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RETURN OF THE FERTILE OCTOGENARIANS

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"Never wonder!" was the motto which Mr. Gradgrind drilled into the children in Dickens' *Hard Times*. In general, one could not accuse the property lawyer of ignoring this admonition. However, the repressed subconscious of this lonely creature takes a triumphant revenge in one area - the strange dream-world of the Rule Against Perpetuities. It is as if the law, too often separated from real life by a lack of imagination, here overleaps the target and lands at its customary distance from the dictates of common sense but this time on the far side of reality.

A recent Law Reform Commission Report has recognised that, "at the very least," the Rule requires to be amended.[1] However that report made only one minor recommendation,[2] explaining that the Commission was examining the reforms adopted by various other jurisdictions with a view to recommending the most suitable for Ireland. Since the camel's back as yet remains unbroken, something may be achieved if this note can add another straw to the weighty case for reform. It will be demonstrated that a section of The Status of Children Act, 1987 (with some assistance from the Adoption Act, 1991) has indirectly limited the benign effect of a well-known dictum of Gavan Duffy J. in *Exham* v. *Beamish*,[3] thus making the operation of the Rule even more unsatisfactory. This enterprise will provide the opportunity for a brief exploration of the limits of the concepts of physical and legal impossibility in the context of the Rule.

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1 Report on Land Law and Conveyancing Law: (1) General Proposals. (L.R.C. 30-1989) at pp.7-8.

2 Their recommendation (at p. 8) was "that easements, options, profits a prendre and rent charges over land should be removed from the effect of the Rule Against Perpetuities and that any such amendment should provide that the Rule never applied to those interests in land."

3 [1939] I.R. 336.

Never Too Soon, Never Too Late

The Rule Against Perpetuities aims to prevent settlements from reaching too far into the future and leaving the ultimate ownership of property uncertain for too long.[4] Even those who do not care to recall may remember that the Rule requires that an interest must vest, if at all, within the perpetuity period of a life or lives in being plus twenty one years (plus any relevant period of gestation).[5] If, looking at the matter from the time of operation of the instrument containing the disposition, it is possible that the gift may vest outside the perpetuity period then it will be void *ab initio*. No possibility, however remote, can be discounted. This has led to a number of startling decisions, caricatured by Professor Leach in a famous plea for reform.[6] The student of this area of property law who manages to evade the unborn widow trap[7] and avoid a grisly fate at the bottom of "the magic gravel pit"[8] must still confront the precocious toddler and the fertile octogenarian.

We are concerned with the last two individuals, a pair one might expect to encounter on their way to consult the Wizard of Oz rather than in a Property Law textbook. We first meet the

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4 See Megarry and Wade, *The Law of Real Property*, (5th Ed., 1984), p.238.

5 This brief statement, in the spirit of the Rule, leaves a lot to the imagination. For further explanation, see Wiley, *Irish Land Law*, 2nd Edition, 1986, p.278 et seq.; Pearce, *Land Law*, 1985, p.68 et seq.

6 "Perpetuities: Staying the Slaughter of the Innocents" (1952) 58 L.Q.R. 35, 44-47. See also the companion article, "Perpetuities in Perspective: Ending the Rule's Reign of Terror" (1952) 65 Harv. L. Rev. 721. Professor Leach's articles were influential in the reform eventually achieved in England and Wales and in Northern Ireland. Sadly his plea, if it landed at all within our shores, fell on deaf ears.

7 Despite delightful connotations of black widow spiders and man-traps, this merely refers to the mundane possibility that a person who is unmarried at the time of a gift may subsequently marry someone who had not yet been born at the time of the gift. This unborn spouse cannot qualify as a life in being. For further detail, see Wiley, op. cit., p.289.

8 See *Re Wood* [1894] 2 Ch. 310, 3 Ch. 381 (C.A.), where the possibility which defeated the gift was that the testator's commercial gravel pits, close to being worked out, might in effect replenish themselves and not be exhausted within the perpetuity period.

elder of our new friends. Consider a gift by will "to the first child of Aunt Mathilda to get married". Aunt Mathilda is 88 and has three children. Unless we can assume that she will have no more children, the gift will be invalid due to the possibility that that new child might get married more than 21 years after all the existing children and Aunt Mathilda (the only possible validating lives in being) have died. But, one might argue, is it not physically impossible for a woman of 88 to have a child?

