently exaggerated the extent of the complexity of the English scheme, it is still fairly elaborate and, if the power to specify exceptions by statutory instrument were ever used, one would indeed end up with two lists. The LRC Report goes on to argue, as it happens, that it is unlikely that there would in this jurisdiction be the political will (or legal awareness) on the part of the responsible authorities to address new problems with the rule on an ongoing basis (thus leading to no new exceptions being specified, leaving a scheme which would be simpler but possibly less just since certain new types of commercial interest might be exposed to the rule). Overall, it is arguable that this possible rolling list of exceptions is a red herring, thrown into the pot by the English Law Commission out of an abundance of caution (which in some respects characterises its report). Is it really that likely that new commercial interests will arise which would fall within the inclusive list of interests to be covered by a reformed rule and, if they did, would one need to lose much sleep over them,48 given that (as the LRC Report points out) the current problems in respect of the rule's application to commercial interests stem largely from the fact that the applicable perpetuity period is generally 21 years.49 It is arguable that an (inclusionary) definition of the rule's scope which does not take in any known commercial interests, coupled with a blanket perpetuity period of 125 years, sufficiently deals with the problem of the rule interfering with commerce.

Two other arguments are to be found in the LRC Report. First, it is suggested50 that a reformed rule would still depend on the concept of vesting and that in practice it can be difficult to determine when a contingent interest has vested. However, it is arguable that the uncertainty evident in (some of) the cases was attributable to a judicial desire to save gifts from a rule which was perceived as unjust. This pressure on the concept of vesting would be greatly diminished if the rule were reduced to a long-stop role. The other argument51 is that with a rule involving a "wait and see" policy "[t]hroughout the perpetuity period, the validity of the gift remains mired in uncertainty, as does the identity of the proper recipient of any intermediate income generated by the subject matter of the gift." Arguably, of course, without a rule gifts can remain "mired" in (a different kind of ) uncertainty for much longer than the perpetuity period, in that vesting may be postponed indefinitely. The problem of intermediate income would admittedly have to addressed by any scheme introducing "wait and see" into Irish law.

# Abolition or Reform?

meant by a "statutory list" of commercial interests or else that this list was confused with the list in para. 7.35 of the Law Commission report (which contains a wider range of commercial interests but does not form any part of the proposed legislative scheme).

48 The author must confess a slight difficulty with the assumption in both the LRC and the Law Commission's reports that, in principle, a transaction which is "commercial" and "at arm's length" should automatically be exempt from the rule. While the rule was not designed with such transactions in mind, it does serve the purpose of preventing interests from vesting too far into the future. It is not clear why the motive of a party in creating an interest (the fact that she did so in pursuance of a bargain) should confer immunity on that interest. The doubt expressed in this footnote seems more reasonable when one imagines a perpetuity period which has been stretched to 125 years (and takes into account e.g. the possible threat to the merchantability of land caused by allowing future easements to vest outside this period).

49 Page 45 of the LRC Report.

50 *Ibid*, p. 57.

51 *Ibid*, p. 18 (this argument was made in respect of the general idea of introducing "wait and see" in Ireland, rather than as a specific response to the English Law Commission proposals).

It is difficult to come to a conclusion about the advisability or otherwise of abolishing the rule as opposed to retaining a "long stop" rule as proposed in England, with a perpetuity period of 125 years. For one thing, at the simplest level at any rate, the difference will only manifest itself 125 years from now. We are not accustomed to making assessments about how the law should operate this far into the future (when the world could be a very different place). One key question is of course the extent to which people would, if the rule were abolished, make dispositions which should have been prevented by a rule against perpetuities.52 The LRC, like the Manitoban reformers in respect of their jurisdiction, were satisfied that it was unlikely that anybody in Ireland would wish to create the sort of dynastic trust against which, historically, the rule was directed.53 On the other hand, the English Law Commission found upon consultation that there was every reason to think that people in England would take advantage of the absence of a rule (with a number of law firms reporting that clients had approached them with a view to creating trusts of this nature).54 Is it possible that our (perhaps temporary) experience of prosperity in recent years will lead to a bombastic tendency amongst our *noveaux riches*, reflecting itself in occasional attempts to create long-lasting trusts? It is very hard to tell but it is possible that there would be comparatively few attempts to press against the boundary set by a 125 year perpetuity period. On the other hand, our law is accustomed to taking care of even relatively minor problems (one thinks at once of the various Musk Rat regulations)55 and it is arguable that it should not scorn to have a rule in place to deal with attempts (albeit rare) to create overly remote dispositions.

