Scottish Law Commission

promoting law reform

(DISCUSSION PAPER No 142)

Discussion Paper on Accumulation of Income and Lifetime of Private Trusts

discussion paper

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The Commission would be grateful if comments on this Discussion Paper were submitted by Friday 9th April 2010.

Please ensure that, prior to submitting your comments, you read notes 1-3 on the facing page. Comments may be made on all or any of the matters raised in the paper. All non-electronic correspondence should be addressed to:

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[1] Amended by the Scotland Act 1998 (Consequential Modifications) (No 2) Order 1999 (SI 1999/1820).

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Part 1 Introduction

Trust law review

1.1 This Discussion Paper deals with the accumulation of income and the lifetime of private trusts. It forms part of our review of trust law.[1]

Advisory group

1.2 We continue to be assisted by an advisory group comprising both practitioners and academics, whose members are listed in Appendix E. Members of the group have discussed the policy set out in this Discussion Paper. We are very grateful to them for their helpful and practical comments.

Purpose of the Discussion Paper

1.3 The purpose of this Discussion Paper is to consider whether the permitted duration of trust purposes should be restricted by law, and if so what form that restriction should take. At first sight this might appear an issue of limited interest, of concern only to those with a specialised practice in the law of trusts. We think, however, that the subject is of general interest and importance for two principal reasons. In the first place, it raises a fundamental policy issue, namely the extent to which the present generation can tie up property long into the future, thus removing the freedom of future generations to do as they wish with that property. This is the so-called problem of 'dead hand' control. We think that it raises a significant moral problem, and we consider it at some length in Parts 3 and 5 of this Discussion Paper. Secondly, the issues raised in the Discussion Paper are of economic importance. Trusts are widely used as vehicles for both investment and financial planning. They are particularly significant for the Scottish economy, where financial services form a major sector. It is accordingly essential that Scottish trust law should be, and should be perceived as being, suitable for use in contemporary financial and economic conditions. The current restrictions on the duration of trust purposes, the rule restricting the accumulation of income and the rule restricting successive liferents, date from the end of the 18th century[2] and the mid-19th century.[3] They can readily be seen as anachronistic in today's economic and financial world.

1.4 The economic importance of trusts is clearly recognised in a report to the relevant Minister in Jersey on the Trust Law in that jurisdiction:

> "Trusts are one of the key products used by the Island's finance industry. [ ] Since 1984, the world of trusts has evolved at a rapid pace. Increasing numbers of

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[1] We have already published 6 discussion papers: *Breach of Trust* (No 123), *Apportionment of Trust Receipts and Outgoings* (No 124; both published in 2003), *Trustees and Trust Administration* (No 126; 2004), *Variation and Termination of Trusts* (No 129; 2005), *Nature and Constitution of Trusts* (No 133; 2006) and *Liability of Trustees to Third Parties* (No 138; 2008). Our Report on *Variation and Termination of Trusts* (Scot Law Com No 206) was published in 2007.

[2] Accumulations Act 1800. See paras 2.15-2.18.

[3] Entail Amendment Act 1848, the so-called Rutherfurd Act. The rule began as an anti-avoidance provision in the law of entails. See paras 2.38-2.40.

> jurisdictions have targeted the trust market. [ ] Legislation itself has developed apace, with jurisdictions keen to develop the concept of a trust and offer flexibility and ease of use wherever possible. [ ] It is important to amend the Trust Law to keep pace with these changes and so maintain and where possible enhance the Island's attractiveness as a place in which to do funds business."[4]

We think that these considerations apply equally to Scotland.

Note on terminology

1.5 We are concerned in this Discussion Paper both with *inter vivos* trusts (ie those set up by a truster[5] which come into force during his or her lifetime) and testamentary trusts (ie those established by a testator in his or her will). In order to avoid undue repetition we generally refer only to *trusters* but, unless the context clearly suggests otherwise, this should be understood as including testators too. In addition, we make frequent references to *liferents*.[6] They broadly correspond to life interests in common law systems, and may either be set up by trust ('trust liferents')[7] or not ('proper liferents'). We briefly discuss the proper liferent in the context of civil law systems in Appendix B.[8]

Structure of the Discussion Paper

1.6 In Part 2 we give an account of the present law relating to both accumulations of income and successive liferents. The common law attitude to long-term or perpetual trusts was that in general such trusts were upheld. The existing restrictions on trust purposes are statutory in origin, as explained below. The choice of period is governed by detailed rules.[9]

1.7 The accumulation of income is restricted to one of six specified periods.[10] The four original periods were laid down in the Accumulations Act 1800.[11] These were the life of the granter, 21 years from the death of the granter, the minority or minorities of any person or persons living or *in utero* at the death of the granter, and the minority or the respective minorities of any person or persons who, under the relevant trust deed, would be entitled if of full age to the income directed to be accumulated. That prohibition is now contained in section 5 of the Trusts (Scotland) Act 1961. The Law Reform (Miscellaneous Provisions) (Scotland) Act 1966 added two further periods: 21 years from the date of the making of the trust deed, and the minority or respective minorities of any person or persons living or *in utero* at that date.

1.8 The restrictions on successive liferents were originally contained in the Entail Amendment Act 1848; they were intended as an anti-avoidance provision in the law of entails.[12] Sections 47, 48[13] and 49 of the Entail Amendment Act 1848 are still relevant to deeds executed on or before 25 November 1968. In relation to deeds executed after that

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[4] This extract from the Report to the Minister for Economic Development is quoted at fuller length in Appendix A, para 22.
[5] The truster is generally termed the settlor in common law systems.
[6] For a discussion of liferents see Stair, vol 13, paras 1608-1609 and vol 18, para 74; and GL Gretton and AJM Steven, *Property, Trusts and Succession* (2009), ch 21.
[7] They are sometimes called 'improper liferents'.
[8] See para 3 of Appendix B.
[9] *Ibid*.
[10] See paras 3.21-3.27 for a discussion of how the period applicable in a given case is determined.
[11] The so-called Thellusson Act.
[12] See paras 2.36-2.46.
[13] As amended by s 9 of the Trusts (Scotland) Act 1921.

date, however, the law is now contained in section 18 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968. The statutory rule is, in summary, that a liferent can only be created in favour of a person who is living or *in utero* at the date when the deed creating the liferent comes into operation. If a liferent is created in favour of any other person, that person is entitled to a right of fee either as soon as the liferent comes into operation or, if later, when he or she attains majority.

1.9 We also deal with two common law rules. The first of these is the so-called rule in *Frog's Creditors.*[14] This has now been largely superseded by statute: section 8 of the Trusts (Scotland) Act 1921.

1.10 Secondly, we consider the grounds on which at common law the Court of Session is prepared to interfere with trust purposes.[15] These can be summarised as unintelligibility, impracticability and unreasonableness. The principle that unintelligible, impracticable or unreasonable trust purposes will be struck down may still be of some importance, and we propose that it should be used to deal with the most extravagant forms of long-term trust that may be created.

1.11 In Part 3 of the Discussion Paper we consider criticisms of the current law. We suggest that the existing rules have proved excessively technical and complex in their operation. They are not widely understood, and it is easy to infringe the prohibitions inadvertently. Although the rules are precise in their formulation, their application in practice is frequently uncertain, and they have produced a large amount of litigation. Moreover, both rules have proved inflexible and arbitrary in their practical operation, and both can be said to frustrate perfectly reasonable trust purposes.

1.12 In addition, the policy reasons that originally underlay both rules are no longer valid. The Accumulations Act 1800 was a reaction to one particular will and ensuing litigation, and a major concern appears to have been the possibility that large landed estates would be built up, according substantial political and economic power. That reason no longer appears valid. The rule restricting successive liferents was originally designed, in the Rutherfurd Act of 1848, as an anti-avoidance measure in the legislation on entails. That reason too no longer seems valid.

1.13 A further concern in the past was that long-term trusts would inhibit the proper economic exploitation of assets. We accept that there might be in force in this consideration when trustees' investment powers were limited, but that is no longer the case.

1.14 The most significant of the modern arguments for restricting the lifetime of trust purposes is the prevention of so-called 'dead hand' control.[16] In short, this is that a truster, in disposing of his property, should not unduly fetter the liberty of future generations to deal with that property as they think fit, in the light of circumstances then prevailing. We accept that there is some validity in this argument; we consider that a balance must be struck between the freedom of a truster to do as he wishes with his property and the freedom of

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[14] *Frog's Creditors v His Children* (1735) M 4262; 3 Ross' Leading Cases 602. The rule is developed and explained in *Newlands v Newlands' Creditors* (1794) M 4289; 3 Ross' Leading Cases 634. See paras 2.47-2.58.
[15] See paras 2.59-2.76.
[16] This is often associated with the work of Professor Lewis M Simes.

future generations to use that property as they think best. We deal with this matter further in Part 5 of the Discussion Paper.

1.15 Finally, in Part 3 and Appendix C we consider the philosophical arguments that have been deployed in recent academic literature in relation to this area of the law. We reach the conclusion that, apart from the 'dead hand' arguments deployed in particular by Professor Simes in articles published in the 1950s,[17] none of these is of great assistance in providing a practical answer to how the law should deal with the duration of trust purposes.

1.16 In Part 4 of the Discussion Paper we give consideration to comparative material drawn from other legal systems. Details of the law in other systems is contained in Appendices A and B; Appendix A deals with the restriction of accumulation and Appendix B with restrictions to liferents and the equivalent. In summary, nearly all legal systems that recognise the trust as a legal institution have in the past imposed restrictions on the duration of trust purposes, in the form of the English rule against perpetuities and a rule restricting accumulation broadly along the lines of the Accumulations Act 1800. The Scottish rule restricting successive liferents can be seen as fulfilling a function corresponding broadly to that of the rule against perpetuities. An exception is South Africa, which has never had either a rule against perpetuities or a rule restricting accumulation, and does not appear to have suffered in consequence.[18] Since 1983, a significant number of jurisdictions have either abolished rules of this nature or have substantially reduced their impact by, for example, lengthy extensions of the perpetuity period that is allowed by law. The restrictions on the duration of trust purposes were abolished entirely in Manitoba in 1983; Jersey and Guernsey did the same in 2006 and 2007 respectively; and Saskatchewan has recently enacted legislation to the same effect. Several US states have done the same, although the chief motivation there is to take advantage of provisions in the Federal Tax Code that favour perpetual trusts. In South Australia, the Law Reform Commission recommended in 1984 that both the rule against perpetuities and the rule restricting accumulation should be abolished, and this was enacted in 1996. This reform was, however, subject to a power in the Court to order the early vesting of property if it has not vested within 80 years of the date of the disposition of property that suspends vesting. In the Republic of Ireland the Law Reform Commission in 2000 recommended abolition without replacement of both the rule against perpetuities and the rule restricting accumulation, and a bill enacting those recommendations was passed in July 2009.[19] Finally, in England and Wales the Law Commission recommended in a report of 1998 that the statutory rule restricting accumulation should be abolished and that the rule against perpetuities should be amended to provide a single perpetuity period of 125 years, subject to a 'wait and see' provision. Those recommendations are now contained in the Accumulations and Perpetuities Act 2009.[20]

1.17 In Part 5 of the Discussion Paper we consider whether the law should impose restrictions on the duration of trust purposes and, if so, what form those restrictions should take. In summary, our proposals are as follows:

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[17] See Simes, *Public Policy and the Dead Hand* (1955).
[18] South Africa does, however, impose limits on the duration of successive life interests: see Appendix B, paras 52-56.
[19] Land and Conveyancing Law Reform Act 2009.
[20] See http://services.parliament.uk/bills/2008-09/perpetuitiesandaccumulations.html (last accessed on 4 December 2009) for a useful history of the bill's passage, which was completed on 2 November 2009. It received royal assent on 12 November 2009.

1. Trusts set up for commercial purposes should be entirely free of any statutory restrictions on their duration, whatever happens in respect of ordinary private trusts. This would apply to trusts found in pension schemes, life assurance policies, partnership agreements and the like.[21]

2. The existing restrictions on the duration of trust purposes should be abolished for private trusts. The rules are technical, complex and uncertain, and are arbitrary and inflexible in their operation. This reflects moves in other jurisdictions to abolish or relax equivalent rules.[22]

3. Scots law should not adopt any other rule that restricts the duration of trust purposes to a fixed period or requires that vesting should take place within a fixed period. If the term permitted for the duration of trust purposes is short, the criticisms that apply to the existing Scottish rules would continue to apply. In particular, the results of any such rule are likely to be arbitrary, and the rule would be inflexible in its operation. In addition, it would set traps for the unwary testator or draftsman. If, by contrast, the term permitted for the duration of trust purposes is long, it is difficult to see that anything is achieved by comparison with regimes such as that in Manitoba which do not impose any time limits.[23]

4. Despite our view that rules restricting the duration of trust purposes to a fixed period are undesirable, we remain concerned by the 'dead hand' problem. We consider that this is a real problem: there is a fundamental conflict between the desire of a truster to dispose of his own property as he wishes and the interest of future generations in making the best use of the world's resources in contemporary conditions. Moreover, this is a dilemma that extends to all long-term trusts, not merely those that provide for long periods of accumulation or long sequences of successive liferents. The critical question is whether it is possible to provide an effective solution to the dilemma.[24]

5. In analysing this dilemma, we are of opinion that the principal mischief arising out of 'dead hand' control is the difficulty that a long-term trust has in dealing with changes of circumstances. At a practical level it is when circumstances change that the undesirable effects of the dead hand become apparent. We accordingly consider that the solution to the dilemma should lie in dealing with changes of circumstances.[25]

6. Our suggested solution to this problem is that, when a private trust has been in existence for 25 years or longer, the Court of Session should have power to alter its purposes in order to take account of any material changes of circumstances that have occurred since the trust was created. The permitted

[21] See paras 5.2-5.5.
[22] See paras 5.8-5.9.
[23] See para 5.23.
[24] See paras 5.16-5.21 and 5.51.
[25] See paras 5.26 and 5.38.

alterations would be those that are clearly expedient to deal with a relevant change of circumstances.[26]

7. This jurisdiction would confer a discretion on the Court. We are of opinion that, in exercising that jurisdiction, the Court should have regard to a number of factors, although none of these would be binding. Those factors are:

   (i) the intentions of the truster, so far as these can be ascertained;[27]

   (ii) the extent to which beneficiaries and trustees have consented to the proposed alterations;[28]

   (iii) whether the proposed alterations can be considered fair, objectively speaking, as among the existing beneficiaries and members of the truster's family and the children, including subsequently born children, of existing beneficiaries and members of the truster's family.[29]

8. Private trusts are almost invariably set up in order to benefit a family, usually the truster's. We are of opinion that this factor should be taken into account in the proposed jurisdiction. This is why, in considering whether the proposed alterations can be considered fair, regard may be had not only to the beneficiaries but to all members of the truster's family. For the same reason, we are of opinion that the petitioners who may initiate an application to the Court should not be confined to the existing beneficiaries and trustees but should extend to all members of the truster's family (although that is without prejudice to the strength of the case that any such petitioner may present; in this respect nomination as an actual or potential beneficiary may be important). All competent petitioners should also be entitled to appear as respondents.[30]

9. We propose that a period of 25 years should elapse before the proposed jurisdiction of the Court can be exercised, although we invite comments on whether that is a suitable period. We suggest that some such period is necessary for three reasons. First, the proposed jurisdiction is designed to deal with long-term trusts, and it cannot be said that a trust is in fact long-term until a substantial number of years have elapsed after its creation. Secondly, the requirement that a substantial period should elapse would help to avoid early applications by dissatisfied members of the family, and to emphasise that it is necessary that there should be a genuine change in circumstances before an application is made. Thirdly, the proposed jurisdiction does not require the consent of the beneficiaries of the trust, and we think that an initial delay is needed to achieve a proper balance among those interested in the trust. We consider a period of 25 years to be appropriate on the basis that that can be considered a 'short' generation, so that the members of family at

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[26] See paras 5.30-5.32.
[27] See paras 5.27 and 5.39-5.40.
[28] See para 5.29.
[29] *Ibid*.
[30] See paras 5.35-5.37.

that point are likely to differ from those that the truster knew when the trust was set up.[31]

10. The Court should retain its existing power to reduce any trust purpose on the ground that it is unintelligible, impractical or unreasonable. That jurisdiction should continue to be exercisable at any time.[32]

11. The common law rules in *Frog's Creditors v His Children*[33] and *Newlands v Newlands' Creditors*[34] should be abolished and section 8 of the Trusts (Scotland) Act 1921 should be repealed. When property is conveyed to one person in liferent and to a person who is non-existent or unidentifiable in fee, the liferenter should take a liferent interest (but no more) and the conveyance of the fee should fail.[35]

Legislative competence

1.18 The proposals in this Discussion Paper relate to the probated duration of trust purposes in private trusts. That is not a reserved matter under the Scotland Act 1998, and it accordingly lies within the legislative competence of the Scottish Parliament.

1.19 In our view our proposals, if enacted, would not give rise to any breach either of the European Convention on Human Rights or of Community law.