This argument was first dealt with by the English courts in the eighteenth century. In *Jee* v. *Audley*[9] it was suggested to Sir Lloyd Kenyon M.R. that it was not possible for a couple of seventy to have further children. He replied that the Rule Against Perpetuities "had grown reverend by age" and was "not now to be broken in upon".[10] He continued:

> I am desired ... to suppose it impossible for persons in so advanced an age as John and Elizabeth Jee to have children; but if this can be done in one case it may in another, and it is a very dangerous experiment, and introductive of the greatest inconvenience to give a latitude to such sort of conjecture.[11]

In a later case, Lord Brougham described the judgment in *Jee* v. *Audley* as "one of the corner stones of the law".[12] In *Re Dawson*[13] Chitty J. found additional authority for the principle, noting the passage in *Coke on Littleton* where Coke, in discussing the right of dower, asserted that a woman of a hundred could not be regarded in law as incapable of child-bearing.[14]

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9 (1787) 1 Cox. 324.

10 Ibid, 325.

11 Ibid, 325-6.

12 *Dungannon* v. *Smith* (1846) 12 Cl. & F. 546, 631.

13 (1888) 39 Ch. D. 155.

14 Ibid, 163-164. Chitty J. did concede that a woman's death proved the impossibility of her bearing any more children. (Ibid, 160). Ironically, even this concession may have been placed in some doubt by recent advances in cyrobiology. Artificial insemination and *in vitro* fertilisation, coupled with the possibility of the preservation of human semen and ova, create potentially insoluble problems for the Rule. If a person could have a child after their death, the

This enthusiasm continued into the twentieth century.[15] It even appears that the conclusive presumption of fertility extended to cases involving the surgical removal of productive organs.[16]

It was therefore inevitable that the capability to conceive against all medical expectations would eventually fall into the hands of young children. The case which introduced the "precocious toddler"[17] to the world was *Re Gaite's Will Trusts*.[18] The testator left property on trust for A for life and then for "such of her grandchildren living at my death or born within five years therefrom who shall attain the age of 21 or being female marry under that age." Roxborough J. had to consider the possibility that A would have a child after the death of the testator, which child, before it reached the age of five, would itself have a child. Had the judge not found an ingenious way to dodge the issue (which will be discussed later),[19] this bizarre possibility might have been sufficient to invalidate the gift to the grandchildren.

When the Rule Against Perpetuities was finally reformed in England and Wales and in Northern Ireland,[20] the problem of fertile octogenarians and toddlers was given particular attention. Rebuttable statutory presumptions were introduced to the effect that a female over the age of 55 or under the age of 12 (or a male under the age of 14), was not capable of having a

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scope of the rule would be widened greatly. See *Halsbury's Laws of England*, 4th Ed., 1981, Vol.35 at pp.511-12.

15 See *Ward* v. *Van der Loeff* [1924] A.C. 653 and *Re Deloitte* [1926] Ch. 56.

16 See Morris and Leach, *The Rule Against Perpetuities* (2nd ed., 1962) at p.77.

17 The boy-wonder of our dynamic duo.

18 [1949] 1 All E.R. 459.

19 See the discussion of Legal Impossibility, infra.

20 Perpetuities and Accumulations Act, 1964; Perpetuities Reform (N.I.) Act, 1966. It must be remembered that this reforming legislation introduced a general "wait and see" principle. The particular reforms discussed in this paragraph must be seen in this context. For a detailed discussion of the operation of the "wait and see" principle in England, see Megarry and Wade, The Law of Real Property, 5th Edition, 1984, pp.247-50 and for the Northern Irish position, see Wiley, op. cit. pp. 281-84.

child.[21] Medical or other evidence could be introduced in the case of any living person "to show that he or she will or will not be able to have a child at the time in question."[22] The legislation also gave the Court a discretion to deal with a situation where a person had a child despite having been treated as incapable of so doing.[23]

Physical Impossibility

In our jurisdiction there has been no statutory reform. However, much attention has been given to a dictum of Gavan Duffy J. in *Exham* v. *Beamish*.[24] One highly eminent English commentator even found it "hard to restrain a wistful sigh" when comparing this decision to the English cases.[25] In *Exham* v. *Beamish*, Gavan Duffy J. held part of a settlement void under the rule against perpetuities. However, he commented on the conclusive presumption of fertility as follows:

> If, before the Treaty, a particular law was administered in a way so repugnant to the common sense of our citizens as to make the law look ridiculous, it is not in the public interest that we should repeat the mistake. .... [N]othing is law here which is inconsistent with derivation from the people.[26]

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[21] 1964 Act, s.2(1)(a); 1966 (N.I.) Act, s.2(1)(a).