In presenting its argument for outright abolition, the LRC is certainly correct in stressing the highly limited attention span of legislators when it comes to this kind of issue. One probably only gets one chance to address the matter and the LRC's scheme has the clear advantages of simplicity and comprehensibility (as against the more finicky English scheme). Unlike an attempt to reform the rule, however radically, there is unlikely to be any need for legal fine-tuning following abolition (the only danger in fact being a need to admit defeat and reintroduce a rule against perpetuities if things went badly wrong following abolition).

When the consequences of each decision are to some extent unknowable, it becomes partly a matter of taste whether one opts for outright abolition or the (apparently) safer course of major reform. The present writer would consider himself an abolitionist at heart but, after reflection on the matter, some nagging doubts remain. There is still a hankering for some form of "long stop" on the creation of very remote interests (ideally one that is rather less complex than the English proposals). One might have thought that, if the concession were made that such a last ditch protection against perpetuities would only come into play in limited and truly exceptional circumstances, one would be able to hit upon some comparatively simple expedient to do the job. One possibility might be an expanded variation of trusts jurisdiction which, if an interest had remained unvested for a very long fixed period of time, would allow the court (if an application were made to it) to take the remoteness of the interest into account in deciding whether to order a variation (rather than there being a

52 See *ibid*, p. 53, where this question is highlighted as the "crux of the debate".
53 The Law Reform Commission felt that reality of taxation legislation would make extremely long-lasting trusts unattractive (*ibid*, p. 54). Note, however, Sparkes' argument ("How to Simplify Perpetuities" [1995] Conv 212, 213) that "it is unsound in principle to rely on taxation to achieve fundamental objectives of trust law since apparently settled taxation policies can change." See also Deech's interesting critique of "the accepted wisdom" that taxation laws actually operate to discourage remote settlements (note 30 *supra*, 460-462).
54 Page 19 of the Law Commission report.
55 Musk Rats (Notification By Occupiers of Land and Returns) Regulations 1933; Musk Rats Act, 1933 (Application to Mink) Order 1965.

precondition that the variation would have to be to the benefit of all parties on whose behalf the court is consenting[56] to the variation). It might indeed have been useful if the LRC (notwithstanding the formidable expertise available to it in this area) had followed the more conventional route of prefacing its Report with a Consultation Paper which could have charted a wider variety of reform options in more general terms.

In any case, one is now left to form a conclusion on one particular fully worked out reform proposal: to abolish the rule. This proposal is beautifully simple and, in the end, perhaps it deserves support on this basis. Given the lack of legislative interest in such matters in Ireland, demonstrated by the fact that no reform at all has occurred to date, it would seem unlikely that a comparatively complex scheme (like that proposed by the English Law Commission) would ever make it onto the statute books here. On the other hand, the outright abolition of an archaic and troublesome rule of law may be a sufficiently straightforward proposition to sell at a political level. Moreover it is also unlikely, now that the LRC has gone to the trouble of putting together this proposal, that some entirely new approach will make it onto the table. Thus, the real choice now is probably between abolition and doing nothing. Given that the LRC's proposition would have considerable attractions even in an ideal world, the case for supporting it in this imperfect one may therefore be irresistible.

Having concluded that abolition appears to be the best way forward from where we stand at present, it is now necessary to move on to the important subsidiary question of whether such abolition should be retrospective or prospective in effect.