[31] See paras 5.30-5.32.
[32] See paras 5.73-5.74.
[33] (1735) M 4262; 3 Ross' Leading Cases 602. See paras 2.47-2.58 for a discussion of these rules.
[34] (1794) M 4289; 3 Ross' Leading Cases 634.
[35] See paras 5.58-5.68.

Part 2 The present law

Introduction

2.1 Scots law does not restrict the length of time for which a trust may exist, other than in exceptional circumstances.[1] However, there are rules that prevent trusters from imposing conditions which remain binding on the trustees for long periods after the trust is established. (This is sometimes called 'dead hand' control.) These rules are two-fold: there is a rule restricting the period during which income may be accumulated into capital and there are rules restricting the creation of future interests.

2.2 Almost all of the rules are statutory. The majority are contained in statutes from the 1960s, although they are generally re-enactments of earlier statutory provisions which date back, in some cases, over two centuries. This means that much of the underlying policy was debated and settled in the distant past. So, in order to have a full understanding of what the current law is, we consider it to be essential to explore its origins. In the course of tracing the legal history it will become clear that, whilst the Scots law rules in this area are distinctive, the influence of English law, especially in relation to the rule restricting accumulation of income, is strong. In addition, as the accumulations rule was widely received across the common law jurisdictions, including by many in the United States of America, Canada and Australia, we have found it beneficial to undertake a comparative law study, which is in Part 4 and Appendix A. Appendix B also contains comparative material, which is of relevance to the rules against successive liferents.

2.3 In this Part we examine four related rules, together with their history: first, the rule restricting accumulation of income,[2] then two rules restricting the creation of future interests, and lastly the rule regulating long-term and perpetual private trusts.

Accumulations of income

Introduction

2.4 Income from trust assets must either be distributed, retained as income or accumulated.[3] If it is accumulated it becomes additional capital of the trust,[4] in turn (usually) generating future income.[5] It has long been accepted that the rule restricting accumulation, and particularly the restriction on the period for which income may lawfully be accumulated,

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[1] See paras 2.59-2.76 for a discussion of the exceptions. We are dealing here with private trusts.

[2] This rule is also known as the rule against excessive accumulations (eg in the Law Commission Report on *Perpetuities and Excessive Accumulations*) and also as the rule against accumulations (eg in Morris and Leach). We do not find these entirely satisfactory: the rule imposes certain limits on the power to accumulate but is not otherwise *against* it, and 'excessive' is an unnecessarily loaded term, in our view.

[3] Individual trust deeds may restrict the choice further.

[4] "Accumulation to my mind involves the addition of income to capital, thus increasing the estate in favour of those entitled to capital and against the interests of those entitled to income": *Re the Earl of Berkeley* [1968] Ch 744 at 772, per Harman LJ.

[5] For a general discussion of the distinction between trust income and capital see the Scottish Law Commission's Discussion Paper on *Apportionment of Trust Receipts and Outgoings* (No 124; 2003), and also the recent Law Commission Report on *Capital and Income in Trusts: Classification and Apportionment* (Law Com No 315; 2009).

is an important aspect of trust administration and law, with potentially serious consequences for any breach.[6] However, until the Accumulations Act 1800, whose origins and effect are discussed later in this Part,[7] the law in this area barely seems to have been the subject of note or litigation. Questions relating to accumulations, to the extent that they ever arose, were simply considered under the umbrella of the wider question of whether the trust itself was lawful. In English law, this almost invariably involved consideration of what has become known as the rule against perpetuities; in Scotland, where the attitude of the common law to perpetuities is "one of indifference and even benevolence",[8] the focus was on issues such as the public policy considerations under the common law.[9] As the statutory rule restricting accumulation originated in English law and, in its original enactment, only extended in part to Scotland, it is helpful to look briefly at the English rule against perpetuities.

2.5 The rule against perpetuities has two forms, one at common law and a statutory form.[10] The classic statement of the common law rule, which can be traced back to *The Duke of Norfolk's Case* in the late 17th century,[11] is:

> "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."[12]

The rule was modified, by statute, in 1964.[13] There were two important modifications. The first was the introduction of the so-called 'wait and see' principle. This provides that, if there is a chance that a future interest in property will vest within the perpetuity period, however remote the chance may be, you wait and see whether it does in fact so vest. If it does, the rule is not breached. Only if the interest does not in fact vest within the permitted period, or it is clear at any stage that it cannot do so, does the common law rule apply, with the result that the future interest is void from the outset. The second modification is the introduction of an alternative perpetuity period to that of a life or lives in being and 21 years. The alternative is a fixed period, not exceeding 80 years, as may be specified in the trust deed. The advantage of this is that the truster can be sure in advance what the perpetuity period will be, thereby eliminating the risk that it will be unexpectedly shortened by the premature death of a life in being.

Common law of accumulations

2.6 In English law, prior to the Accumulations Act 1800[14] it was lawful to provide for the accumulation of income for any period falling within the perpetuity period. This is illustrated

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[6] See para 3.26 for an example.
[7] See paras 2.15-2.18.
[8] *Muir's Trs v Williams* 1942 SC 5 at 11, per Lord President Cooper. See also Burgess, pp 17-23. Burgess regards the passage from which Lord Cooper's quotation is excerpted as "typical of so many modern rationalisations of the attitude adopted by the common law to perpetuities, perhaps induced by some fear of 'the sinister influence of the English rule against perpetuities' being introduced into Scots law" (pp 17-18, with footnotes omitted).
[9] See paras 2.59-2.76 for a full discussion.
[10] What follows is a very brief summary of a complex area of law. For a good introduction, see the Law Commission Report on *Perpetuities and Excessive Accumulations*.
[11] (1681-5) 3 Chan Cas 1; 22 ER 931; 2 Swans 454; 36 ER 690; 1 Vern 163; 23 ER 388.
[12] Gray, p 191.
[13] See the Perpetuities and Accumulations Act 1964, especially ss 1(1) and 3(1). As this Act was not retrospective the common law still applies to instruments taking effect before 16 July 1964. (Similarly, the Perpetuities and Accumulations Act 2009 is not retrospective. See Appendix A, paras 32-34, for a brief discussion of this Act.)
[14] See paras 2.15-18.

by a passage from Lord Chancellor Eldon's speech on the Thellusson litigation, discussed more fully later in this Part:

> "If the law is so as to postponing alienation, another question arises out of [Mr Thellusson's] Will; which is a pure question of equity: whether a testator can direct the rents and profits to be accumulated for that period, during which he may direct, that the title shall not vest, and the property shall remain unalienable; *and, that he can do so, is most clear law*."[15]

The rationale was that, if it is lawful to postpone vesting of the trust fund for a certain period, there is no reason to prevent the truster from directing that the fund contain not only the initial assets but also the accumulated income.

2.7 Although Scots law has no equivalent of the rule against perpetuities its rule on accumulation is similarly dependent on the validity of the underlying settlement. "At common law there does not seem to be any restraint upon the power of a settlor to direct the accumulation of the proceeds of his property, heritable or moveable, provided the purpose of the accumulation is rational, and capable of being carried into effect."[16] The decision in *M'Culloch v M'Culloch* is instructive.[17] John M'Culloch of Barholm, who owned, with his wife, a number of estates near Gatehouse of Fleet, created a series of settlements in the 1740s, shortly before his death. They included an entail and two trust deeds. The latter conveyed property to trustees with a direction to apply the rents for specified purposes and to do so for a period of 60 years after the death of the survivor of the truster and his wife. The heir and other surviving family members argued, soon after the truster's death, that the deceased had "sunk the rents of his estate for a great while after his death, and had locked them up, in order to raise irrational provisions for his younger great grandchildren, while in the meantime the heir of tailzie was left to starve, and without the possibility of obtaining a proper education"; the effect of the settlements, taken as a whole, was said to be "irrational, extravagant, illegal, and contra bones mores".[18] The court agreed:

> "M'Culloch of Barholm, at different times made several ridiculous entails of his estate upon his own children, whereby he allowed only a small pitiful aliment to his heirs of entail for a great number of years, and settled the rest in trust, the rents to be kept and applied in purchasing other lands, and entailing them on the same series of heirs, whereby his heirs, after some generations, might have a great estate, and the heirs in the mean time starve. This entail we unanimously reduced. *Interest rei publicae ne quis [re] sua male utatur*."[19]

From this brief report, quoted in full, it appears that the accumulations were not objectionable in themselves. Rather, it was the overall effect of the settlements, whereby income was to

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[15] *Thellusson v Woodford* 11 Ves Jun 112 at 146 (with emphasis added).

[16] M'Laren, p 306 (with footnote omitted). M'Laren goes on to note that a perpetual accumulation would not be tolerated: "The accumulation, it would seem, must be not only for a definite object, but also limited as to time and amount."

[17] *Dictionary of the Decisions of the Court of Session, reported by Patrick Grant of Elchies* (Edinburgh, 1815; Branch I of Appendix II, *sub nom* Tailzie, No 48). The decision is dated 28 November 1752.

[18] This is taken from the note to *Strathmore v Strathmore's Trs* (1831) 5 W & S 170 at 183-4. It sets out the terms of the various settlements and the arguments presented in court.

[19] *Dictionary of the Decisions of the Court of Session*, *supra*. The Latin sentence means that it is in the public interest that no-one should use his own possessions improperly. It is used in Justinian's Institutes in a passage on the relationship between master and slave, as justification for action which may be taken against a master for intolerable cruelty towards his slave: *Inst.* 1.8.2. It was later used, as here, in a more general family context. The Thellusson Act was seen as an illustration of the maxim: J Trayner, *Latin Maxims and Phrases* (4th ed, 1894).

be largely withheld from the living in favour of future generations,[20] which offended against the public interest and justified the court in reducing them.[21]

Peter Thellusson's will

2.8 Events at the end of the 18th century caused the common law to be superseded, in large measure, by statute.[22] The Accumulations Act 1800 was passed on 28 July 1800 towards the end of the first premiership of William Pitt the Younger. It is sometimes dubbed the Thellusson Act because it was enacted, as explained below, in response to a will drawn up in 1796 by Peter Thellusson.[23] The link between the will and the subsequent legislation is so close that the latter cannot be fully appreciated without some understanding of the former.

2.9 Born Pierre, Peter Thellusson was the third of four sons (and four daughters) born to Isaac de Thelusson.[24] (The spelling of the family name varied.) Isaac was a financier, head of the Paris branch of the Swiss banking firm of Thellusson. He was a close adviser to the Duke of Orléans, the Regent of France from 1715 to 1723, and from 1728 to 1744 was Genevan envoy at the Court of Louis XV. Peter (or Pierre) was born in 1735 and went to England in 1760 with a legacy of £12,000 from his father, who had died 5 years earlier. He must have also come with good credentials as he was naturalised very soon after arriving. He became a financial agent, for the Thellusson bank amongst others, and one of the main activities of the era was the financing of sea-cargo travelling within Europe or from the Caribbean to Europe. The likelihood of war, often between England and France, was a constant risk to the safe passage of the ships, many of which were French. This led to frequent litigation over contracts of insurance and a picture of Thellusson's activities can be built up from the reported cases in which he was a party.[25] In addition, Thellusson acquired interests in the sugar trade in the West Indies, buying plantations in Montserrat and Grenada.[26]

2.10 Thellusson married Ann Woodford[27] in January 1761, the year after his arrival in England. Initially they lived in London, close to his business in the heart of the City, but Thellusson was anxious to acquire land and, with it, influence and power beyond the realm of commerce. In 1778 he bought almost 100 acres of land at Plaistow, near Bromley in Kent. There he had a country house built, complete with hothouses. Then, after retirement, he bought an estate at Brodsworth, near Doncaster, in Yorkshire. It is reported that he paid £140,000 for it. Even after that purchase he did not rest and made an unsuccessful offer, in 1795, to buy a house in Henley.[28] But beyond the mere acquisition of property there lurked a

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[20] For further discussion of the reasons behind the decision see para 2.66.
[21] The petitioners argued that the settlements must stand or fall together. The court appears to have agreed and did not, for instance, examine whether the deed of entail (which formed a part of the settlement) should stand.
[22] See paras 2.59-2.76 for the common law rules which survive. It has been suggested that, but for the financial concerns in England around the turn of the 18th and 19th centuries due to the continuing wars with France, there may have been no reason to change the common law in any way: see Keeton, pp 156-157.
[23] Mr Thellusson's name has been chosen by history as the one associated with the rule restricting accumulation. However, he was by no means the only testator of his era whose will was drawn up in the way it was: see Keeton, p 164.
[24] There is much further information on the family, the will and its consequences in Polden.
[25] See Keeton, pp 144-145.
[26] Thellusson's second son became a director of the East India Company and one of his relations by marriage, Sir Ralph Woodford (who was later a trustee of the Thellusson trust), was appointed governor of Trinidad in 1812.
[27] The name is now inextricably linked with that of the Thellussons: much of the litigation following on from the will is reported as *Thellusson v Woodford*. Of the three trustees appointed under the will two were Woodfords.
[28] Of this failed bid Horace Walpole wrote: "I am not sorry that Thellusson has withdrawn – Lord Malmesbury [another would-be buyer] I hope is no banker and does not propose to buy the most beautiful villa in England to

strong desire for wider recognition within English society. One ambition was to join the peerage and Thellusson's sons took steps in that direction by seeking political office.[29] In the unreformed House of Commons seats could readily be bought, which is what Thellusson's eldest son, Peter Isaac, did in 1795. (Thellusson himself was ineligible to become an MP as he was not a natural born subject of His Majesty.) In the same year Charles, the youngest son, was also returned, after a genuine contest. The middle son, George, was unsuccessful in his bid.[30] But it was not until after Thellusson's death that the goal of his family entering the Lords was achieved when Peter Isaac became Baron Rendlesham on 1 February 1806.

2.11 Peter Thellusson's death came in 1797, when he was aged 62. Ann survived him, along with their three sons and three daughters. Some six years before his death Thellusson had transferred his business, both as a banker and as a merchant, to his sons and at that time he was considered to be one of the richest merchant bankers in England. His fortune at the time of death is estimated to have amounted to £800,000. However, it was not so much the size of the fortune but the terms under which it was to be distributed which aroused so much popular attention and concern.[31]

2.12 Thellusson's will was drawn meticulously and at length.[32] After directing that his funeral be conducted in a plain and decent manner and that his debts be settled as soon after his death as convenient, he made provision for his survivors – including over £2,000 a year to his widow and legacies of £12,000 to each daughter and £7,600 to each son,[33] and a number of specific legacies to other relatives – with the residue to be held in trust. As the residue amounted to around £600,000, a colossal amount of money,[34] the trust excited much interest.[35] The trustees were directed to accumulate the income generated by the trust assets and to invest it in further land. The accumulation was to continue until the death of the last survivor of specified classes of family members, whereupon the fund was to be split into three equal portions. One was to be taken by the eldest male lineal descendant of each of Peter Thellusson's three sons. To the dismay of the survivors, the effect of the will was that no person alive at the testator's death could be a beneficiary of the accumulated fund. Instead, the trust was to come to an end on the last death of:

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make money of it." (Polden, p 110). Whilst the tone no doubt partly reflects the character of the writer, it also presages the public hostility with which Thellusson's will was to be met in certain quarters.

[29] There was also some commercial attraction in being elected. For example, MPs enjoyed the privilege of having their mail franked for free. However, this particular abuse of expense allowances was stopped in 1795: see Polden, p 110.

[30] He was later successful in gaining a seat. The direction in which these efforts were heading and the effect on the established echelons of English society have been expressed thus: "Here, then, was a prospect to dismay peers and country gentlemen alike. A handful of boroughs purchased out of huge fortunes were the road to the peerage down which the Thellussons were travelling, perhaps to be followed by a train of bankers and brokers, a class already more influential than the landed interest cared for. And if, like Thellusson's, the accumulations were directed at land purchases, their huge estates would eventually dominate the countryside as well." (P Polden, "Panic or Prudence? The Thellusson Act 1800 and Trusts for Accumulation" (1994) NILQ 13 at p 20).

[31] The contemporary practices in relation to wills and the legal constraints on testators are discussed by Polden, pp 127-133.

[32] There is dispute as to who drew up the will, but Polden estimates that "it would have taken more than an hour and a half to read aloud at normal speed": Polden, p 135.

[33] The sons had already had substantial lifetime advances. The effect of the legacy was to give them each a total of £23,000. Thellusson's will says that "the provision which I have made for my three sons, and the very great success they have met with, will be sufficient to procure them comfort; and it is my earnest wish and desire, that they will avoid ostentation, vanity and pompous shew; as that will be the best fortune they can possess".

[34] By way of comparison, in 1790 Pitt secured a perpetual loan of £500,000 from the Bank of England. The money came from unclaimed dividends on government stock, totalling £547,000, held by the Bank (one of whose directors was Thellusson's eldest son Peter Isaac): see Keeton, p 154.

[35] Contrary to custom, Thellusson's widow and children publicly disclosed the main assets in the estate and their value: Polden, pp 257-258.

(i) the testator's three sons;

(ii) such of the testator's grandsons who were born (or conceived) during his lifetime; and

(iii) the issue of any predeceasing grandsons or of any grandsons falling within (ii) above, provided that any such issue was born (or conceived) during the testator's lifetime.