[22] 1964 Act, s.2(1)(b); 1966 (N.I.) Act, s. 2(1)(b).

[23] 1964 Act, s.2(2); 1966 (N.I.) Act, s.2(2). S.2(4) of both Acts provide that references to "having a child" extend to having a child "by adoption, legitimation or other means."

[24] [1939] I.R. 336.

[25] Megarry, [1943] L.Q.R. 26, 27. One imagines that few of the sighs heaved over Irish property cases have been wistful ones.

[26] Ibid. Kelly, *The Irish Constitution, Supplement to Second Edition*, 1987, at p.80, explains the case as turning on "a sort of presumption that the date of the enactment of the 1922 Constitution (and its provision as to the general continuance of laws) passed the old common law through a "sieve" of Irish common sense." In *Vone Securities Ltd.* v. *Cooke* [1979] I.R. 59 the Supreme Court declined to discard a different archaic common law rule, arguing (per Henchy J.) that to do so "would involve the retrospective abrogation of the rule in its application to existing circumstances", thereby affecting vested property rights. Kelly, ibid at p.204, argues that this "would seem to suggest that the operation

Gavan Duffy J. expressed his willingness to receive medical evidence to prove that, at the relevant time, it was physically impossible by reason of a woman's age for her to have further children. He explained that:

> [W]hen I speak of physically impossible, I am not thinking of anything like mathematical proof, which cannot be expected, but I mean evidence that in the ordinary course of nature, now well ascertained by long observation and experience, the thing cannot happen.[27]

The English rule as was dismissed as "absurd"[28] and the learned judge refused to be bound by views expressed by Lord Coke and Lord Kenyon in bygone centuries.[29] *Exham* v. *Beamish* was decided a decade before *Re Gaite's Will Trusts*, so Gavan Duffy J. did not direct his attention to the fertility of children of tender years. In principle his dictum is equally applicable to that question.[30]

It might seem that a little self-congratulation is in order when the common-sense of an Irish judge deflates the solemn-faced folly of his English counterparts. However, although the approach of Gavan Duffy J. is probably the better one, one should not get carried away. The

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of the principle contained in *Exham* v. *Beamish* should be confined within strict limits and even perhaps that *Exham* v. *Beamish* itself was wrongly decided, in that it too sanctioned the retrospective abrogation of a vested property right." However, see also *S.* v. *S.* [1983] I.R. 68, (discussed by Kelly, ibid., at p.80).

[27] [1939] I.R. 336, 348. See Morris and Leach, op. cit. note 19 supra, p.82 n.20, for some statistics on the outer limits of fertility. See also ibid, p.85 n.27, discussing a birth in Peru in 1939, to a child allegedly aged five. More recently in Victoria, Australia on July 22nd, 1991, Les Colley became the father of a child at the age of 92. Young Oswald Colley has a half-brother aged 72. See Irish Times, Aug. 2nd, 1991.

[28] Ibid, 349.

[29] Ibid, 350-351.

[30] Although Professor Kelly has suggested that the principle of *Exham* v. *Beamish* may have to be confined within strict limits (see note 26, supra), a distinction here between old and young people would be indefensible.

point is that once the law adopts a rule, the consistent application of which leads to absurdity, the day is really already lost. Either one takes the attitude of the English judges and follows the rule into absurdity, or one takes Gavan Duffy J.'s line and suffers the consequence of inconsistency.

The inconsistency of Gavan Duffy J.'s approach derives from the fact that common-sense is being injected into the proceedings one stage too late. The Rule requires that we consider all possibilities however remote they are. This is absurd, since there is no reason why the law should allow important consequences to turn on something so alien to the experience of humans as the difference between that which is extremely improbable and that which is strictly impossible. However accepting this initial absurdity, as Gavan Duffy J. conceded he was bound to do, it is uncertain whether one should try to be selective about the extremely unlikely possibilities which one is willing to consider. It must be pointed out that Gavan Duffy J.'s dictum would only seem to cover cases of "physical" impossibility. It would still be necessary to invalidate gifts on the basis of utterly unrealistic possibilities, the absurdity of which did not happen to stem from a conflict with the expectations of medical science.