# Retrospectivity

The Report favours retrospective abolition. To assess the issue, one may draw on the example given in the Report of a disposition which violates the rule: *"to A for life, remainder to the first of my grandchildren to become a doctor."*[57] The second part of this disposition is void under the rule and (let it be assumed) X is the person entitled to the property in this event. What should be the consequences in this context of a subsequent abolition of the rule? The position of the Report is as follows: if A is already dead by the time of abolition, so that X has taken an interest in possession, his rights should be undisturbed. However, if A is still alive, so that X has not yet taken his interest in possession, X should lose out. The only exception would be if X had relied to his detriment on the fact the disposition was invalid under the rule.[58]

The LRC explains its choice on the basis of preferring to honour the settlor's intention at the expense of not fulfilling "(at most) the expectation of a windfall, which X (on the basis of a law which to most lay people and many lawyers would seem antiquated and irrational) entertained."[59] However, this reference to "the expectation of a windfall" is misleading. X does not "expect" to receive an interest – he already has a property interest vested in him. It is a basic principle that a right which is vested in interest (i.e. which has not yet fallen into possession) is nonetheless vested and the holder of the interest has, even before the prior interests have expired, a present right to future enjoyment of the property. There is, in

56 In this context, the word "consent" might no longer be fully apposite.
57 See p. 63 of the Report. (One must assume that this is an *inter vivos* conveyance since if it occurred in a will it would be valid in some circumstances – i.e. if the testator had no surviving children).
58 See p. 62 for the wording of this proposed exception.
59 *Ibid*, p. 63.

principle, no clear-cut distinction between depriving someone of property which is vested in possession and depriving them of property which is vested in interest.60

When the law repents of a policy and decides that a particular rule is no longer necessary, it does not follow automatically that people should be deprived of their property rights. One must be able to identify some convincing reason why the legislation should be made retrospective. In the present context, it seems that the attractiveness of retrospectivity is the immediate simplification of the law which it achieves; once the rule against perpetuities has been abolished retrospectively, one can forget about it almost completely (subject to the limited exceptions to retrospectivity envisaged by the LRC). This is an important point but surely a compromise is possible. The rule against perpetuities has endured for hundreds of years; a few more years is not too much to tolerate. Why not allow a short period (say between one and three years) to allow third parties to assert claims based on past dispositions being invalid under the rule? After this period is over, no further claims would be permitted and the abolition of the rule would be given full effect. This approach would seem to reconcile the desire to simplify the law with the need (in justice as well as under the Constitution) to protect existing property rights.61

# PART TWO: THE REFORM OF COGNATE RULES

## The Common Law Remainder Rules

In the current writer's view, come the property law revolution, the common law remainder rules62 should be one of the first against the wall. These ancient rules serve absolutely no identifiable purpose in modern times, have their basis firmly in the feudal system and operate only as a trap for the unwary. However, the Report takes a different view, arguing as follows:

Unlike the rules against perpetuities and accumulations, the contingent remainder rules are not mere rules against remoteness. Rather they prevent a situation where no-one owns the legal estate, or in technical terms, they prevent an abeyance in seisin. The notion of seisin continues to play a pivotal role in modern land and conveyancing law. Insofar as the rules prevent an abeyance in seisin, they continue to perform a valuable function.63

This is most surprising (a pivotal role today for the feudal concept of seisin?)64 and also somewhat circular, since (for the most part) it is the common law remainder rules themselves

60 Note also the Report's reference (p. 61) to "diverting the gift away from" the person entitled upon invalidity; this language gives the false impression that the property has somehow not yet reached the person in question and is, as it were, still in motion.
61 It would certainly assist the position of someone who knew from the start of his rights (*cf* para 4.44 on p. 63 of the Report) and who would be particularly galled by losing them retrospectively. Arguably, the softened retrospectivity suggested in the text would usefully reduce the potential concerns (whether well-founded or not) of legislators about the constitutionality of a Bill which interfered retrospectively with property rights.
62 See generally Wylie *Irish Land Law* (3rd ed) (Dublin: Butterworths, 1997), pp. 287-296.
63 Page 75 of the LRC Report.
64 *Cf* Wylie note 62 *supra*, 185-186: "Seisin was a concept fundamental to the feudal system as it developed in the early centuries" (and so on in the past tense).

which prevent us from completely forgetting about seisin. As for the "valuable function" of preventing "an abeyance in seisin", the fact is that any interest precluded by the common law remainder rules can simply be created as a legal executory interest.