In the event of there being no beneficiaries – in other words, if none of his sons had a male lineal descendant at the point when the accumulations ceased – Thellusson directed that the estates be sold and the whole proceeds be paid to the Crown as a contribution to the sinking fund which Pitt had established with the aim of discharging the national debt.[36]

2.13 There was a fear that such an array of qualifying lives would result in the trust lasting for an inordinate length of time. This, coupled with the effect of compound interest, created consternation. (We now know, with the benefit of hindsight, that neither fear became a reality.)[37] The court report of the initial litigation says: "According to the lowest computation, supposing the survivor of the persons, during whose lives the accumulation was to continue, should live seventy years, the property at the end of that period, if improved at compound interest, at the rate of 5 per cent, would amount to above nineteen millions sterling. Other calculations upon different data carried it much higher."[38] In the event there were 9 qualifying lives, made up of the testator's three sons and six grandsons (including twins who were in the womb at Thellusson's death). The last died in 1856, so the trust lasted just less than 60 years and its final value fell far short of the predictions.[39]

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[36] Pitt had launched a reformed fund in 1786. The ensuing wars with France meant that the fund faced a Sisyphean struggle and it was wound up in the 1820s, long before the Thellusson trust came to an end. The ultimate beneficiary may – we do not know – have been chosen so as to encourage the authorities, including the courts, to take a favourable view of the will as a whole; but there is a reported case in which a contemporary of Thellusson's left a bequest in his will to the government "in exoneration of the national debt": *Newland v Attorney General* (1809) 3 Mer 684.

[37] It is, however, interesting to note the continuing fascination with what might have happened. During the passage of the Perpetuities and Accumulations Act 2009 Henry Bellingham MP said (without revealing the basis for his calculations): "Peter Thellusson died in 1797 and left the staggering sum of £600,000, equivalent to more than £200 million today. His will made it clear that all the income had to be rolled up and accumulated for ever, or at least for the whole life of the last survivor of his descendants living at his death. This formula could have taken us up to the 1950s. By then, with accumulation and compound growth, the sum could have increased to £20 billion-odd." *Hansard*, HC, vol 498, col 602 (2 Nov 2009).

[38] *Thellusson v Woodford* 4 Ves Jun 227 at 237-238.

[39] "Instead of the many millions which had been predicted so confidently in 1800, the accumulated estate in 1859 amounted to little more than half a million. The discrepancy was due, not to an error in arithmetic, but to the unflagging efforts of the Thellusson family and the legal profession." (Keeton, p 174). Or, in the words of Morris and Leach: "Thus the legal profession, mindful as always of the public weal, did its best to ensure that the accumulation did not exceed reasonable limits" (Morris and Leach, p 267, fn 5). And the legal system itself also played a part: Lord Chancellor Brougham said, in a House of Lords decision of 1831 (ie about half way through the life of the Thellusson trust): "[T]he Court of Chancery having got possession of the [Thellusson trust] property, this great accumulation, instead of nineteen millions, now is under £500,000! It is thirty-three years since; and what was an estate of near £20,000 a year at the death of Mr Thellusson is, I believe, little more than £22,000 at the present time; so well have they provided in Chancery for the prevention of an accumulation, which was [a] matter of alarm at the time, as threatening to overset the constitution. Effectual means have, it should seem, been found to moderate the rate of accumulation, so as to make it harmless enough to the state." *Strathmore v Strathmore's Trs* (1831) 5 W & S 170 at 192. The role of the Chancery Court was typically one of close involvement. "[The Court] would not decide a single doubtful point connected with the administration of a trust or the estate of a deceased person, without administering the whole estate": W Holdsworth, *A History of English Law* (3rd ed, 1966), vol ix, p 348.

2.14 The will was subject to immediate criticism and, no less swiftly, to litigation.[40] Nine months after the testator's death his family went to court to challenge the trust. If they had been successful (and we need to jump forward a number of years and much court time and expense to know that their suit failed) the trust assets would have fallen into intestacy, with the real estate being conveyed to Peter Isaac, as Thellusson's heir at law, and the personal estate distributed amongst the surviving family members according to the rules of intestacy. It appears that the testator, while confident of the validity of his settlement, had a reasonable suspicion that it may not be upheld. After setting out the terms of the trust the will continued:

> "As I have earned the fortune which I now possess with industry and honesty I trust and hope that the legislature will not in any manner alter my will or the limitations thereby created but permit my property to go in the manner in which I hereby dispose of it."[41]

Parliament did indeed respond to the will, though not retrospectively, by passing the Accumulations Act 1800.

The Accumulations Act 1800[42]

2.15 We have already seen that the Accumulations Act 1800 was aimed at dissuading testators from making a will of the type which Peter Thellusson devised.[43] It was sometimes known in its early years as Lord Loughborough's Act, after the Lord Chancellor who introduced it to Parliament. He had also been instrumental in deciding the litigation at first instance, and it is clear from the case report that he did not care for the way in which the will had been drawn. In his relatively short speech he said: "I have no difficulty in saying, the disposition is so unkind and so illiberal, that I think it no breach of duty in [Peter Thellusson's immediate family] to endeavour to set it aside, if they can by Law."[44] However, he held that the will did not infringe the rule against perpetuities and the rule restricting accumulation and so it must be upheld. "It is not for me", he said "to make a new law; and without making a new rule I do not know what to do; … I must hold myself bound by those rules, that are established, as it has been observed, as matter of positive law."[45] Unable to create new law from the bench he was active in doing so in Parliament.

2.16 Lord Loughborough laid his bill before Parliament only months after his decision in *Thellusson v Woodford* was handed down in April 1799. The bill was designed "to prevent the effects of posthumous avarice".[46] In debate, Lord Hawkesbury added that the measure was needed "lest too great a mass of property should be in the possession of the individual to the danger and injury of the State".[47] There was a prevailing feeling that accumulation for

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[40] Other than two early decisions, reported as *Thellusson v Woodford* 4 Ves Jun 227 (1799) and *Thellusson v Woodford* 11 Ves Jun 112 (1805), the course of the litigation is not of direct relevance for this Paper; it is summarised in Keeton, pp 164-174. It lasted, in its various strands, for about 60 years and is estimated to have generated more than 950 court orders and at least 780 reports, and to have cost a total of about £150,000: Polden, pp 397-398. A number of writers of fiction, including Dickens and Galsworthy, are thought to have derived inspiration from it: see Keeton, pp 138-142.

[41] *Thellusson v Woodford* 4 Ves Jun 227 at 235.

[42] The text is set out in Appendix D. It was given the title "Accumulations Act 1800" by the Short Titles Act 1896.

[43] Accumulations similar to those in Thellusson's will were, however, far from unknown at the time. Even after the 1800 Act was passed there were still wills drawn, either in ignorance of the Act or stubborn resistance to it, which directed accumulation for periods longer than permitted: see Keeton, pp 135-138 and 164.

[44] *Thellusson v Woodford* 4 Ves Jun 227 at 340.

[45] *Ibid* at 341.

[46] See Polden, p 191.

[47] *Ibid* at p 194.

an overlong time was dangerous, egotistical, callous and cruel. Moreover, Lord Loughborough told the house that several conveyancers had been instructed to draw up wills similar to Thellusson's.[48] The bill was passed by 50 votes to 3. It became law in July 1800, barely a year after the challenge by Peter Thellusson's family had been decided and five years before the House of Lords determined the appeal. By the time of the appeal Loughborough had been replaced by Lord Chancellor Eldon who, whilst appearing to share some of the aims of the legislation, considered it to have been passed in too much haste: "in some respects I would have corrected [it], if it had not come upon me rather by surprise".[49] Despite these perceived defects, the provisions of the Act remained substantially in force, domestically and in many overseas jurisdictions,[50] for more than two centuries.

2.17 The Act introduced tighter limits on the time during which an accumulation[51] is lawful. We have seen that under the common law income could be added to capital freely (provided that, where English law applies, the rule against perpetuities was not infringed)[52]. Under the 1800 Act accumulations could only be lawfully directed for one of four periods:

(i) the life of a grantor (or their lives, if there was more than one); or

(ii) 21 years from the death of the grantor(s); or

(iii) the minority, or respective minorities, of any person(s) alive or in the womb at the time of the death of the grantor(s); or

(iv) the minority, or respective minorities, of any person(s) who would, if of full age, be entitled to the accumulations.

Directions which infringe the rule were void: the income was to be paid to whomever who would be entitled to it had no direction been made.[53]

2.18 The restrictions summarised in the preceding paragraph were set out in section 1 of the 1800 Act.[54] Section 2 specified three exceptions: section 1 did not affect accumulations to pay a debt, to provide a portion for a child, or in respect of the produce of timber. The second of these exceptions, in particular, generated a great volume of case law.[55] (As section 2 was repealed, for Scots law, by the Entail (Scotland) Act 1914, and no replacement provision has been enacted,[56] we do not consider these exceptions further.) Section 3, which was repealed in 1848,[57] provided that the Act did not apply to dispositions of heritable property in Scotland, meaning that accumulations of income from Scottish heritage were subject only to the common law. The final provision, section 4, was a transitional measure.

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[48] *Ibid* at pp 194-195 and fn 24 to that text.
[49] *Thellusson v Woodford* 11 Ves Jun 112 at 148.
[50] See Part 4 and Appendix A for a comparative law survey.
[51] Of "rents, issues, profits or produce" from "any real or personal property": 1800 Act, s 1.
[52] See paras 2.6-2.7.
[53] Very soon after the 1800 Act came into force it was decided that a direction which infringed the Act was only void for the excess: *Griffiths v Vere* (1803) 9 Ves 127. However, if the direction also infringed the rule against perpetuities it was wholly void.
[54] As explained in paras 2.25-2.27, the 1800 Act was (for Scots law) repealed by, and largely re-enacted in, the Trusts (Scotland) Act 1961.
[55] See, for instance, Morris and Leach, pp 281-289.
[56] See para 2.24. In English law, the exceptions, currently in s 164(2) of the Law of Property Act 1925, will be repealed once the Perpetuities and Accumulations Act 2009 comes into force.
[57] See para 2.21.

The Act applied to all future wills and also to wills executed before the passing of the Act provided that the testator was alive and sane 12 months after then (ie on 28 July 1801).[58] For this reason Peter Thellusson's concerns about retroactive legislation were unfounded.[59]

The subsequent history of the provisions of the 1800 Act

2.19 We have already seen that the 1800 Act extended only partially to Scotland.[60] As a result, even after the 1800 Act had been passed, accumulations of income from heritable property situated in Scotland were subject to the common law alone; there are Scottish decisions from the first half of the 19th century which indicate that income from heritable property could be accumulated in a manner which, in England or Wales, would fall foul of the 1800 Act.[61] However, the 1800 Act extended to accumulations of moveable property in Scotland, even if that property came from the sale of heritable property.[62]

2.20 As is widely known, the Trusts (Scotland) Act 1961 repealed and re-enacted the 1800 Act. We discuss this and other relevant legislation in the following paragraphs. However, before the Act was repealed changes to the rule restricting accumulation were made on a number of occasions. The history of these changes can be useful in showing how the rule was seen at different points in history; and one of the enactments (from 1892) is still in force today.

2.21 The first legislative change came with the passing of the Entail Amendment Act 1848. Introduced by the Lord Advocate, Andrew Rutherfurd (hence sometimes known as the Rutherfurd Act), it had the aim of modernising the Scots law of entail.[63] As the Lord Chancellor said during the second reading, the object of the bill is "to assimilate the law of Scotland with respect to entails to that of England".[64] Of interest to us is section 41 which repealed section 3 of the 1800 Act, citing, by way of preamble, that "it is expedient that the provisions of the [Accumulations Act 1800] should be extended to Heritable Property in Scotland". This is a logical extension of the broad aim of bringing into Scots law those measures of English law which had proved effective in controlling the power of land-owners to tie up their estate far into the future. Whatever the exact reason for the change,[65] from

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[58] This is mirrored in the current law: see s 5(5) of the Trusts (Scotland) Act 1961.
[59] See para 2.14.
[60] See para 2.18. One result of this is that the vast majority of decisions on accumulations from the first half of the 19th century are decided under English law. It did not extend to Ireland at all: the 1800 Act was passed at the end of July 1800 and the Act of Union of Great Britain and Ireland was passed at the start of that month.
[61] Eg *Keith's Trs v Keith* (1857) 19 D 1040 at 1058.
[62] *Ogilvie's Trs v Kirk-Session of Dundee* (1846) 8 D 1229.
[63] Not only did the law of entail have a link with the rule restricting accumulation but it was also central to the restrictions on successive liferents, which are discussed from para 2.36. For a brief account of the law of entail see the Report on *Abolition of the Feudal System* (Scot Law Com No 168), paras 9.8-9.17.
[64] Parl Deb, vol 99, ser 3, col 1306-1307 (29 June 1848). The bill was introduced on 24 February 1848 in the House of Commons; the Hansard reports of that day record the Lord Advocate's speech.
[65] We see some possible reasons why the 1800 Act's extension to Scotland was only in relation to moveables in the speech of Lord Chancellor Brougham in *Strathmore v Strathmore's Trs* (1831) 5 W & S 170, esp at 192-193 and 199: see Burgess, p 175. Lord Brougham gives two possible reasons in his speech (though this part of his opinion is obiter). The first is that Scots common law is sufficient to deal with accumulations. But he continues (at 192-193): "On the other side (and it appears to me, if it went no further, that this is the better argument of the two,) it may be said that the act expressly excludes Scotland, because it proceeded on a principle known to the law of England; namely, the recognition of the period of twenty-one years, and a little more, after lives in being, beyond which restraint of property is not allowed, for fear of creating perpetuities. But in Scotland the law, instead of discouraging perpetuities, gives them all manner of encouragement, and instead of confining the time to the lives in being, and twenty-one years, with the time of gestation beyond, permits you in every case to tie up property for ever and ever, as may happen in one case in England that of the reversion being in the Crown, and in that case only. The adaptation of the limitation was therefore intelligible and rational in England, but would

1848 the Thellusson Act applied to all accumulations in Scotland, whether the income arose out of heritable or moveable property.[66]

2.22 The next piece of legislation was the Accumulations Act 1892, which contains just one substantive section.[67] Whilst not amending the 1800 Act textually the 1892 Act restricts its application:[68] a direction to accumulate income "for the purchase of land only"[69] is valid solely if restricted to the minority, or respective minorities, of any person(s) who would, if of full age, be entitled to the income.[70] Thus accumulation is restricted not only as to its duration but also as to its purpose: it must be for the benefit of the person who, if he or she were not a minor, would be entitled to the income.[71] This corresponds to the fourth of the periods in the 1800 Act, and although the drafting of the later statute differs in some respects from that of the earlier one it has been given a consistent interpretation.[72] The 1892 Act is still in force in Scotland as well as in Northern Ireland; it was repealed (along with the 1800 Act itself) and re-enacted, with modifications, in English law in 1925.[73] (This re-enactment will, though, be repealed once the Perpetuities and Accumulations Act 2009 comes into force, and the 1892 Act was very recently repealed in the Republic of Ireland.[74])

2.23 The reason for the 1892 Act's brevity appears to have been the failure of a more substantial bill a few years earlier.[75] An Accumulations Bill had been introduced in February 1890 by Mr Cozens-Hardy only for it to be withdrawn in June of that year.[76] In the second reading of what became the 1892 Act Lord Chancellor Halsbury said that he had "objected very much" to the earlier bill, "but I said at the time that if certain parts of the Bill had been by themselves I should have had no objection to raise".[77] On introduction the 1892 bill contained two clauses, of which the second – which would have given the measure some

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have been inconsistent with the principle of the Scotch law, and therefore it was not extended to Scotland." However, a little later he added: "I must say, – adverting to the difficulty felt in these cases, and to the others connected with the present question, that it would be very desirable to have the rule fixed by positive statute in Scotland, as Lord Loughborough's act [ie the 1800 Act] did in England" (at 199). That is just what happened under the 1848 Act.

[66] Section 41 of the 1848 Act stated that the 1800 Act "shall in future apply" to accumulations out of heritable property; this was held to mean that it was restricted to such accumulations beginning after the 1848 Act entered into force: see *Keith's Trs v Keith* (1857) 19 D 1040.

[67] See Appendix D.

[68] It only applies to settlements and dispositions made on or after 28 June 1892.

[69] This is to be read with s 3 of the Interpretation Act 1889: "The expression 'land' shall include messuages, tenements, and hereditaments, houses, and buildings of any tenure." See Morris and Leach, p 272 and *Re Clutterbuck* [1901] 2 Ch 285 (which held, obiter, that 'land' was not restricted to 'corporeal hereditaments').

[70] The restriction on accumulations directed at the purchase of land stands in contrast to the distinction made in the 1800 Act. The Act did not deal with the use to which accumulated income was to be put but (for Scotland) distinguished between income derived from moveable property and income arising from dispositions of heritable property: as has been seen, the latter was not covered by the Act until 1848.

[71] See Burgess, pp 201-203.

[72] *Robertson's Trs v Robertson's Trs* 1933 SC 639.