Moreover, Gavan Duffy J. seems to be using the word "impossible" in its plain everyday sense, so as to include events which are merely "very, very unlikely".[31] The trouble with this approach lies in deciding where extreme improbability shades into practical impossibility. It seems clear that medical science, oblivious to the absurd agenda set by the Rule Against Perpetuities, would say that it was "impossible" for any woman of eighty to conceive a child. But is it "impossible" for a woman aged 53, or 55, or 57?

One is clearly left wondering where to draw the line, a question which is very difficult to answer satisfactorily without legislation. A point stressed in the old English cases was that the

[31] One is informed that physics regards it as theoretically possible (although rather improbable) that the random movement of the molecules in this page will cause it to rise and strike the reader sharply between the eyes. The adoption of a strict "scientific" outlook would impact on questions of physical impossibility but not on those cases where impossibility depends on the concepts involved. For example, given our definition of marriage, it would still be impossible for a gift "to the future wife of X" to vest outside the perpetuity period.

traditional inexorable application of the Rule avoided the need to draw the line in difficult borderline cases. The pencil may be thrown away, since no possibility can be treated as too unlikely to consider. Thus in *Re Deloitte*,[32] Tomlin J. described the conclusive presumption of fertility as being "not a blind technicality" but "a principle of public utility forbidding for the purpose of determining legal rights the employment of an inquiry of a kind often detrimental to prosecute and difficult if not impossible to answer".[33]

Although the drawbacks of Gavan Duffy J.'s common-sense approach have been noted, it still seems to represent an improvement on the attitude taken in the old English cases. It is probably better to be inconsistent but sensible than it is to be consistent but absurd. However, it is now necessary to comment on a change in the law which impacts on the application of Gavan Duffy J.'s dictum.

Statutory Complications

Formerly, when considering a disposition "to the first child of Aunt Mathilda to marry," one did not have to worry about the possibility of the intrepid old lady adopting a child. This was because the law presumed, in the absence of contrary evidence, that the word "child" in a disposition did not extend to children who were adopted after the will or other instrument was executed.[34] However, this presumption was reversed by Section 27(4)(b) of the Status of Children Act, 1987 which states that:

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[32] [1926] Ch. 56.

[33] Ibid, 66. Gray, *The Rule Against Perpetuities*, (4th Ed., 1942) at p.214 explains the irrebuttable presumption of fertility on the basis of the "difficulty and delicacy of determining the question involved." Leach and Morris, op. cit. supra, at pp. 83-84, attribute this concern for "delicacy" to Victorian notions of propriety.

[34] See Adoption Act, 1952., s.26(2). No difficulty was caused by the fact that, under the Legitimacy Act, 1931, a future marriage of Aunt Mathilda might legitimate a child. This child would of necessity (since we are assuming she is now past the age of child-bearing) have already been born at the time the disposition takes effect and so would qualify as a life in being.

> An adopted person shall, unless the contrary intention appears, be entitled to take under a disposition made after the commencement of this Part in the same manner as he would have been entitled to take if, at the date of the adoption order, he had been born in lawful wedlock to the person or persons who so adopted him.

Therefore, it is possible that Aunt Mathilda could have a "child", within the terms of the disposition, by means of a future adoption. Even if she is unable to conceive a child at her advanced age, this possibility of adoption will be fatal under the Rule Against Perpetuities.

There would not appear to be anything in the Adoption Acts to preclude a woman of advanced years from adopting a child.[35] Presumably this would be most likely to happen in practice if the woman were a relative of the child, e.g. the grandmother. The conclusion must be that, even if one accepts the approach of *Exham* v. *Beamish*, a bequest "to the first child of Aunt Mathilda to marry" will be invalid irrespective of her age or fertility. Thus the practical effect of Gavan Duffy J.'s intervention seems to have been nullified.

Has the Status of Children Act also revived the precocious toddler conundrum? It should be remembered that this problem could only be raised by a very unusual disposition and is of lesser practical importance.