Thus, while the remainder rules prevent a conveyance "to A in fee simple if he marries", nothing prevents a conveyance "to X in fee simple to the use of A in fee simple if he marries" (the result of which, after the operation of the Statute of Uses 1634, is to eliminate X from the picture and to give A a legal fee simple if he marries). The reason why the problem of an "abeyance in seisin" arose was that, in its early development, the common law lacked the sophistication to deal with the issue as equity later did – by means of the device of the resulting use (and later the resulting trust). This device means that there can never be a gap in the equitable interest; any part which is undisposed of will result back to the grantor. There is no reason in principle why a conveyance "to A in fee simple if he marries" should not have the effect of giving A a fee simple when the condition is satisfied and, in the meantime, leaving the legal ownership in the hands of the grantor (which is the effect of a conveyance "to X in fee simple to the use of A in fee simple if he marries").65 Why not provide that, if there is a gap in the legal interest, it should be filled in the same manner as a similar gap in the equitable interest (i.e. the undisposed of interest should revert to the grantor) or, coming at the matter from another angle, provide that legal interests should (for certain purposes) be treated in the same manner as legal executory interests? Obviously, care would have to be exercised over the wording of any provision abolishing the common law remainder rules but there is nothing to suggest that any drafting problems would be insurmountable.

As a final argument against abolition of the common law remainder rules, the Report suggests that the methods of avoiding the common law remainder rules (e.g. the insertion of a use) have become "integral aspects of standard conveyancing practice" and that "[u]psetting the effect of these standard phrases is more likely to complicate, rather than simplify, modern conveyancing practices".66 However, how would the elimination of the common law remainder rules "upset" the effect of existing avoidance devices?67 Such devices (e.g. the insertion of a preliminary use) would continue to deliver precisely the same results as before and, at the same time, effect would also be given to conveyances which omitted an avoidance device (and which would previously have fallen foul of the remainder rules). It seems remarkable that the Report, which elsewhere puts a very high value on giving effect to settlors' intentions, should be willing to allow conveyances to fail because of the entirely pointless common law remainder rules.68

---

65 The example in the text is of a so-called "springing interest" but, of course, "shifting interests" (the other target of the common law remainder rules) could be treated in an identical fashion.

66 Page 75.

67 One might as well contend that the rule against perpetuities should not be abolished because it is now standard conveyancing practice to avoid its effect by means of a royal lives clause (it being arguable in fact that the post-abolition use of a royal lives clause could actually be detrimental to a settlor, in that it would unnecessarily cut down the scope of her gift).

68 The argument is exactly the same as one made in the Report (pp. 52-53) in the context of the rule against perpetuities: why preserve a rule which punishes only those whose lawyers are too incompetent to avoid it? The point is actually stronger in relation to the common law remainder rules since, although skilful drafting is a limited protection against the rule against perpetuities, it is a complete protection against the common law remainder rules.

# Other Rules

As well as examining the rule against perpetuities and the common law remainder rules, the Report also considers a number of other rules. These will now be considered briefly in turn.

(i) *Quia Emptores 1290*

What is at issue here is the rule against the imposition of restrictions on the powers of alienation of the grantee of a freehold estate.69 The Reports sensibly sees no reason to abolish this rule.

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

Again, the Report recommends against abolition. Certain issues raised here will be touched on below in the context of the Report's recommendation that the Rule in *Whitby* v. *Mitchell* be abolished.

(iii) *The Rule Against Trusts of Undue Duration*

This rule, also known as the rule against inalienability, restricts the duration of non-charitable purpose trusts to the length of the perpetuity period. Since non-charitable purpose trusts are very much an anomaly in our law, this particular rule has received comparatively little attention in legal discourse. The Report suggests that, because this rule affects the position of unincorporated associations, which occupy a special position in our law, any recommendation to change the rule should come in the context of an overall review of the law on unincorporated associations.