[73] Law of Property Act 1925, s 166.

[74] See Appendix A, paras 38-45. The rule has not been re-enacted.

[75] We have been unable to ascertain with any certainty the policy reasons for the 1892 Act nor have we discovered the details of the earlier bills. Nonetheless, we are aware that agricultural land values suffered a severe depression in the last quarter of the 19th century, with the advent of cheaper and plentiful imports of wheat and dairy produce from Canada, New Zealand and elsewhere, and this may have given rise to a concern that accumulations of land by trustees would exert further pressure on the rural economy. In addition, the cachet of land ownership which we have seen in the 1790s was still a factor. "The *Economist* reported in 1870 that 'social consideration is a great and legitimate object of desire' … Land could be used for residence, status and position, in addition to earning an income from agriculture. Landownership was an explicit expression of wealth and could be traded above its economic value." (T Nicholas, "Businessmen and land purchase in late 19th century England", Economic History Review (February 1999) 27 at 34). These reasons for the 1892 Act are, though, speculative.

[76] A further Accumulations Bill was introduced in November 1890 but it too fell.

[77] Parl Deb, vol 5, ser 4, col 1023 (14 June 1892).

retrospective effect – was dropped following opposition. Even the first clause, which was subject to minor amendment, was criticised: first, its scope was much too limited, as the whole law of accumulations and perpetuities was in need of reform;[78] secondly, it could easily be defeated as it struck only at *directions* to invest accumulations in land and did not touch cases where there was a power to do so; and, thirdly, it introduced what was seen as an anomaly in that accumulations to which the 1800 Act applied might last for a longer period than those under the bill.[79] Unfortunately the Hansard debates do not disclose why directions to accumulate land should be subject to a single period nor why this period should not apply to all accumulations.[80] A case arising soon after the 1892 Act came into force had to decide whether a testator's direction "comes within the vice aimed at" by the Act,[81] but the vice is not further discussed. Morris and Leach are more forceful: they consider that the equivalent provision in English law is on the statute book "presumably in order to check a particularly loathsome manifestation of posthumous vanity".[82]

2.24 The rule restricting accumulation was further amended by the Entail (Scotland) Act 1914, whose section 9 repealed section 2 of the 1800 Act.[83] As mentioned in paragraph 2.18, section 2 created exceptions for accumulations which were for specified purposes; the result was that such accumulations were subject only to the common law. The repeal of that section meant that all accumulations would fall within the statutory restrictions.[84]

Trusts (Scotland) Act 1961

2.25 That is where matters rested until the passing of the Trusts (Scotland) Act 1961.[85] One of the main aims of the Act was to bring into Scots law the advantages recently secured in English law under the Variation of Trusts Act 1958.[86] However, the opportunity was also

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[78] See the Earl of Selbourne's speech (*ibid*) which begins: "My Lords, as the Bill stands it seems to aim at an improvement, though only a very small improvement, in the law. And this leads me to say, that I hope those who in any future Session may have the conduct of business in your Lordships' House may consider the propriety of reviewing in a larger spirit the whole law, I do not say of accumulations so much, as of the kindred subject of perpetuities, with a view to putting it into a better form than at present."

[79] This point was made by Lord Herschell, *ibid*.

[80] There was much criticism of the rushed timetable for the bill: see, for instance, the debate in the Lords on a procedural motion on 25 June 1892. It is clear from Lord Herschell's speech in the third reading, which immediately followed this debate, that he continued to view the bill as deficient. It was passed after direct intervention from the Prime Minister, Lord Salisbury. (When the Conservative government of Lord Salisbury was succeeded, later in 1892, by the Liberal administration of Gladstone, Lord Herschell became Lord Chancellor. One can only speculate how any accumulations act would have been framed had it been introduced by Lord Chancellor Herschell.)

[81] *Re Clutterbuck* [1901] 2 Ch 285 at 288.

[82] Morris and Leach, p 272.

[83] There is no recorded debate on the 1914 Act in Hansard, and the bill had a very swift passage through Parliament: it was introduced by the Lord Advocate on 2 July 1914 and received royal assent on 10 August (less than a week after the country had gone to war with Germany). The Feudal Casualties (Scotland) Bill shared the same dates of introduction and royal assent; this bill attracted some recorded debate. It is possible that the co-existence of these two bills on Scottish land law meant that there was less debate on each than there would have been if they had been considered at different times.

[84] The repeal was limited to Scots law; English law still contains exceptions: Law of Property Act 1925, s 164(2) (though this will be repealed once the Perpetuities and Accumulations Act 2009 comes into force).

[85] In English law the accumulation periods were restated, and the 1800 Act repealed, by the Law of Property Act 1925: see esp ss 164-166. An obiter remark of Lord Moncrieff in *Henderson's Trs v Anderson* 1930 SLT 346 at 348 indicated that the repeal was good in Scots law too. This caused some concern and in June 1930 the Lord Advocate replied to a written question in Parliament that he hoped that the Appeal Court would soon settle the matter: *Hansard*, HC, vol 240 col 588W (19 June 1930). This happened soon thereafter: see, eg, Lord Justice Clerk Alness's speech in *Smith's Trs v Gaydon* 1931 SC 533, confirming that the repeal did not affect Scots law.

[86] For a brief account see the Scottish Law Commission's Discussion Paper on *Variation and Termination of Trusts* (No 129), paras 2.10-2.15.

taken to repeal and restate, with minor modification, the 1800 Act.[87] In speaking to what is now section 5 of the Act the Lord Advocate said:

> "During the Committee stage [it was] suggested that the provisions of the Accumulations Act, 1800, should be re-written in the Bill and not merely referred to. That was done in England about 35 years ago. On consideration, I felt that it would be easier for those who have to use this Bill when it becomes an Act that we should write out in modern language what the Accumulations Act, 1800, says."[88]

2.26 As a result, the 1800 Act was repealed and the permitted accumulation periods were restated. Section 5 reads:[89]

> "5.— Accumulations of income.
>
> (1) The following provisions of this section shall have effect in substitution for the provisions of the Accumulations Act, 1800, and that Act is hereby repealed.
>
> (2) No person may by any will, settlement or other disposition dispose of any property in such manner that the income thereof shall be wholly or partially accumulated for any longer period than one of the following, that is to say—
>
> (a) the life of the grantor; or
> (b) a term of twenty-one years from the death of the grantor; or
> (c) the duration of the minority or respective minorities of any person or persons living or in utero at the death of the grantor; or
> (d) the duration of the minority or respective minorities of any person or persons who, under the terms of the will, settlement or other disposition directing the accumulation, would for the time being, if of full age, be entitled to the income directed to be accumulated.
>
> (3) In every case where any accumulation is directed otherwise than as aforesaid, the direction shall, save as hereinafter provided, be void, and the income directed to be accumulated shall, so long as the same is directed to be accumulated contrary to this section, go to and be received by the person or persons who would have been entitled thereto if such accumulation had not been directed.
>
> (4) For avoidance of doubt it is hereby declared that, in the case of a settlement or other disposition *inter vivos*, a direction to accumulate income during a period specified in paragraph (d) of subsection (2) of this section shall not be void, nor shall the accumulation of the income be contrary to this section, solely by reason of the fact that the period begins during the life of the grantor and ends after his death.
>
> (5) The restrictions imposed by this section apply to wills, settlements and other dispositions made on or after the twenty-eighth day of July, eighteen hundred, but, in the case of wills, only where the testator was living and of testamentary capacity after the end of one year from that date.

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[87] The 1800 Act may still be of use for interpreting the current legislation: Wilson and Duncan, para 9.03.
[88] *Hansard*, HC, vol 643, col 1409 (4 July 1961).
[89] The scope of s 5 has since been amplified by s 6 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966, as explained in paras 2.28-2.32.

(6) In this section 'minority' in relation to any person means the period beginning with the birth of the person and ending with his attainment of the age of twenty-one years, and 'grantor' includes settlor and, in relation to a will, the testator."[90]

2.27 From the terms of subsection (5) it is clear that the new provision is, in essence, a direct replacement for section 1 of the 1800 Act.[91] However, attempts to use the fourth period in respect of *inter vivos* dispositions had occasionally been frustrated by the courts and subsection (4) is designed to resolve this difficulty by putting it beyond doubt that any accumulation which had begun during the grantor's lifetime would not automatically have to cease on his or her death.[92] As the Minister of State, Lord Craigton, explained:

> "Clause 6 [now section 5(4)] deals with a point of difficulty arising from the interpretation in Scotland of the Accumulations Act, 1800. This is an Act intended to check the mischief which it was anticipated might arise from directions for the accumulation of income for prolonged periods. There is some doubt about the period of accumulation that is allowed in the case of a trust which provides for an accumulation of income for a minor beginning during the life of the settlor. It would seem from the wording of the Act that the settlor could choose either the balance of his own life or the minority of the beneficiary. In Scotland, however, it has been observed by certain judges, though never absolutely decided, that accumulation must cease on the death of the settlor, should that occur before the end of the minority, notwithstanding a direction by the settlor that it should continue during the minority of the beneficiary. This view is thought to be contrary to the intention of the Act and it has not been so interpreted in England. Clearly there should be uniformity here, especially as liability to death duty is often involved."[93]

Law Reform (Miscellaneous Provisions) (Scotland) Act 1966

2.28 The final changes to the statutory rule restricting accumulation were made in section 6 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966. It reads:

> "6.— Amendment of section 5 of Trusts (Scotland) Act 1961.
>
> (1) The periods for which accumulations of income under a settlement or other disposition are permitted by section 5 of the Trusts (Scotland) Act 1961 shall include—
>
> (a) a term of twenty-one years from the date of the making of the settlement or other disposition, and

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[90] Section 5(6) is unaffected by the changes made by the Age of Majority (Scotland) Act 1969: see Stair, vol 24, para 36.

[91] See para 2.18.

[92] Accumulations which began during a grantor's lifetime were liable to be subject to the first of the accumulation periods, ie the life of the grantor. See, for example, *Union Bank v Campbell* 1929 SC 143 and, in England, *Re Lady Rosslyn's Trust* (1848) 60 ER 925. This might not only result in the truster's intentions being frustrated but also in estate duty being payable at an earlier date. Two further points may be noted in passing. First, this difficulty only arose in relation to accumulations which were invested in moveables. As mentioned in para 2.22, the fourth period is the only one applicable where income is to be accumulated into land: accumulation for the lifetime of the grantor is not competent in those circumstances. Secondly, the approach taken by English law to the interpretation of the (substantially similar) fourth period is rather different. Section 165 of the Law of Property Act 1925 provides for accumulations made during a period of minority; Morris and Leach write (at p 278): "Having regard to the very wide effect of section 165, it is difficult at first sight to see what the fourth period under section 164 now adds to the other three. In the great majority of cases, it appears to add nothing."

[93] *Hansard*, HL, vol 233, col 546-547 (18 July 1961).

(b) the duration of the minority or respective minorities of any person or persons living or in utero at that date,

and a direction to accumulate income during a period specified in paragraph (a) or paragraph (b) of this subsection shall not be void, nor shall the accumulation of the income be contrary to the said section 5, solely by reason of the fact that the period begins during the life of the grantor and ends after his death.

(2) The restrictions imposed by the said section 5 shall apply in relation to a power to accumulate income whether or not there is a duty to exercise that power, and they shall apply whether or not the power to accumulate extends to income produced by the investment of income previously accumulated.

(3) This section shall apply only in relation to instruments taking effect after the passing of this Act, and in the case of an instrument made in the exercise of a special power of appointment shall apply only where the instrument creating the power takes effect after the passing of this Act."

2.29 One effect of this provision is to increase the number of permitted accumulation periods by a further two. (However, in contrast to the periods in the 1961 Act which apply to trusts established from the early 19th century onwards, the two new accumulation periods are only available for instruments taking effect after 3 August 1966.) The 1966 Act followed hard on the heels of a very similar measure in English law: section 13 of the Perpetuities and Accumulations Act 1964 added the same two new accumulation periods to those set out in the Law of Property Act 1925. The genesis of the provision on accumulations in the 1966 Act owes much to the English Act of 1964, which therefore merits some examination.

2.30 The Perpetuities and Accumulations Act 1964 was largely based on recommendations made by the Law Reform Committee in 1956 when, at the invitation of the Government, it had examined the rule against perpetuities, the rule against alienability and the rule restricting accumulation.[94] Much of the report is concerned with perpetuities but the rule restricting accumulation was also considered, both at a general level and in particular. This is the Committee's discussion of the general scheme of the rule:

> "One view is that a direction to accumulate is evil *per se* in that it enables a settlor or testator to starve the living in order to augment the fund for posterity. Whatever may have been the position a century ago or more, we doubt whether this is a serious or insurmountable evil today. On the other hand, we know of no substantial argument why the periods should be extended. Certainly the two periods of minorities serve a useful purpose in enabling a fund to be built up to start children in life. On the whole, we consider that the general scheme of the statutory regulation of accumulation calls for no change."[95]

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[94] Law Reform Committee, Fourth Report, *The Rule against Perpetuities* (1956) Cmnd 18.

[95] *Ibid* at para 55. In addition, there was some consideration of whether 21 years was an appropriate period: "We may add that we have considered a suggestion that any period of 21 years should be reduced to 7 years, but we do not feel that there is sufficient reason for reducing the period." (*ibid* at para 56).

2.31 After this brief confirmation of the need for a rule restricting accumulation,[96] the Committee turned to an examination of particular aspects of it and made two recommendations. The first is that two new periods should be made available: these are the ones which are enacted in the 1964 Act (and, for Scotland, the 1966 Act). Each period was judged to be one which a settlor might reasonably want to use, though case law indicated that they were unlawful.[97] The second recommendation is to resolve two issues on which the courts had failed to come to consistent decisions: it was recommended, first, that accumulation of simple interest is to fall within the rule and, secondly, that the rule is to apply to *powers* to accumulate as it does to directions.[98] This recommendation also found its way onto the statute book: section 13(2) of the 1964 Act (and, in a slightly different form, section 6(2) of the 1966 Act for Scotland).

2.32 Whilst the Perpetuities and Accumulations Act 1964 and the Law Reform Committee Report which underpinned it clearly had a marked effect on the substance of section 6 of the 1966 Act – the basic aim of the later legislation being to mirror the former – pains were taken to frame the Scottish provision so as to accommodate the nuances of Scots law on accumulations. No longer was it the case that the law could be uniformly applied across the UK, as happened, for instance, with the Accumulations Act 1892.[99] One example of the tailoring of the provision for Scots law can be seen in the way in which section 6(1) deals, after its paragraph (b), with the situation in which accumulations begin during the grantor's lifetime. This is not included in the equivalent provision in English law,[100] but it was explicitly acknowledged in Parliament to be desirable in Scots law.[101] The other place in which express consideration was given to the niceties of Scots law on accumulations comes in section 6(2). The equivalent English provision, section 13(2) of the 1964 Act, is declaratory in its formulation, beginning: "It is hereby declared that the restrictions imposed by …". The bill which became the 1966 Act contained, on introduction, a similar formula but it was later withdrawn and replaced by the current wording after misgivings were expressed, both on the ground that the current law was sufficiently uncertain for there to be a reliable declaration as to what it was, and also because of a possible adverse effect on charities.[102] Only after

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[96] Consideration as to whether to abolish the perpetuities rule was very brief: "The first question to be considered is whether the rule against remoteness of vesting needs radical alteration or whether it is sound in principle and merely requires revision as regards the mode and consequences of its application. Granted the necessity for placing some time limit on the vesting of future interests, *which we take to be beyond argument*, the foremost matter for examination is the length of the permitted period." (*ibid* at para 4, with emphasis added).

[97] *Re Bourne's Settlement Trusts* [1946] 1 All ER 411 is cited in respect of the 21 year period from the date of the settlement, and *Jagger v Jagger* (1883) 25 Ch D 729 in respect of the minorities of persons living at the time of the settlement.

[98] *Ibid* at paras 56, 57 and 60. The last of these cites Scottish authority: *Union Bank v Campbell* 1929 SC 143.

[99] See para 2.22.

[100] Section 13(1) of the Perpetuities and Accumulations Act 1964 (which will be repealed when the Perpetuities and Accumulations Act 2009 comes into force).

[101] The wording at the end of s 6(1) was included on the recommendation of the Scottish Law Commission: see *Hansard*, HL, vol 271, col 865 (16 Dec 1965). The 1961 Act contains similar provision: see para 2.27.

[102] See, for instance, the speech of the government spokesman, Lord Hughes, recorded in *Hansard*, HL, vol 276, col 76-77 (12 July 1966): "Your Lordships may recall that a provision to the same effect, which was, however, declaratory in form, was included in the earlier Bill which was before your Lordships' House earlier this year, and at that time the noble and learned Lord, Lord Guest, expressed misgivings about it. In the first place, he considered that it represented a change in the law rather than a declaratory provision: at that time this was stated as being a declaration of the law rather than a change of it. On the merits, he was apprehensive that its effect would be to require charitable trusts to disburse all their income, even in years where they found it unnecessary to do so. The noble and learned Lord accordingly suggested that the provision should be dropped till some such body as the Scottish Law Commission had considered it. This course was adopted, and the Amendment before your Lordships gives effect to the advice which has been received from the Commission."

these issues had been fully explored – and it appears to have taken about 6 months – was the provision forming section 6 of the 1966 Act passed.