Whatever the position in relation to an elderly person, it seems repugnant to common-sense to suggest that a person far too young to conceive a child would be permitted to adopt one. However, it does seem to be theoretically possible under the present Adoption Acts. Under the Adoption Act, 1991, the minimum age at which a person can adopt is normally 21. However, if the applicants are a married couple and one of them is the mother or father or merely a relative of

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[35] Shatter, *Family Law in the Republic of Ireland*, 3rd Ed., 1986 at p.296 comments as follows: "Although the Acts do not do so, in practice, most adoption societies fix an upper age limit of 40 years, though this is not always rigidly adhered to. Much depends on the circumstances of the applicants who seek an adoption order." No upper age limit is set in the Adoption Act, 1991, which revised the minimum age requirements.

the child, only one of them need have attained the age of 21.[36] Also, while s.1(1) of the Marriages Act, 1972 requires both parties to a marriage to be over 16, under s.1(3) of the Act the President of the High Court may grant an exemption from this sub-section "if the applicant shows that its grant is justified by serious reasons and is in the interests of the parties to the intended marriage."

It seems that a far-fetched scenario could be constructed which would invalidate the gift in *Re Gaite's Will Trusts*[37] if it fell to be considered under current Irish law, even if it was accepted in the spirit of *Exham* v. *Beamish*, that a five year-old is unable to conceive a child. The fatal possibility would be that, with the permission of the President of the High Court, the precocious toddler would marry a 22 year-old, and then, together with his new spouse, adopt a child who was either her child, or one of his or her relatives. This child could possibly have been born after the death of the testator and so could not qualify as a validating life in being.

Thus it seems that, courtesy of the Status of Children Act, both octogenarians and toddlers are theoretically back in the parental stakes.

Legal Impossibility

The final question raised by this reflection on the Rule seems to have been little explored, so that it may be more difficult to be categorical about the conclusions reached. We saw that adoption was legally possible for an elderly person and, by a more tortuous route, also for a very young person. But why would it have mattered if the present law made it impossible for an eighty year-old or a five year-old to adopt a child? Since the Rule requires us to consider all

[36] S.10(5). Under the old law, the only situation when one of the spouses could be under 21 was if the wife was the mother of the child: Adoption Act, 1952, s.11(3)(c) (now repealed). This meant that it was only a male who could, in theory, adopt when he was too young to have a child himself.

[37] Supra.

eventualities, how could we have ignored the possibility that shortly after the death of the testator an Act might be rushed through parliament, changing the law on adoption to remove these pieces of ageism from the statute-book?

The conventional wisdom is that the law is unwilling to take cognizance of physical impossibility but will not ignore legal impossibility. This proposition seems to rest largely on the authority of *Re Gaite's Will Trust*.[38] Here, as we have discussed, Roxborough J. declined to hold that a child aged five was incapable of having a child. However the judge found a devious way of upholding the gift. He argued that a child under sixteen was not permitted by the law of England to marry, so that his offspring would not be legitimate and would not, as the law then stood,[39] have qualified as a "child" when construing the will.[40]

But why not consider the possibility that the law in relation to marriage might change, making it possible for a five year old to marry? This question was not considered by Roxborough J. nor is it adverted to in the leading textbooks on Perpetuities. The answer appears to be regarded as too obvious to merit discussion: If we cannot assume a constant legal substructure, everything becomes uncertain thus making the application of the Rule impracticable.

For example, consider a gift "to X if he marries." No-one would suggest that this gift was invalid under the Rule, since, as the law now defines marriage, we will know during X's life whether or not he will marry. However, if we had to take account of possible changes in the law,

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[38] [1949] 1 All E.R. 459. See also the case of *Re Atkins' Will Trusts* [1974] 2 All E.R. 1, where, on the basis that "equity treats as done that which ought to be done", Pennycuick V.-C. refused to take account of a possibility which would necessarily involve a breach of trust by the testator's trustees.

[39] In England, references to "children" were to be taken to exclude illegitimate offspring in the absence of a contrary intention, until the law was changed by the Family Law Reform Act, 1969. A similar reform was effected in Ireland by ss.3 and 27 of the Status of Children Act, 1987.