Although certainly no particular reason is apparent for interfering with the rule against inalienability, it may be worth addressing what appears to be a suggestion in the Report that unincorporated associations hold their property on the basis of a purpose trust. The Report states that "the probable reality is that a significant number of the richer purpose trusts contain the property of unincorporated associations".70 However, the property of unincorporated associations cannot be held on the basis of a purpose trust (which trust would simply be invalid unless charitable, there being no exception in the law for unincorporated associations); instead (to summarise) the property must be held on a private trust for the benefit of the members or held by the members themselves on the basis of the contractual arrangement reflected in the rules of the association. This said, it is true that the rule against inalienability does currently have some impact on the legal treatment of gifts to unincorporated associations.71 In view of this, there is good sense in the LRC's decision to

69 See e.g. *Re Dunne's Estate* [1988] IR 55.
70 Page 68 of the Report.
71 See generally Delany *Equity and the Law of Trusts in Ireland* (2nd ed) (Dublin: Round Hall Sweet and Maxwell, 1999) pp 276-284.

postpone consideration of the rule until it can be viewed in its full context (so long as this context extends to include also a review of the law on non-charitable purpose trusts).72

(iv) *The Rule in Purefoy v. Rogers*

An attempt was made to abolish this rule by means of the Contingent Remainders Act, 1877. However, the LRC points out that that Act was badly drafted and, to avoid any confusion, it recommends that the 1877 Act be repealed and the rule in *Purefoy* v. *Rogers* abolished again in clearer language.73 Although one might feel that it is relatively unlikely that the efficacy of the 1877 Act could be successfully questioned now, it seems a reasonable idea to tidy up this point in the context of broader reforms in the area.

(v) *The Rule in Whitby v. Mitchell*

This rule "states that where an estate is given to an unborn person, any remainder over to that unborn person's issue and any subsequent limitations are void."74 The aim of this rule was to prevent the creation of an unbarrable entail through the device of a conveyance "to X for life, remainder to his eldest son for life, remainder to that son's eldest son for life … [and so on to each succeeding eldest son's eldest son]". The LRC considers that this rule has even less to be said for it than the rule against perpetuities and recommends its abolition.

But what about the possibility of an unbarrable entail? This does not discomfit the LRC because of its view that the restriction inherent in a fee tail is "in effect trumped by statutory power bestowed on the tenant for life to sell the entire estate in the settlement"75 by the Settled Land Acts 1882-1890. Indeed, this confidence in the effect of the Settled Land Acts had earlier led the LRC to describe the Fines and Recoveries Act, 1834 (which allows, under certain conditions, the conversion of a fee tail into a fee simple) as "not very useful".76 This reasoning is somewhat puzzling. It is certainly true that the Settled Land Acts mean that an entail does not truly "tie up" the ownership of land; the tenant for life can sell the fee simple at will. However, while this may prevent the damage to the general economy which would result if land were kept out of circulation, it is really only to this extent that the Settled Land Acts "trump" the fee tail. Even after a sale of the fee simple, the tenant for life still has only a life interest in the property (which has now been converted from land into money) and is entitled only to the income but not the capital sum. From the tenant for life's point of view, the Fines and Recoveries Act serves an extremely useful purpose in that it allows him to convert his mere life interest in the property (or its value) into a fee simple.

Of course, the LRC did not (fortunately, in the present writer's view) recommend the abolition of the Fines and Recoveries Act. However, it did create the possibility of an

72 One very specific and useful reform suggested by the Commission in this part of the Report is the revision upwards of the monetary amounts specified in s 50 of the Charities Act, 1961 to compensate for the effects of inflation. This section gives charitable status to gifts, within specified monetary limits, for the provision, maintenance or improvement of tombs or memorials. The LRC proposal would increase the maximum amount from £1,000 to £16,000 (or, in the case of a gift of income only, from £60 per annum to £1,000 per annum).
73 Page 75 of the Report.
74 *Ibid,* p. 76.
75 *Ibid,* p. 77.
76 *Ibid,* p. 66.