2.33 In summary, the current Scots law rule restricting accumulation of income is contained in:

(i) section 5 of the Trusts (Scotland) Act 1961, as read with section 6 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966;[103] and

(ii) the Accumulations Act 1892 (where accumulated income is to be invested in land).[104]

The common law, which applies to trusts established before the relevant statutory rule first came into force, is thereby superseded to the extent that the statutory rules apply.

2.34 We discuss the merits and criticisms of the current law in Part 3.

Restrictions on the creation of future interests

2.35 We turn now to the restrictions on the creation of interests, typically in liferent or fee, in favour of those who have yet to be born. The first topic concerns the statutory rules restricting successive liferents.[105] We then discuss the common law rule in *Frog's Creditors*,[106] and the associated case law and statutory provisions.

A: Successive liferents

2.36 There is a similarity between the genesis of the statutory rule restricting successive liferents and the rule restricting accumulation. Both were enacted in order to deal with a particular perceived threat. Just as the latter was aimed at preventing settlements of the type created by Peter Thellusson, the rule restricting successive liferents was a necessary, if incidental, part of the reforms to the law of entails brought about by the Entail Amendment Act 1848. The history of entails (or tailizies as they are more properly known in Scots law)[107] in both England and Scotland goes back to early feudal times. It is beyond the scope of this Paper to describe the source of entails in Scots law and to trace their early development. For our purposes, it is the reforms of the 19th century, and their continued effect in the 20th century, which are of interest. However, to place them in context we begin with the 'Act concerning Tailyies', later known as the Entail Act 1685. This established a procedure for the judicial adjudication and registration of entails which, once registered, would be binding as to any conditions in the deed of entail. The framework was modified on a number of occasions – and indeed the 1685 Act was only repealed on 28 November 2004[108] – but

[103] See paras 2.26 and 2.28 respectively. It should be remembered that the two periods specified in the 1966 Act can only be applied to instruments taking effect after 3 August 1966. The four periods specified in the 1961 Act apply to all deeds (provided that they were not made before 28 July 1800).
[104] See para 2.22 and Appendix D.
[105] As will be seen, the legislation is not confined to liferent interests but that is the paradigm case. For brevity, we refer in this Paper to these restrictions as the rule restricting successive liferents.
[106] *Frog's Creditors v His Children* (1735) M 4262; 3 Ross' Leading Cases 602.
[107] For a brief account see Stair, vol 22, para 646. There is a fuller discussion in Gretton at pp 163-167.
[108] The Abolition of Feudal Tenure etc. (Scotland) Act 2000 (Commencement No 2) (Appointed Day) Order, SSI 2003/456, art 2.

substantial reform did not take place until 1848.[109] Long before then the advantages of entails, the main one being the ability of landed families to keep the property within the family, were acknowledged to give rise to a number of disadvantages:[110] for instance, an entailed proprietor's powers to deal commercially with the property were circumscribed, thereby restricting his (the heir of entail was invariably male) ability to make improvements; and, from a wider perspective, much land, which was vitally important as an economic resource, was rendered unavailable for purchase and rent.[111]

2.37 Attempts at reform, aimed at freeing the restrictions imposed by entails, were made in the late 18th and early 19th centuries. One such attempt came in the mid-1830s when a draft bill was prepared. On being consulted, the Lords of Session were critical of it. The criticism that the bill's terminology was that of English and not Scots law was slight, given that the overall aim was to assimilate Scots law on entails to English law.[112] However, of much greater, and indeed fatal, importance was the ease with which it was considered that the bill's provisions could be avoided. The central aim – the creation of a way of disentailing an estate – could be subverted with little difficulty by the simple expedient of creating a succession of liferents rather than an entail:

> "Thus the entailer may settle his estate on a series of persons, for example, his children and their issue successively in liferent, for the liferent use of each allenarly, and to a 3rd party and to his heirs whatsoever in fee. As the law of Scotland stands it does not appear that there is anything to prevent a series of liferents of this nature being effectual and the power of each liferenter, though not the same as that of a Scottish Heir of Tailzie or an English tenant in tail, will greatly resemble both insofar as the Use of the Subject is concerned, and that for an indefinite period."[113]

Entail Amendment Act 1848

2.38 This criticism was addressed directly in the Entail Amendment Act 1848, whose sections 47 to 49 are aimed at preventing the creation of what would amount in effect to an entail by means of various devices: trusts, liferents, or leases.[114] Indeed, section 47 is entitled "Act not to be defeated by trusts"[115]. Sections 47 to 49, with some subsequent amendments, are still in force today – though the effect of section 48 is now restricted to deeds executed before 1968.[116]

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[109] Certain important reforms were achieved in the intervening years, notably by the Entail Improvement Act 1770 (the 'Montgomery Act') and the Entail Provisions Act 1824 (the 'Aberdeen Act').

[110] For a detailed list of disadvantages see Burgess, pp 98-100 where evidence given to the Select Committee of the House of Commons in 1828 is reproduced.

[111] J Dalrymple, in *An Essay Towards a General History of Feudal Property in Great Britain* (2nd ed, London, 1758) recorded (at pp 133-134) that this was seen, in earlier times, as a benefit: "It was obvious to the ancient nobles that the allowing [of] land to come so much into commerce, tended to weaken them; by the prodigality of some, and the misfortunes of others of their own body, their lands, they saw, were continually shifting into the hands of people, who had formerly been little better than their slaves. In order to prevent such consequences the great nobles invented the artifice of entails, which took particular estates out of commerce, and with regard to those estates, revived the spirit of the feudal law."

[112] Compare para 2.21.

[113] Reply of the Lords of Session on the Entails (Scotland) Bill 1835: Parliamentary Papers 1835 (163) xlvi (quoted at greater length in Burgess, p 105, fn 241). In the same vein, in an opinion issued in 1846, Lord Mackenzie said: "A series of liferents is the most proper entail, and, if competent, would soon supersede all others." (*Erskine v Wright* 8D 863 at 867).

[114] See Appendix D for the text of these provisions.

[115] The purposes of the Act which may otherwise be "defeated" include the power of an heir in possession (sometimes with certain consents) to disentail the estate or to sell, lease or mortgage it.

[116] See paras 2.45 and 3.39-3.41.

2.39 These provisions each have a similar structure.[117] All deal with heritable property ("land")[118] possessed by virtue of an interest under a trust deed (section 47) or held under a proper liferent (section 48)[119] or held under a lease, whether directly or through trustees (section 49). The effect of each provision is that if a person possesses or holds land – either as a beneficiary under a trust, as a proper liferenter or as a lessee – and is both of full age and born after the date of the relevant deed, then he or she "shall not be in any way affected by any prohibitions, conditions, restrictions, or limitations" in the deed which qualify or restrict his interest in the property.[120] The person requires to petition the Court of Session for decree, and to register the decree, before the new property right is of full effect.[121] This mirrors the approach of the core provisions on entails: for example, section 1 provides that, where a deed of entail is dated after the coming into force of the Act and an heir born after the date of the deed takes possession of the entailed property, he or she can (if of full age) acquire the property in fee simple. In order to do so he or she must apply to the Court of Session for authority that an instrument of disentail be registered in the Register of Tailizies.

2.40 We examine the detail of these provisions, and the legal difficulties to which they give rise, in Part 3.[122] Their general effect is to prevent property owners circumventing the reforms of the law of entails. Attempts to pass heritable property, by any one of a variety of methods other than entail, to a pre-determined succession of people who are not yet born can be defeated once the first such person comes into possession and is of full age. In this way, sections 47 to 49 can be seen as anti-avoidance measures.[123] (It is perhaps worth noting that the reforms in the 1848 Act did not meet with total success. One particular problem was that, although heirs of entailed estates had the right to disentail them in certain circumstances, there was nothing to prevent that person, having gained outright ownership, from creating a new entail. At the earliest, this could only be broken, without consent, by the first heir born after the deed of entail. So, in practice, an owner would often be able to pass the entailed estate to his children and grandchildren without them being able to use the provisions of the 1848 Act to disentail it.)[124]

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[117] Unless otherwise stated, we discuss the current version of the provisions. One notable amendment was effected by s 8 of the Entail (Scotland) Act 1914, which repealed words restricting the application of these sections to deeds dated on or after 1 August 1848; under the amendment, they apply to deeds of any date.

[118] See para 2.41 for a discussion of moveable property. Heritable property could not be conveyed by testamentary disposition until 1868 (s 20 of the Titles to Land Consolidation (Scotland) Act 1868), although ways of circumventing this rule had been in common use for at least the previous century.

[119] The question of whether s 48 is confined to proper liferents, thereby excluding those constituted by trust, was only resolved, in the affirmative, in 2002 (albeit obiter): *Earl of Balfour, Pet* 2003 SC (HL) 1 per Lords Hope, Clyde and Rodger. But see also paras 3.39-3.41 for a critical discussion of this point.

[120] This is subject to the continued effect of certain third party rights, such as those of a security holder. Also, in the case of leasehold interests, conditions for the *bona fide* purpose of protecting the lessor's rights will continue to be enforceable.

[121] This procedure does not apply under s 49 (leasehold interests).

[122] See paras 3.32-3.42.

[123] Lord President Inglis described these sections as "directed to prevent an evasion of the leading provisions of the statute [ie the 1848 Act], either by the creation of trusts, or by the creation of successive liferents, or by the creation of leasehold rights in succession. All these modes of evading the statute have been anticipated and provided against. It is part of the same system, which we find developed in the statute as a harmonious whole." (*Black v Auld* (1873) 1R 133 at 145).

[124] See Stair, vol 22, para 646. M'Laren, writing in 1869, says: "The effect of Lord Rutherfurd's Act, when it comes into full operation, is to place the law of entail in Scotland on the same footing as that of England: and the practice in England has been, to settle a property after getting as much money as is required secured upon it. The effect of such a system upon the cultivation of the soil is even worse than that of a system of strict entail." (*ibid*). It has not been possible to create new entails after 10 August 1914: Entail (Scotland) Act 1914, s 2.

Entail Amendment (Scotland) Act 1868

2.41 Further reforms of the law of entail were enacted during the second half of the 19th century but they were generally of a piecemeal nature. One of the statutes, the Entail Amendment (Scotland) Act 1868, contained a provision restricting the creation of successive liferent interests in moveable property, whether by way of proper liferent or trust.[125] We have seen that sections 47 to 49 of the 1848 Act applied only to heritable property.[126] This was consistent with the view, only reached after some hesitation, that the Entail Act 1685 was restricted to subjects which could be feudalised, with the result that moveables could not be made subject to an entail.[127] That being so, moveable property was unaffected by the reforming measures in the Rutherfurd Act of 1848, which were directed at controlling the effect of entails. However, if moveable assets could be tied up for generations to come by the creation in effect of a quasi-entail, this would attract at least some of the criticisms directed at entails. Section 17 of the 1868 Act was aimed at preventing this from happening.

Trusts (Scotland) Act 1921

2.42 Section 17 of the 1868 Act was repealed by the Trusts (Scotland) Act 1921 and re-enacted, in section 9, in very substantially the same terms:[128]

> "9.– Liferents of personal estate beyond certain limits prohibited.
>
> It shall be competent to constitute or reserve by means of a trust or otherwise a liferent interest in moveable and personal estate in Scotland in favour only of a person in life at the date of the deed constituting or reserving such liferent, and, where any moveable or personal estate in Scotland shall, by virtue of any deed dated after the thirty-first day of July, eighteen hundred and sixty-eight, (the date of any testamentary or *mortis causa* deed being taken to be the date of the death of the granter, and the date of any contract of marriage being taken to be the date of the dissolution of the marriage) be held in liferent by or for behoof of a person of full age born after the date of such deed, such moveable or personal estate shall belong absolutely to such person, and, where such estate stands invested in the name of any trustees, such trustees shall be bound to deliver, make over, or convey such estate to such person:
>
> Provided always that, where more persons than one are interested in the moveable or personal estate held by trustees as herein-before mentioned, all the expenses connected with the transference of a portion of such estate to any of the beneficiaries in terms of this section shall be borne by the beneficiary in whose favour the transference is made."[129]

2.43 The 1921 Act is essentially a consolidating measure. In the main, it repealed the previous Trusts Acts; however, for whatever reason it did not also consolidate the provisions in sections 47 to 49 of the 1848 Act. As already mentioned, they remain in force today, though section 48 has now been superseded by a provision of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968.

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[125] Section 17: see Appendix D for the text of the provision.
[126] See para 2.39.
[127] *Baillie v Grant* 1859 21D 838; and see also Burgess, p 111.
[128] We discuss in paras 3.37-3.38 the legal difficulties to which the latter provision has given rise.
[129] Section 45 of the Conveyancing (Scotland) Act 1924 provides that s 9 is to apply to all deeds, of whatever date, and that those dated before 31 July 1868 are deemed, for the purpose of s 9, to be dated 1 August 1924.

Law Reform (Miscellaneous Provisions) (Scotland) Act 1968

2.44 Section 18 of the 1968 Act (which has only been slightly amended since it was enacted)[130] presently reads:

> "18.— Restriction on duration of liferents.
>
> (1) Where by any deed executed after the commencement of this Act there is created a liferent interest in any property and a person who was not living or in utero at the date of the coming into operation of the said deed becomes entitled to that interest, then—
>
> (a) if that person is of full age at the date on which he becomes entitled to the liferent interest, as from that date, or
>
> (b) if that person is not of full age at that date, as from the date on which, being still entitled to the liferent interest, he becomes of full age,
>
> the said property shall, subject to subsection (2) of this section, belong absolutely to that person, and, if the property is vested in trustees, those trustees shall, subject as aforesaid, be bound to convey, deliver or make over the property to that person.
>
> (2) The fact that, by virtue of subsection (1) of this section, any property has come to belong absolutely to any person shall not affect—
>
> (a) the rights in the property of any person holding a security over the property;
>
> (b) any rights in the property created independently of the deed by which the liferent interest in question was created;
>
> (3) The expenses of the conveyance, delivery or making over of any property to any person in pursuance of subsection (1) of this section shall be borne by that person.
>
> (4) Section 48 of the Entail Amendment Act 1848 and section 9 of the Trusts (Scotland) Act 1921 shall not have effect in relation to any deed executed after the commencement of this Act.
>
> (5) For the purposes of this section—
>
> (a) the date of the coming into operation of any testamentary or other *mortis causa* deed shall, subject to paragraph (c) below, be taken to be the date of the death of the granter thereof:
>
> (b) the date of the coming into operation of any marriage contract shall, subject as aforesaid, be taken to be the date of the dissolution of the marriage;
>
> (c) the date of the execution, or of the coming into operation, of any deed made in the exercise of a special power of appointment shall be taken to be the date of the execution, or as the case may be of the coming into operation, of the deed creating that power."

2.45 This provision is a consolidating one. It applies to liferent interests in any property, whether moveable or heritable, and also applies to proper liferents and to those created by

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[130] Subsection (2)(c) was repealed by the Abolition of Feudal Tenure (Scotland) Act 2000, sch 13(1), para 1.

trust. Thus, it supersedes both section 9 of the 1921 Act and section 48 of the 1848 Act in respect of deeds executed after 25 November 1968.[131]

2.46 To sum up, the current statutory rule restricting successive liferents is contained in:

(i) section 18 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 (for all liferent interests created by deed executed after 25 November 1968);

(ii) sections 47 and 49 of the Entail Amendment Act 1848 (for heritable liferents created by means of a trust,[132] and for interests under a lease, respectively);

(iii) section 48 of the Entail Amendment Act 1848 and section 9 of the Trusts (Scotland) Act 1921 (but only in relation to deeds executed on or before 25 November 1968).

B: Common law rules: Frog's Creditors and Newlands

2.47 *Frog's Creditors v His Children* (1735)[133] concerned the disposition by Bethia Dundas of a liferent interest in heritable property to her grandson Robert Frog, with the fee to his lawful heirs.[134] At the time, Robert was 9 years old. He subsequently fell into debt and, to pay his creditors, he entered into a sale of part of the property he had received from his grandmother. The issue for the court was whether, as liferenter, Frog had the power to sell. The court was persuaded that, once the disposition had been executed by the grandmother, the fee which she had disponed must vest in a living and identified person. Robert Frog's children, in whom it was to vest in terms of the disposition, were many years away from being born. In order to prevent the fee from being left hanging until their birth (should they in fact be born) the court held, with some hesitation,[135] that the deed had the effect of giving Robert the full fee rather than a mere liferent interest. His future children, instead of being fiars, had only a hope of succession.

2.48 The decision can be usefully approached by recalling two familiar rules of property law:[136]

(i) It is not possible to transfer ownership to a non-existent or unidentifiable person.[137] Any attempt to do so would result in ownership lying *in pendente*, or in limbo, until the person is born or becomes identifiable. This rule applied as much in 18th century Scots law as it does nowadays (thereby confirming that it is not a technical aspect of feudal law, since it has survived the abolition of feudal tenure).