[40] This reasoning has been criticised on the basis that the child might have acquired a domicile and married in some foreign country where the legal age for marriage was less than sixteen. See Morris, "Rule Against Perpetuities and the Age of Marriage", (1949) 13 Conv. (n.s.) 289.

it would be easy to construct a possibility which would defeat the gift. For example:

> The day after the death of the testator a law could be passed which provided that a man would be deemed "married" to the first woman who placed flowers on his grave on the fiftieth anniversary of his death. Then, fifty years after the death of X, who was the only possible validating life in being, the grand-daughter of his childhood sweetheart could lay a wreath over the resting place of his bachelor bones, causing the gift to vest in him outside the perpetuity period.

The argument would be that, since every disposition could be invalidated by imagining a change in the law which altered the concepts underlying the contingency involved, it is necessary to ignore the possibility of a change in the law when applying the Rule.[41]

There does not seem to be any escape from this argument.[42] Yet it does not sit comfortably with the traditional grim determination to take account of all possibilities, however ridiculous. A Rule based on the inexorable consideration of all possibilities loses some of its credibility once it is conceded that is necessary to ignore a whole class of perfectly feasible possibilities because to admit them would make the Rule unworkable. It should also be remembered that, although in applying the Rule we are compelled to ignore the possibility that a change in the law will affect the vesting of the gift, in deciding when a gift (valid under the Rule) actually does vest, we cannot ignore changes in the law. This means that it could happen that a

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[41] In the spirit of the Rule, it cannot be important whether a given change in the law is likely or even imminent - we are concerned with possibility not probability. Moreover, it is not only a change in the law which could alter the concepts involved in a contingent gift. To take one simple example, consider a gift to the first child of Y, a young bachelor, "who shall win the Murphy Cup", a competition run for the last fifty years by the local tennis club for players aged under 18. This gift would seem to be valid under the Rule since apparently it must vest, if at all, within 18 years of the death of X. But what of the possibility that the committee of the tennis club might, at some stage in the future, alter the rules of the competition to allow players of all ages to enter? The definitions central to many contingent gifts could be altered by a change in non-legal rules. Must we also ignore the possibility of this kind of change?

[42] Intuitively, it would not seem unreasonable in considering the disposition in *Re Gaites*, supra, to take into account a possible change in the law relating to the minimum age for marriage, which would operate prospectively and would have only an indirect impact on the definition of a "child". However, it does not seem possible to develop a tenable distinction which would allow one to take account of this kind of legal change but ignore the kind of extreme possibility discussed in the example in the text.

gift, which has survived the application of the Rule Against Perpetuities because we have ignored the possibility of a change in the law, could actually vest outside the perpetuity period due to that subsequent (perhaps long expected) change in the law. This casts doubt on the "relentless logic" which has led English judges to ignore the laws of nature to avoid the slightest theoretical possibility that a gift might vest outside the perpetuity period.

Oliver Wendell Holmes pointed out that "the life of the law has not been logic; it has been experience".[43] This remark could be dangerous in the wrong hands, but it seems fair to apply it to the present discussion. Once the law moves too far from its foundation in the ordinary lives of people, it loses its way. The Rule Against Perpetuities sees an attempt by the law to create a theoretical model which will be applied with mathematical precision. Unfortunately not only is the result unsatisfactory because of its divorce from real life, it is also imperfect as a logically consistent system.

Conclusion

It was suggested in the previous section that, in the context of the Rule, lawyers are telling the world that they are willing to countenance any possibility, however absurd, except for the possibility that the law itself might change. One hopes that the possibility of legal reform in the real world is not quite so remote.

There is a danger that the modification of the rule by statute may further increase the complexity of the area by requiring one to grapple both with the old law and new statutory regime. The better course might be to abolish the rule entirely, consigning the whole nightmare to the bottomless "magic gravel pit" of oblivion. It is difficult to imagine that the benefit, to lawyers and the public alike, achieved by this rationalisation and simplification of the law would

[43] *The Common Law* (1881), Lecture I.

be offset by any harm caused by the absence of the Rule.

This note has challenged the Rule on its own terms, arguing that the problems of physical and legal impossibility undercut the Rule's claim to represent a coherent logical structure. It has also presented the case of "the adopting octogenarian"[44] as one more small reason for reform. After all, who could be so heartless as to resist the plight of a frail old lady, particularly when she has just taken on the responsibilities of motherhood?

[44] Along with that of her youthful sidekick, "the adopting toddler."