unbarrable fee tail through the different means of recommending the abolition of the Rule in *Whitby* v. *Mitchell* (with nothing to replace it).77 Why should our law permit such a possibility, whereby a person living today could determine that a particular chunk of the world's wealth should, potentially forever,78 be owned in a series of life estates by his descendants? Each owner of the wealth in question would have it only for his life before it passed on to the next owner in a manner determined by the decision of someone who might have died hundreds of years before. It is not a fully satisfactory answer to assert that fee tails are unlikely to be created (in particular, because it is only after the proposed reforms that an unbarrable fee tail would become a possibility). In fact, it seems that the problem of the unbarrable entail could be dealt with through a provision to the effect that an interest which amounts in substance to a fee tail should be subject to the Fines and Recoveries Act (and therefore capable of being converted into a fee simple).79 In the current writer's view, the LRC should be in the business of simplifying the law by abolishing the fee tail itself (rather than tinkering instead with the mechanisms which the law has developed to deal with it).80

(vi) *The Rule Against Accumulations*

The common law version of this rule, which still applies in Ireland, prohibits the accumulation of income for a period longer than the perpetuity period.81 The position taken by the LRC on this rule is effectively that it should be treated in the same way as the rule against perpetuities and, on the same basis, should be abolished with retrospective effect. The approach of treating the two rules in a similar manner seems well-founded. Therefore, one's conclusion on this recommendation of the LRC would appear to depend on one's view of the general wisdom of abolishing the rule against perpetuities, a question which was discussed at length earlier in this article.

# CONCLUSION

This article has considered in detail the LRC's proposals on the *Rule Against Perpetuities and Cognate Rules*. While it was felt that the Report underestimated the value of having a rule against perpetuities, it was concluded (after a consideration of the perhaps equally reasonable option of radical reform and simplification of the rule) that the LRC's abolition proposal could be supported as the best way forward in the present reality. However, it was suggested that the LRC proposal that abolition should be fully retrospective should be

77 Note that, even in the "perpetuities-free world" of Scottish law, if a person attempts to create a liferent interest (similar to a life estate) other than in favour of someone who is alive or *in utero* at the time, the grantee takes an absolute interest instead. See English Law Commission report, note 4 *supra*, p. 21.
78 Assuming that his line of direct descendants did not die out.
79 *Cf* the cy-près jurisdiction currently applicable to the Rule in *Whitby* v. *Mitchell* (discussed by Wylie note 62 *supra*, pp. 305-306), which of course serves a quite different function.
80 Strangely, when the LRC considered the possible abolition of the fee tail in its *Report on Land Law and Conveyancing: (1) General Proposals* (LRC 30-1989), it decided to retain the estate on the ground that it was harmless. This approach underestimates the cost of an unnecessarily complicated system of property law, a cost which is more fully appreciated in the LRC Report under discussion in this article.
81 In England, under the Accumulations Act, 1800, an even more strict regime of control applies to accumulations. Oddly, although this Act never applied to Ireland, the amending Accumulations Act, 1892 was inadvertently extended to this country (although the practical impact of this is very limited).

modified to allow a fixed period of time to assert their rights to those who have already benefited from the operation of the rule but whose interests have not yet vested in possession.

In relation to the other rules considered by the LRC, it was concluded that, contrary to the surprising recommendation in the Report, it is imperative that the wretched common law remainder rules should share the fate of the rule against perpetuities.82 It was also suggested that, upon the abolition of the Rule in *Whitby* v. *Mitchell*, something should be done about the resulting possibility of an unbarrable entail. The device proposed was a provision to the effect that an arrangement which amounts in substance to a fee tail should be subject to the Fines and Recoveries Act, 1834 (and therefore capable of being converted into a fee simple).

It remains only to commend the Law Reform Commission for its scholarly report on a particularly difficult topic and to hope that it brings a prompt legislative response. In this article, an attempt was made to weigh up the subtle advantages and disadvantages of abolition of the rule against perpetuities. However, whatever about the finer points of this complex debate (and irrespective of whether it is really the right thing to do), the LRC will earn itself much heartfelt gratitude from students (and former students) of law if it manages to put an end to the rule forever.

82 All the more fitting since they have spent so much time side by side in the textbooks.