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[131] See ss 18(4) and 22(5) of the 1968 Act.
[132] This may need to be qualified: see paras 3.39-3.41.
[133] M 4262; 3 Ross' Leading Cases 602.
[134] There were also destinations over. If Robert were to die without issue the liferent was to go to his brother and the fee to the latter's lawful heirs, with further provision lest the brother also die without issue.
[135] Morison's report ends: "The Lords having considered the right granted by Bethia Dundas to Robert Frog her grandson, found, That thereby a right of liferent was only established in the person of the said Robert; and therefore, that the creditors of the said Robert have no interest in the price. But, on petition and answers, 'They found Robert Frog to be fiar,' &c" (at 4267). A case from a few years later is reported by Morison "only because the Court had given different judgments" in *Frog*: see *Lillie v Riddell* (1741) M 4267.
[136] The cases discussed in this section all concern heritable property.
[137] More widely, it is far from clear that the common law permits a proper liferent to be created in favour of such a person: see fn 66 to para 3.33.

(ii) In general, where ownership is ostensibly transferred to a non-existent or unidentifiable person the conveyance fails. If X transfers ownership to nobody, nobody acquires ownership from X who therefore remains owner.[138]

Frog's Creditors affirmed the first rule but created an exception to the second one by holding that a conveyance to a non-existent or unascertainable person with a liferent interest to a living individual results in that individual becoming owner. Where we refer to the rule in *Frog's Creditors* it should be understood as a reference to this exception. Further, although that case did not involve the use of a trust the rule has since been extended to include such situations.[139]

2.49 The rule in *Frog's Creditors* was revisited a few years later, in *Lillie v Riddell*.[140] The facts were essentially similar to those in *Frog*, though on this occasion a father disponed to his son, in the son's contract of marriage, a liferent interest in his estate with the fee to the children to be procreated of the marriage. It was held to be "an established point" that the effect was to give the son the full fee and the case was disposed of without answers. Despite this certainty of outcome, the same hesitation as to the underlying reasoning which accompanied the decision in *Frog* remained:

> "many of the Court … declar[ed], as likewise had been done in the said case of *Frog*, that but for the course of decisions, they should have been of opinion, that the son was not fiar, but fiduciary for his children."[141]

2.50 The unsatisfactory rule in *Frog's Creditors* remained in force until it was substantially displaced towards the end of the 18th century. *Newlands v Newlands' Creditors* (1794)[142] concerned a very similar disposition to that in favour of Frog, but (crucially) the property was described as being for the liferent use *allenarly* (ie only) of Mr Newlands' son.[143] The court was unanimously of the opinion that the disponer's intention was to restrict his son's interest to that of a liferenter and not fiar, and also that the fee could not be left hanging. In effect, this affirms rule (i) in paragraph 2.48. It might have been expected, following *Frog's Creditors*, that the conveyance would result in the disponer's son taking the full fee. That did not happen. Nor, following rule (ii) in paragraph 2.48, did the conveyance fail. Instead, a majority of the court decided to create a new exception to that rule. Their solution was to invent a legal fiction in the form of a fiduciary fiar:

> "In the present case it is to be held *fictione juris*, that a fiduciary fee was vested in Lieutenant Newlands [the disponer's son], but which substantially is no more than a liferent, as it excludes the power of disposal, either onerously or gratuitously."[144]

2.51 However, a minority opposed this. They conceded that testaments granting a liferent of moveable property should always be treated so as to give effect to the testator's

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[138] Eg *Colvile's Trs v Marindin* 1908 SC 911 (discussed in para 3.48).
[139] See para 3.45.
[140] (1741) M 4267. It is cited as *Lilly v Liddle* in 3 Ross' Leading Cases 606.
[141] *Ibid*.
[142] M 4289; 3 Ross' Leading Cases 634. The House of Lords' decision of 1798 is reported at M 4289 at 4294; 3 Ross' Leading Cases 634 at 649; 4 Pat 43.
[143] Using 'allenarly' in the grant of a liferent was not novel. Its origin is ascribed by Lord President Campbell, in his speech in *Newlands*, to cases of conjunct fee and liferent where it denotes that the wife's interest, though that of a conjunct fiar, is to be restricted to that of a liferentrix: 3 Ross' Leading Cases 634 at 655.
[144] *Ibid* at 4293. The idea of a fiduciary fiar had arisen in earlier decisions: see the quotation from *Lillie v Riddell* in para 2.49.

intentions. But they considered that liferents of heritable property should be subject to a different rule, one which would give creditors the opportunity to go after the underlying assets in satisfaction of the liferenter's debts. In relation to the Newlands disposition "a fee of some sort" had vested in the liferenter, "and as it is not fettered by a strict entail, it must be subject to his onerous debts and deeds, however much he may be personally bound to give effect to the intended limitation. Indeed, the notion of a fiduciary fee, in cases like this, is not only repugnant to feudal principles, but highly inexpedient in itself, as, if once allowed, such fees might be continued through many generations and substitutions, and thus become a worse species of entails than any hitherto known, in so far as they neither would require irritant and resolutive clauses, nor to be recorded in the register of tailzies, nor would they be limited by the regulations of the [Entail Improvement Act 1770]."[145]

2.52 On appeal to the House of Lords the Lord Chancellor, Lord Loughborough, affirmed the lower court's decision, despite having the gravest doubts as to its correctness:[146]

> "[T]hough I feel no conviction, though my mind incline to doubt exceedingly that the judgment [in the court below] proceeded on safe grounds; yet I have not courage to venture on a reversal, when I am told by a person of high authority ["a very learned Judge, of great authority", of the Court of Session], that the effect of such reversal would be to put numerous settlements, made even in the course of his own experience, in a situation in which they were not understood by the makers of them to stand. I would, therefore, have it understood, that this consideration alone restrains me, and I would wish that the Court would, in some future case proper for the purpose, re-consider the principle of their judgment in this case".[147]

On this basis, avowedly intended only to be a temporary measure, the rule in *Frog's Creditors* became narrowly confined,[148] and the doctrine of the fiduciary fee took hold. This meant that the grant of a liferent (allenarly) to Y with the fee to an unborn Z gave Y something more than a liferent but less than a full fee.

Trusts (Scotland) Act 1921

2.53 The *Newlands* rule has, in part, been put onto a statutory footing. Section 8 of the Trusts (Scotland) Act 1921, entitled "Conveyances to non-existing or unidentifiable persons", contains three subsections.[149] Subsection (1) provides that where heritable or moveable property is conveyed (by means of a deed taking effect during life or on death) in fee to persons who, when the conveyance comes into operation,[150] are either unborn or cannot be ascertained, with a liferent interest to another person (who, necessarily, must be living), the liferenter "shall not be deemed to be beneficially entitled to the property in fee by reason only that the liferent is not expressed in the deed to be a liferent allenarly".[151] So, unless a

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[145] *Ibid* at 4293-4294.

[146] Very shortly thereafter Lord Loughborough was to hear the challenge to Peter Thellusson's will and to lay the Accumulations Bill in Parliament: see paras 2.15-2.16.

[147] *Ibid* at 4295. In a note immediately after his report Morison records that the weight of authority would make re-examination of the rule in a future case all but impossible. Indeed, when the opportunity arose a couple of years later the Court of Session held that they "were not at liberty" to depart from the House of Lords' decision: *Watherstone v Rentons* (1801) M 4297.

[148] Its scope was narrowed even further by subsequent court decisions: see para 3.44 and Dobie, p 38.

[149] See Appendix D for the text of the provision.

[150] For the purposes of s 8 this is the date on which the liferenter first becomes entitled to receive the rents or income of the property.

[151] Subsection (1) applies only to conveyances which came into operation on or after 19 August 1921. By contrast, ss (2) applies to all conveyances in liferent and fee of the type described in s 8.

contrary intention appears in the deed, the liferent interest is to have effect as if it had been declared to be a liferent allenarly. Generally, this means that the rule in *Frog's Creditors* is not to apply and the liferenter will be a fiduciary fiar, following the rule in *Newlands*.[152]

2.54 Subsection (2) clarifies the relationship between a fiduciary fee and a trust.[153] It permits various classes of interested person, including the liferenter and any prospective fiar, to seek the intervention of the Court of Session in connection with the fiduciary fee. First, the court has power to authorise the fiduciary fiar to exercise the common law powers of a trustee or those statutory powers set out in the 1921 Act itself.[154] In addition, the court can appoint trustees to hold the property in trust in place of the liferenter (who may be appointed as trustee).[155] The powers of the trustees appointed under this provision will be limited. For instance it is not competent for the court to grant them the power of sale of trust property.[156] Finally, subsection (3) provides that all references in the 1921 Act to a trust deed shall include references to a conveyance to which section 8 applies.

2.55 The effect of the statutory provision in the 1921 Act is that the rule in *Frog's Creditors* is severely restricted. Even before that Act came into force, the rule was restricted to cases where there is insufficient evidence, read as a whole, to indicate that the intention is to create only a liferent interest:

> "Apart from the unfortunate rule of *Frog*, the word 'liferent' and the words 'liferent allenarly' designate the same species of interest. It would, accordingly, be against reason to exclude an application of the principle of *Newlands* in any case where the deed under construction, while containing, like the disposition in *Frog*, a destination to a parent in liferent and his issue *nascituri* in fee, also contains, independently, sufficient evidence of intention on the part of the granter that the liferent to the parent is to be a liferent and not a full fee, as did the disposition in *Newlands* by the particular method of adjecting the word 'allenarly'."[157]

2.56 It appears that the one situation in which section 8 of the 1921 Act does not apply, and in which the rule in *Frog's Creditors* is therefore applicable, is that in which the fiars are, at the time the liferent opens, ascertainable but are not named.[158] The example often given is that in which the fiars are the (unnamed) children of a woman who is beyond the age of child-bearing. It has been held that there is a rebuttable presumption in Scots law that a woman aged 53 or over is incapable of having a child.[159] However, in the light of modern

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[152] The rule in ss (1) is slightly wider than the *Newlands* rule. For example, the latter only applies where the fiar is the child or heir of the liferenter: see *Napier v Napiers* 1963 SLT 143 at 144 and Dobie, pp 34-35. However, as mentioned in the following footnote, the statutory deeming of the liferent to be a liferent allenarly (by ss (1)) does not automatically result in the liferenter falling within the *Newlands* rule.

[153] In addition it allows a liferenter who would not, under the rule in *Newlands*, be a fiduciary fiar to apply for a judicial factor to be appointed: see *Napier v Napiers* 1963 SLT 143. In that case the fiar was unascertained but was of such a description that he or she could not be the liferentrix's heir, so the *Newlands* rule did not apply.

[154] Section 8(2)(a). Before this provision came into force it was competent to apply to court for reasonable powers of administration: see *Pottie* (1902) 4F 876.

[155] Section 8(2)(b).

[156] See *Gibson, Petr* 1967 SLT 150.

[157] *Lockhart's Trs v Lockhart* 1921 SC 761 at 769 (opinion of the First Division). See Dobie, pp 34ff for a detailed discussion of the application of the rule in *Frog's Creditors* before the 1921 Act.

[158] See Dobie, p 34. Section 8(1) applies where the fiars are "unborn or incapable of ascertainment" when the liferenter first becomes entitled to receive income.

[159] *G's Trs v G* 1936 SC 837 (decided by a bench of 7 judges who were split 4-3 on this issue). It was followed in *Munro's Trs v Monson (No 2)* 1965 SC 84.

fertility treatment it must be doubtful whether this would be followed today.[160] If this presumption were to fall, the number of instances in which the fiars are, in the words of section 8, "incapable of ascertainment" will be diminished, thereby reducing still further – to the point of practical inapplicability – the scope of the rule in *Frog's Creditors*.[161]

2.57 We discuss in Part 5 the options for reform of the rule in section 8 of the 1921 Act and of the rule restricting successive liferents. It may be useful, though, at this stage to illustrate and compare their effect in particular situations. Suppose that a property owner (O) wishes to keep his property within his family after his death. He has a daughter (D) and an infant grandchild (G). If O decides to create a liferent interest in his property (which may be either heritable or moveable) in favour of D and, on her death, G, any attempt to create a liferent interest in G's unborn children, grandchildren, or remoter issue will be subject to section 18 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968. Its (likely)[162] effect is that the property will belong absolutely to the person who takes the liferent interest after G's interest terminates (provided that, on termination, the person is of full age). In other words, that person will take the fee rather than a mere liferent interest. However, he or she will have only a contingent interest until G's liferent terminates.

2.58 Alternatively, O may decide to make adequate provision for D and then to convey his property, either directly or by way of directions to trustees, to G in liferent and in fee to G's unborn issue. In this case section 8 of the Trusts (Scotland) Act 1921 will apply. Subsection (1) provides that G's interest is limited to that of a liferenter. The fee will vest in G's issue at birth.[163] The difference between this scenario and that in the preceding paragraph is that vesting takes place at an earlier date. Under the arrangement outlined in the preceding paragraph the fee will only vest once the fiar has both attained full age and become entitled to the liferent (ie on the termination of G's liferent).

Lifetime of private trusts

2.59 The final topic is concerned with the common law rule which may limit the lifetime of a private trust. We have already seen that the law may require a trust to terminate earlier than specified in the deed in certain circumstances: for instance, if it creates a series of successive liferents to which one of the statutes in paragraph 2.46 applies, or if the rule in *Frog's Creditors v His Children* applies.[164] Separately, income may only be accumulated for a period permitted under one of the statutes set out in paragraph 2.33, though this will not prejudice the continued operation of the trust. But, excepting these situations,[165] what rule may limit the period for which a private trust can last?

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[160] On the other hand, modern science could conceivably be used to support other presumptions, eg that an infertile man of over a certain age (set with an eye on the age at which he would be unlikely to be allowed to adopt) is to be presumed to be incapable of fathering a child.

[161] See paras 5.58-5.68 for proposals on this rule.

[162] The precise effect will depend on factors such as when G's issue is born, whether D survives to take the liferent, and so on.

[163] If the deed conveys the fee to just one child of G the fee vests on that child's birth. But if the conveyance is to more than one child (say, to all of G's children) then the fee vests in the first one who is born both for his or her own interest and also, as trustee, for any future children of G and it vests in subsequent children on birth on the same terms: see Dobie, p 35.

[164] (1735) M 4262; 3 Ross' Leading Cases 602. See paras 2.47-2.58 for a discussion of the rule. Its application to trusts is discussed in Dobie, pp 36-37.

[165] There may also be other events which affect the time for which a trust operates, eg the variation of trust purposes which results in early termination. They fall outwith the scope of the present project.

2.60 In Scots law long-term or perpetual trusts are not unlawful *per se*.[166] There are, however, certain limiting rules. Bell, in a passage in his *Commentaries* dealing with trust administration and trustees' powers, writes:

> "But wherever the will becomes inextricable, or where it is intended for too distant a contingency, it will be ineffectual at common law, or barred by a statute made on the view of the difficulties raised on the will of the late Mr Thellusson."[167]

2.61 Bell supports his statement on the common law by reference to *M'Nair v M'Nair*.[168] Robert M'Nair, who died in 1780, had established a trust designed to provide a variety of periodic payments for his family for many generations to come. There was no means of saying, at the outset, how long the trust would last, and there was nothing to prevent it from enduring perpetually. After it had operated for about a dozen years the trust was challenged on the twin grounds that the setting up of a perpetual trust was *ultra vires* and that the trust purposes were irrational. The judges were split in their opinions, deciding (according to Bell's report) by 3 to 2 that neither of these challenges was good and, consequently, that the trust deed should stand. Although described as whimsical, it was not inextricable.[169] The reporting of the decision in *M'Nair* may be problematic by modern standards – it being uncertain, for instance, exactly which judges gave opinions[170] – but the majority decision, to the effect that a trust deed is not to be set aside simply because the settlement might endure in perpetuity or for a long period, remains good law. There are other, more reliably reported authorities which support this.

2.62 In *Strathmore v Strathmore's Trustees* (1830)[171] the court considered a settlement of the Earl of Strathmore's property in Glamis which was to last for at least 30 years. Lord Balgray, sitting in the First Division, set out the relevant common law rule:

> "I concur with the Lord Ordinary, and think [the truster had power to make the settlement], and that there is no rule yet known in the law of Scotland which prevents the execution of a trust similar to that which was made by the late Earl. I acknowledge that every man living is limited in his exercise of the right of property by this principle, that he cannot make a valid deed which is *contra bonos mores*, or *contra publicam utilitatem*. In such a case the Court could interfere; but it is not the case before us."[172]

2.63 The First Division's decision was appealed to the House of Lords. There is a classic statement on the lawfulness of long-term trusts in Lord Chancellor Brougham's speech.[173]

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[166] English law takes a very different approach. The twin rules against perpetuities and against alienability limit the length of time for which a private trust can last. The rule against perpetuities is explained in para 2.5 and see para 2.63 for the rule against alienability.

[167] GJ Bell, *Commentaries on the Laws of Scotland and on the Principles of Mercantile Jurisprudence* (5th ed, 1826), vol 1, p 38 (with footnotes omitted).

[168] (1791) Bell's Cases 546 (and see also the note to *Strathmore v Strathmore's Trs* 5 W & S 170 at 187-191).

[169] In Bell's report, following an account of the speeches, the Lord President summed up the result: "The import of such a decision then will be, that although the deed be not reducible, on account of its form, the parties may afterwards set it aside, when it shall have become inextricable." Burgess records, at p 119, that the trust became unworkable about 20 years later and so was set aside. However, this was not because it tended to perpetuity. Contrast this with the earlier decision in *M'Culloch of Barholm*: see para 2.66.

[170] Bell's report mentions only five judges but it appears from other sources that there was a larger bench, though with a majority in favour of upholding the deed. Burgess discusses the identity of the judges at p 19, fn 101.

[171] 8S 530.

[172] *Ibid* at 538.

[173] (1831) 5 W & S 170. With some reluctance, the appeal was refused.

After outlining the English law against inalienability,[174] by which no-one could restrict the disposal of property for a period longer than a life in being and 21 years ("for fear of creating perpetuities"), he said:

> "But in Scotland the law, instead of discouraging perpetuities, gives them all manner of encouragement, and instead of confining the time to the lives in being, and twenty-one years, with the time of gestation beyond, permits you in every case to tie up property for ever and ever, as may happen in one case in England, that of the reversion being in the Crown, and in that case only."[175]

2.64 Another important decision in this area is *Suttie v Suttie's Trustees* (1846).[176] The First Division heard a challenge to a trust deed by which the truster made provision for his family for what was likely to be a long period in the future.[177] The court was unanimous in upholding the settlement, and *M'Nair*, discussed in paragraph 2.61, was cited as authority that Scots law has no principled objection to perpetuities of the sort found in English law.

2.65 There are, though, various grounds on which a court will reduce a long-term or perpetual settlement at common law (and indeed these grounds are applicable to trusts generally, but we concentrate in our illustrations on long-term ones). By its nature, the common law is adaptable and may be used in situations which are novel or unusual. We focus on three main grounds: unintelligibility, impracticability, and unreasonableness.

Unintelligibility

2.66 The decision in *M'Culloch of Barholm* (1752),[178] which is set out in paragraph 2.7, can be seen as an illustration of a case where the court struck down a settlement as being unintelligible or impossible to construe. This does not so much appear from Elchies' report of the decision,[179] where public policy considerations seem to have prevailed, but there is other evidence that the Barholm settlements were seen as confused. The case is closely considered by the Lord Chancellor in his opinion in *Strathmore v Strathmore's Trs* (1831).[180] He describes the Barholm settlement deeds as "a contradictory and unintelligible disposition of property".[181] And, more tellingly, he says: "when I find the settlement [by M'Culloch] mixed up with such a mass of clauses impossible to be construed, that very nonsense of itself constitutes a material specialty, and prevents the case from applying as an authority to another case, where no such specialty exists, but where a clear, consistent, and intelligible sense is seen operating from the beginning to the end of a very short and simple conveyance [such as in the *Strathmore* case]."[182]

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[174] In English law, the rule against inalienability is related to, but distinct from, the rule against perpetuities. See the Law Commission Report on Perpetuities and Excessive Accumulations at para 1.14, and the discussion in the Law Reform Committee Report at paras 49-50.
[175] (1831) 5 W & S 170 at 193. Lord Mackay described this as "a sarcastic exaggeration": *Lindsay's Exrs v Forsyth* 1940 SC 568 at 574.
[176] 18 Jur 442.
[177] The Lord Justice-General, upholding the settlement, said: "as to … the practicability of [the trust's] execution, at least for a very considerable length of time, there seems to be no room for doubt" (at 445).
[178] *Dictionary of the Decisions of the Court of Session, reported by Patrick Grant of Elchies* (Edinburgh, 1815; Branch I of Appendix II, *sub nom* Tailzie, No 48).
[179] Quoted in para 2.7.
[180] 5 W & S 170. There is a lengthy note of the *M'Culloch* case at 180-185.
[181] *Ibid* at 195.
[182] *Ibid* at 196.

Impracticability

2.67 A trust settlement which cannot be put into practical operation may be struck down. We have already seen that Bell wrote that "wherever the will becomes inextricable" the settlement is liable to be set aside.[183] In *Mason v Skinner* (1844)[184] a perpetual settlement by John Mason for what are described as "purposes of a very complicated description" was challenged by his son. The first of the five grounds of challenge set out the broad grounds: the "pretended trust-disposition by the said John Mason is irrational, inconsistent, unintelligible, absurd, and inextricable".[185] The court had misgivings as to whether the trust was readily workable and remitted the question to an accountant to report. His finding was that, in practice, the beneficial purposes of the trust could not be achieved. In the light of this report the judges were unanimously of the view that the deed should be reduced. Lord Fullerton's speech is instructive:

> "I do not hold that it is incompetent to make a settlement which is to last for ever; but then the accumulations must have a definite object. The beneficial interests must merge immediately, as in the case of a charitable endowment. Here not only is the fund to continue for ever, but the accumulations also are to continue for ever, and, without any definite object, making it impossible for any Court to carry the testator's intentions into effect. It is in fact a mere emulous accumulation."[186]

Unreasonableness: the M'Caig cases and their legacy

2.68 The statutory reforms relating to the rule restricting successive liferents in the middle of the 19th century, which we have already mentioned,[187] would undoubtedly have had the effect of cutting down the lifetime of certain settlements. M'Laren notes that trust deeds like that in *Suttie v Suttie's Trustees*[188] would have been affected:

> "Trusts of this nature, executed after 1st August 1848, would be cut down by the operation of sections 47 and 48 of the Entail Amendment Act [1848] if the subject of conveyance consisted of heritable estate in Scotland, and by [section 17 of the Entail Amendment (Scotland) Act 1868], if of moveable estate."[189]

This may have had a particular impact on certain long-term trusts established in the second half of the 19th century. Nevertheless, by the beginning of the 20th century there began to be challenges to long-term or perpetual trusts which were wholly unaffected by the statutory reforms we have mentioned. Whilst such trusts are not objectionable in law *per se*, it can be clearly seen that the courts developed the common law to allow an effective control to be exercised.

2.69 Bequests left by two members of the M'Caig family gave rise to a pair of important decisions in the early years of the 20th century.[190] Lord Sands, in his opinion in a case which was heavily influenced by them, described them as having "opened up a new chapter in our

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[183] See para 2.60.
[184] 16 Jur 422.
[185] *Ibid* at 424.
[186] *Ibid* at 425.
[187] At paras 2.36-2.46.
[188] (1846) 18 Jur 442. See para 2.64.
[189] M'Laren, p 305.
[190] *M'Caig v University of Glasgow* 1907 SC 231; *M'Caig's Trs v Kirk-Session of United Free Church of Lismore* 1915 SC 426.

law".[191] The M'Caig family consisted of nine brothers and sisters. The brother whose will formed the basis for the first action was survived by one brother and one sister. At his death he owned a considerable amount of property in and around Oban,[192] most of which he directed to be put into a trust The surviving brother died a month later and it was the will of the surviving sister which gave rise to the second case. None of the children had issue, and the parents were already dead by the time of the contested wills. At the death of the final sibling there was no known heir-at-law.

2.70 The trust in the first *M'Caig* case required the trustees (the University of Glasgow) to spend the income of the fund on erecting statues of the M'Caig parents and children. Each was to cost a minimum of £1,000. Monuments and "artistic towers" were also to be built, all on prominent sites on the testator's estates. "Young and rising Scotch sculptors" were to compete for prizes for the design of the monumental work. The trust was to be perpetual. In the event it was very short-lived as it was successfully challenged by the testator's sister, who by then was the sole survivor of the M'Caig family.[193] The court's principal reason for allowing the challenge was that the trust failed to confer an enforceable benefit on anyone and so the testator did not succeed in disinheriting his heir (ie his sister). The Lord Justice-Clerk ended his opinion: "A testator who desires to confer a benefit on an individual or a class can have no difficulty in doing so. But in this case I cannot hold that this has been done by this eccentric testator, and I am of opinion that the heir is entitled to prevail."[194]

2.71 However, one of the judges, Lord Kyllachy, was sympathetic to the argument that the trust was contrary to public policy.[195] Lord Sands, in an opinion given about 20 years later, said:

> "It would appear that the Court [in the first *M'Caig* case], hesitating to recognise a new principle, viz., the setting aside of a bequest on account of its fantastical or egregious character, sought, while reserving that question, to rest their decision upon an old principle, viz., that the heir cannot be negatively disinherited – the estate must be given to some other person who is *in titulo* to enforce his right. There can, however, be no doubt that, while this is the ostensible ground of judgment, the Court took account, not merely that no enforceable beneficial interest was created, but that the directions were, in their view, egregious."[196]

2.72 As a result of the first *M'Caig* case Miss M'Caig inherited her brother's estate. Shortly thereafter she executed a will and codicil which, on her death in 1913, established a trust for very similar purposes to those her brother had attempted. Her plan was to have bronze statues of all of her siblings and her parents erected in the tower which her brother had

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[191] *Aitken's Trs v Aitken* 1927 SC 374 at 379. This case is discussed at paras 2.71 and 2.74.
[192] He left heritable estate with an annual yield of between £2-3,000, and moveable estate of about £10,000.
[193] At first instance the challenge was unsuccessful. In a full opinion Lord Dundas said: "The scheme may be fantastic, and may result in what most people will consider [a] waste of money. But the money was Mr M'Caig's, and the project is neither, so far as I can see, contrary to public policy or morals, nor more vague and indefinite in scope than some of the schemes which have been held to be within the recognition of the law." (This is reported in *M'Caig v University of Glasgow* 1907 SC 231 at 236.) Lord Dundas also said, obiter, that he was "disposed to think that we are here in the region of charitable bequest, as defined and illustrated by the various cases in the books": *ibid* at 238.
[194] *Ibid* at 241.
[195] Lord Low took the opposite view, but the comments on this issue are obiter.
[196] *Aitken's Trs v Aitken* 1927 SC 374 at 379-380. By then the court had decided the second *M'Caig* case which, as mentioned in the following paragraphs, turned on public policy issues.

already built.[197] Each statue was to cost a minimum of £1,000. A fence was to be erected round the tower to prevent the public from entering and the whole mausoleum was to be maintained in perpetuity. The residuary legatee was successful in its challenge to the validity of this trust. The court restated the ratio of the first *M'Caig* case but went further. Lord Guthrie said:

> "If, as laid down in [the first *M'Caig* case], the general principle in regard to testamentary bequests be against the validity of any bequest the performance of which there is no one to enforce, and if to that principle there be an exception in favour of memorials to the dead, whether the testator or testatrix, or, as in this case, near relatives, but so far only as these are customary or rational [ ], then I am of opinion that the bequest in question is unnatural, contrary to custom, and unreasonable."[198]

2.73 The development from the earlier *M'Caig* decision can be seen even more clearly in Lord Salvesen's opinion:

> "[T]he question appears to me to be decided by the unanimous decision of this Division in [the first *M'Caig* case]. I am unable to find any substantial distinction between the bequests in the two cases. [ ] There are no legal grounds of distinction; and accordingly our duty is to declare the bequest wholly void. By some of the reasons given by the learned Judges who decided the previous case I do not hold myself bound, but I entirely concur in the result at which they arrived. For myself I am prepared to hold that the bequest is contrary to public policy on more than one ground."[199]

Lord Salvesen then lists the grounds. In the first place it involves "a sheer waste of money".[200] The fact that it would also offer some employment to sculptors and workmen is immaterial, as they could be better employed on other projects. Secondly, it would be "dangerous" to uphold a bequest "which can only gratify the vanity of testators, who have no claim to be immortalised" but who possess the means by which they can erect substantial monuments to themselves, surpassing those built for famous people after public subscription. The reason that this would be dangerous is that, whilst people may spend their money as they wish during their lifetime, they are "generally restrained from wasteful expenditure by a desire to enjoy [their] property, or to accumulate it". But these considerations do not restrain "extravagance or eccentricity in testamentary dispositions, on which there is no check except by the Courts of law".

2.74 At about the time Miss M'Caig made her will, Mr Aitken set up a testamentary trust by which trustees were to erect a giant statue of him, on horseback, in the centre of Musselburgh. It was to cost about £5,000 and would involve the demolition of a number of commercial and residential properties owned by the truster. The statue was to be maintained in perpetuity. Although he died in 1909 his trustees did not bring a case to court until 1927 for a ruling on the validity of the truster's directions to them.[201] We have already seen[202] that the court was heavily influenced by the two *M'Caig* cases, and the same

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[197] The "M'Caig Tower", which still overlooks Oban, was built around 1896 by the brother whose settlement was disputed in the first *M'Caig* case. It cost him about £5,000.
[198] *M'Caig's Trs v Kirk-Session of United Free Church of Lismore* 1915 SC 426 at 436.
[199] *Ibid* at 433-434.
[200] *Ibid* at 434. This also applies to the other quotations in this paragraph.
[201] *Aitken's Trs v Aitken* 1927 SC 374.
[202] At paras 2.69 and 2.71.

principles which operated to reduce the settlements in those cases were applied to reduce Mr Aitken's settlement too. Lord Sands reiterated that bequests in respect of memorials, either to the testator or to his or her ancestors, would be respected if they represented the "reasonable, honourable, or pious wishes of a testator".[203] There is a public benefit in allowing such wishes to be carried out. But the trust purposes in this case constituted "an irrational, futile, and self-destructive scheme",[204] and so the court reduced the trust.

2.75 The question of whether a particular bequest is so unreasonable as to offend against public policy will be a matter of judgment in each case. The difficulty inherent in using decided cases to predict the outcome of a future case is illustrated by the approach taken by the judges in *MacKintosh's Judicial Factor v Lord Advocate*.[205] The testatrix, who died without known relatives, left a will directing that her whole estate be used to erect a suitable memorial for her and a couple whom she regarded (and described) as her uncle and aunt, both of whom had predeceased her. They were to be disinterred and reburied in the new vault, along with her own remains. The court was unanimous that the testament must fail, though this was on the ground that the testatrix had no power to direct the disinterment of those to whom she was not in fact related. There were, however, some obiter comments of interest for our purposes. Lord President Clyde, referring to the *M'Caig* cases and *Aitken*, mentioned above, said:

> "Those cases are not easy to understand. There appears to be a considerable conflict of opinion among the members of the Court who delivered judgments. But they seem to lay down that, if a testator's directions reach a certain pitch of grotesqueness, of extravagance, of wastefulness, or of futility, then the testator's act may be regarded as going beyond the right of *testamenti factio*. There are, of course, unwise and even eccentric people who leave behind them unwise and eccentric wills. These are entitled to respect just as much as the wills of wise and sober-minded people. But the principle seems (if I may state it in a popular way) to be that, just as a mad person cannot make any will, so a sane person cannot make a mad will. But does any consideration of this kind apply to this testatrix's project to erect a granite vault (even if it is to involve the expenditure of the whole £3600 of which her estate consists)? Is it so grotesque, so extravagant, so wasteful, or so futile – in a word, so mad – that her direction must be declared a nullity? One tries to place oneself in her position. She had not been married and had no children; and, owing to defect of status under which she suffered by no fault of her own [ie her illegitimacy], she was without a living relative in the world – the only two people with whom she could claim any kind of affinity or connexion (whom she knew as her uncle and aunt) having died many years before. As it appears to me, she, not unnaturally, sought such consolation as might be derived from the assurance that her remains were to rest alongside the remains of the only two people in the world with whom she had any relation. It is no doubt impossible to look at her plan for the realisation of such a project without a smile; and it is impossible not to be impressed with the grossly disproportionate character of the project. But I do not, for myself, see my way to say that it constitutes an abuse of testamentary power."[206]

On the other hand, Lord Blackburn dissented on this point:

> "I should have been prepared to hold that it was such a preposterous and extravagant scheme, and such a complete waste of money, as to entitle us to refuse

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[203] *Ibid* at 381.
[204] *Ibid* at 383.
[205] 1935 SC 406.
[206] *Ibid* at 410-411.

to allow the estate of the testatrix to be thrown away in attempting to carry out that part of her scheme".[207]

2.76 The court has subsequently been petitioned to determine similar issues.[208] In *Lindsay's Executor v Forsyth*[209] the court considered a testamentary bequest of £1,000 whose income the testatrix wished to be used, in perpetuity, to provide weekly supplies of fresh flowers for the graves of herself and her mother. The Lord Justice-Clerk was in no doubt that this was invalid on the twin grounds that it was "extravagant to the point of caprice" and that it conferred no benefit on any identifiable living person. More recently, in *Sutherland's Trustee v Verschoyle*[210] a testatrix provided for a testamentary trust under which certain of her possessions were to be housed and maintained in perpetuity. In her view the possessions were a "valuable art collection" but the decision proceeded on the basis that they held insufficient artistic merit of lasting interest to justify the expenditure which the trust would have required. The court therefore held that the trust directions were invalid.

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[207] *Ibid* at 413. Lord Blackburn was one of those who decided *Aitken's Trs*, *supra*.
[208] In addition to the cases cited in this paragraph two further ones may be noticed: *Campbell Smith's Trs v Scott* 1944 SLT 198 (residue of estate to be used to erect a monument to commemorate the past services of the Royal Scots regiment; the court upheld the trust) and *Tait's JF v Lillie* 1940 SC 534 (testamentary trust for the establishment of a sanatorium at the truster's house held to be invalid as there was no reasonable probability that, with the funds provided, the scheme could be executed within a reasonable period).
[209] 1940 SC 568. The quotation later in the paragraph is at 572.
[210] 1968 SLT 43.

Part 3 Criticisms of the current law

Introduction

3.1 In Part 2 we traced the history of certain rules, namely those restricting (i) the accumulation of income, (ii) the creation of future interests and (iii) the lifetime of private trusts. In this Part we offer a critical examination of the current law in each of these areas.

3.2 Two broad criticisms can be made of the statutory rules under heads (i) and (ii) in the preceding paragraph:[1]

(a) they have been found to be complex and uncertain in practice, and do not always operate consistently; and

(b) the policy reasons that underlay their enactment no longer appear valid, and no other policy justification exists for the rules.

3.3 We intend to be begin by examining the first of these issues, the practical operation of the rule restricting accumulation and the rules on the creation of future interests. We believe that the technical complexities and uncertainties that are revealed are important in determining whether the rules should exist and if so in what form. Thereafter we intend to consider possible policy justifications for the rules. At the end of the Part we discuss the common law rule governing the lifetime of private trusts.

Operation of the rules: complexity, uncertainty and inconsistency

A: Rule restricting accumulation of income

3.4 By way of introduction, it is worth noticing two points. The first is that there has been a large volume of litigation on the rule restricting accumulation since it was first enacted in 1800. Indeed, Morris and Leach, writing in 1962, note that there were, by then, about 180 reported cases on the Accumulations Act of 1800: an average of over one a year since it was passed.[2] That Act was motivated in large part by a desire to restrain testamentary settlements which were seen as damaging to the public interest. Yet, while the overall – and continuing – cost to trustees of this litigation is impossible to quantify, it is clear that there has been a significant cost, both in respect of the litigation itself and in respect of legal advice on the application of the legislation. Moreover, in many cases it is clear that the advice given to the truster or to the trustees has not been correct. Thus what began as a swift and apparently straightforward response by Parliament to the perceived threat of accumulating wealth for the benefit of people in the distant future has in many cases developed into a perilous trap for the wary and the unwary alike and, in some instances, an unnecessary barrier in the way of well-intentioned trusters.

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[1] We deal with head (iii), the common law rule on the lifetime of private trusts, in paras 3.75-3.76.

[2] Morris and Leach, p 304. They also predict that certain issues, which had by then hardly been litigated, "seem bound to produce some complicated litigation". Many of the reported cases are from the English courts but, given that the legislation is broadly similar on either side of the border, they serve as weighty authority in the absence of direct Scottish authority.

3.5 It is, of course, impossible to assess either the benefits or the disadvantages of a particular law through a crude assessment of the number and nature of court actions which it has generated.[3] It may be that, in certain fields, the fact that legislation gives rise to regular litigation is an argument in support of its worth. Nevertheless, while it is clear that the rule restricting accumulation has given rise to a very considerable quantity of litigation, and no doubt to much legal advice which has avoided yet more court actions,[4] the overall cost – financial and otherwise – which this involves can only be justified if the rule serves a sufficiently useful purpose. The question of whether that balance has been achieved is one which we propose to explore in this Part.

3.6 The second introductory point is that the rule restricting accumulation has long been subject to criticism. Morris and Leach, describing the Accumulations Act 1800, write:

> "Judge after judge has complained of the looseness of its drafting. It has proved to be one of the most difficult Acts on the Statute Book to apply. … No one who has not been exposed to this material [ie the jurisprudence generated by the Act] can have any idea of the complexities involved."[5]

As an example of judicial exasperation, Lord Justice-Clerk Alness's opinion in a case in 1929 contains the following:

> "The first question involves a problem of importance and complexity. Its solution depends on the terms of the Accumulations Act, 1800, popularly known as the Thellusson Act. Lord Chancellor Brougham has referred to it as 'an Act which has hardly ever been discussed, in Courts either of Law or Equity, without the Judge having occasion to observe upon the inartificial, and, in several respects, ill-defined language, in which its provisions are expressed'. The description, in my humble opinion, does not err on the side of severity. I confess that I have found the task of interpretation and co-ordination of the several provisions of the Act to be one of unusual difficulty."[6]

3.7 The operation of the statutory provisions containing the rule restricting accumulation is extensively documented.[7] We propose to consider certain practical aspects which are, mainly because of uncertainties or complexities in the rule, unsatisfactory. We do this by examining how some fundamental questions which will inevitably arise from time to time have been answered by the courts. A rule which operates in a satisfactory manner should provide clear answers. We will see that the currently formulated rule does not always do so. The questions are:

(i) What is an 'accumulation'?

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[3] One way to reduce the volume of litigation in this area might be to lengthen greatly the accumulation periods, for which there is some (rather dated) empirical evidence from the USA: see LM Simes, *Public Policy and the Dead Hand* (1955), p 208. But a supporter of the Accumulations Act would hardly take this as evidence that the new rule was somehow a better law. However, the supporter might reasonably concede that the current rule should be reformed, preserving its broad policy but simplifying its operation so as to be more efficient and less in need of interpretation by the courts.

[4] Compare the comments in paras 4.18-4.19 of the Law Commission's Consultation Paper on the *Rules against Perpetuities and Excessive Accumulations* (No 133; 1993), made in relation to the perpetuities rule.

[5] Morris and Leach, p 304.

[6] *Union Bank v Campbell* 1929 SC 143 at 149. Brougham was Lord Chancellor in the early 1830s. The repeal and restatement of the 1800 Act has not markedly improved its intelligibility or simplified its operation.

[7] For a full discussion see Stair, vol 24, paras 34-48; Wilson and Duncan, pp 125-143; Dobie, pp 264-271; M'Laren, pp 306-316; Burgess, pp 181-225 and Morris and Leach, pp 266-306.

(ii) What is a 'direction' to accumulate?

(iii) For how long may income be lawfully accumulated?

(iv) What application does the rule have in commercial contexts?

(i) What is an 'accumulation'?

3.8 In many cases this question can be answered by recalling the basic mischief at which the 1800 Act is directed, as explained succinctly in its long title:

> "An Act to restrain all Trusts and Directions in Deeds or Wills whereby the Profits or Produce of Real or Personal Estate shall be accumulated, and the beneficial enjoyment thereof postponed, beyond the time therein limited."

Thus what is restricted is the accumulation of income whose beneficial enjoyment is thereby postponed for a period longer than one of those prescribed by the Act. The statute provides that income which may no longer be accumulated must be paid out.[8] In a sense, the direction to pay out the income lies at the heart of the rule: accumulation is only objectionable if it delays the enjoyment of the income for an excessive period. M'Laren uses this to show that simple accumulation (ie accumulation of income but not of income generated by that income) falls within the rule.[9] The same reasoning can often be used more widely to determine whether or not income is being 'accumulated' within the mischief of the rule. Nevertheless, such reasoning does not provide the answer in all cases. A lack of clarity as to what constitutes accumulation is a significant defect. We examine two broad areas in which there has been considerable litigation: first, where income is not paid out because it is used to preserve the value of the trust assets in the course of prudent management by the trustees; and, secondly, where income is saved for a period rather than paid out promptly. We also touch on the question of what counts as 'income'.

(a) maintenance of trust property

3.9 Trust assets, notably heritable property, may need periodic maintenance to keep them in good repair. Any income spent on this is not regarded as an accumulation. As was said in a late Victorian case in the Chancery Division:

> "All improvements in substance, which can in any fair sense be regarded as coming under the words, 'maintaining in good habitable repair houses and tenements', appear to be outside the Thellusson Act altogether. There may be [ ] building land on the estate; money laid out in building houses on that land would be within the Act."[10]

So, if a truster leaves his farm to trustees, with provision that income from it is to be accumulated for a period after his death, sums paid out of income for the upkeep of the farm will probably not fall within the rule restricting accumulation and so do not need to stop at the end of the permitted period. Nevertheless, the distinction between what counts as expenditure on maintenance and what goes beyond that will not necessarily be obvious.

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[8] See s 1 of the 1800 Act (in Appendix D) and s 5(3) of the Trusts (Scotland) Act 1961 (in para 2.26).
[9] M'Laren, p 310. Compound accumulation is obviously caught.
[10] *Vine v Raleigh* [1891] 2 Ch 13 at 26, per Lindley LJ.

3.10 In addition, other maintenance costs may fall outwith the scope of the rule restricting accumulation; these include any payments made under insurance contracts against fire and the like.[11] More broadly, it has been held that insurance premiums under a policy designed to protect the value of a wasting asset do not qualify as accumulations.[12] A testator left leasehold interests in a number of properties in London. At his death the leases had 29 years to run. He directed that, for the duration of the remaining term of the leases (and therefore for longer than the period permitted under the 1800 Act), a specified amount of the rental income be paid out each year to secure a suitable insurance policy whose aim was to produce, at the determination of the leases, a sum equivalent to the value of the leasehold interests at his death. It was held:

> "What the testator has here directed is not, in my opinion, an accumulation within the Act. All that he has done is to direct that the property shall not be diminished. At the end of the term the leaseholds will be gone, and his scheme is that the money shall be there to replace them. Therefore, on principle, I do not think that this is an accumulation."[13]

These authorities are considered in a more recent case in which the court said that:

> "a provision for accumulating income which goes no further than a prudent owner would go in the management of the property in question is not within the [Accumulations] Act".[14]

3.11 One explanation for this approach is that it aims to preserve a proper balance between those interested in capital (including the accumulated income) and those interested purely in income. If the rule restricting accumulation were to apply to income needed for the long-term maintenance of capital assets such as farms and houses then, at the expiry of whatever period was allowed under the rule, further accumulation would be unlawful and all future income would require to be paid out. Unless other monies were available for the maintenance of the capital assets their value would gradually diminish, to the detriment of those entitled to them, whilst the income stream would be secure, at least in the short term,[15] for those purely interested in income.[16] Thus exempting income to be used for the proper maintenance of trust assets from the rule restricting accumulation is, in our view, justified. If the rule is to be retained, however, even in a modified form, there may be a case for putting the exemption on a statutory footing.

(b) what counts as income?

3.12 A second, and related question is: what counts as income?[17] Whilst there will generally be no doubt, this is not always so. A case from the early 20th century provides an

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[11] See, eg, *In re Mason* [1891] 3 Ch 467, decided a few months after (and affirming) *Vine v Raleigh, supra*.
[12] *In Re Gardiner* [1901] 1 Ch 697. (Other types of insurance are discussed at paras 3.28 and 3.30.)
[13] *Ibid* at 699, per Buckley J.
[14] *Re Rochford's Settlement Trusts* [1965] Ch 111 at 124, per Cross J. Compare the exception in the USA for income retained "in the course of judicious management of the trust" in Section 2.2(4) of the Restatement (Second).
[15] In the longer term the income from a dilapidating asset may well be diminished because of the dilapidations.
[16] For a general discussion of the allocation of income from wasting assets between those interested in capital and those in income see the Scottish Law Commission's Discussion Paper on *Apportionment of Trust Receipts and Outgoings* (No 124), paras 2.11-2.16.
[17] The modern legislation is framed solely in terms of income whereas the Accumulations Act 1800 restricts accumulation of "the rents, issues, profits or produce" of real or personal property.

example.[18] Almost 60 years after the truster's death, the trustees granted leases to work the coal which lay under parts of the estate. The primary issue for the court was whether the rents from these leases were to be taken by the income or the capital beneficiaries under the trust. There was House of Lords authority to the effect that it was the latter who were entitled.[19] That being so, the court held that it was inevitable that the Accumulations Act did not apply to the payments under the leases, as they fell to be classified as capital, not income. It is an open question whether financial products which are deliberately structured so as not to produce periodic income (such as those with a zero coupon), or stocks and shares which pay no dividend, would attract the rule restricting accumulation. In our view there is a strong argument that the rule would not apply if a truster directed that the trust fund be invested solely in this way, as there is no income.[20]

(c) 'retention' or 'saving' of income

3.13 The general rule is that income must be either accumulated or distributed: there is no third option.[21] The courts have, however, occasionally sanctioned a temporary retention on the basis that it does not amount to accumulation. One example concerns annuities payable by trustees. There may be a direction to meet them out of trust income and to accumulate the excess income. Problems can arise if the annuitant survives the period during which income may be lawfully accumulated. If the income comfortably covers the annuity, there is no difficulty: the annuity is paid and, as further accumulation is unlawful, the balance is distributed. Nevertheless, in a case where the income was not always sufficient to meet the annuity, as it varied from year to year, the court allowed the trustees to retain some of the income in case it was needed in a future year for the payment of the annuity, and held that in this situation the rule restricting accumulation did not apply.[22] Rather than income being accumulated (in the sense prohibited by the rule restricting accumulation), it was decided that there was a "temporary retention of income as an administrative precaution against future deficiencies".[23] Different rationales for the decision were given by the three judges. This fact alone highlights the uncertainty that permeates this area of the law.

3.14 Separately, there are decisions from the early 20th century which suggest that, where income is directed to be accumulated for a particular purpose, it is not unlawful to continue to accumulate (or to 'save') beyond the permitted period. Thus, where trustees were directed to build up income in order to establish a library, but were not permitted to encroach on capital for that purpose, it was permissible to continue to accumulate after 21 years until a sufficiently large fund had been amassed.[24] And where a testator left the residue of his

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[18] *Ranken's Trs v Ranken* 1908 SC 3.
[19] *Campbell v Campbell's Trs* (1882) 10 R (HL) 65.
[20] But some jurisdictions tax certain zero coupon products on the 'phantom income' which accrues, which suggests that they could be classified as income-bearing for the purposes of the rule against accumulations.
[21] Eg see *McIver's Trs v LA* 1973 SC 189 where, by *inter vivos* deed, a father conveyed property to trustees to be accumulated for the benefit of his son when he turned 22. In dismissing an argument that the permitted period should be the minority of the son (which would have raised the question of how to treat the income produced while the son was aged 21) Lord Fraser said, at 198, that "in a trust such as the present income which is not paid to or applied for the benefit of some beneficiary can in my opinion only be regarded as having been accumulated. There is no third or intermediate way in which the trustees can deal with it."
[22] *Re Berkeley* [1968] Ch 744. See Stair, vol 24, para 47 which summarises the differing reasons given by the three appeal judges for their unanimous decision.
[23] *Ibid* at 780-781, per Widgery LJ.
[24] *Lindsay's Trs, Petrs* 1911 SC 584. The court's analysis was that this would not amount to an accumulation of income within the Accumulations Act but to a saving from income. The authors of the Encyclopaedia criticise this decision, saying that it is difficult to see any distinction between savings and accumulations. It appears that income is being retained and held as capital. They also point out that, even if such a distinction can be

estate to trustees with a direction to make payments to such issue as were, in the trustees' opinion, "most deserving" the trustees were permitted to continue to accumulate income for longer than 21 years after the testator's death. As Lord Salvesen explained:

> "the fact that there have been accumulations beyond twenty-one years has not resulted from a direction, express or implied; nor do I think that the accumulation is the necessary consequence of the directions given. It has resulted entirely from something extraneous to the deed, namely, the inability of the trustees to find proper objects of the testator's bounty."[25]

The reasoning in each case depends upon the fact that the trustees continue to accumulate (or to make savings out of) income because of a discretionary act on their part and not in any way because of a direction by the truster. These cases were, however, decided before the rule restricting accumulation was explicitly made applicable to powers, as well as to directions, to accumulate.[26] It is doubtful whether the same results would be reached today.

(ii) What is a 'direction' to accumulate?

3.15 This is another area of considerable uncertainty and complexity. There are in fact two distinct issues behind this question: the first is whether only an express direction will be caught or whether an implied direction will also be subject to the rule; and the second is whether discretionary accumulation is caught (ie where income is accumulated by trustees exercising their discretion as opposed to following a mandatory direction). It is clear that express mandatory directions fall under the rule restricting accumulation, but what of other situations?

3.16 On the first issue, there is no doubt that the Accumulations Act 1800 clearly had express directions in mind. The terms of the Act, however, were not restricted to express directions by the truster and, over time, it was inevitable that cases arose in which it was argued that implied directions were or were not also covered by the legislation. In the first half of the 19th century there were some decisions to the effect that only express directions fell within the legislation, though soon thereafter it became settled that implied directions were also covered.[27] The courts have found implied directions in a wide variety of situations.[28] For example, where a will did not provide a destination for the surplus income after the payment of the annuities the court held that there must be an implied direction that it be accumulated.[29]

3.17 There is also a further point to be considered. Only directions *by the truster* fall within the rule restricting accumulation. If another person, such as an actuary who is appointed by the court to assist with the construction of a scheme of equitable

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sustained, it will only be relevant to public trusts or other trusts where income is to be directed to a specified purpose: Stair, vol 24, para 48 and fn 2.

[25] *Mitchell's Trs v Fraser* 1915 SC 350 at 357.

[26] See s 6(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966, and also paras 3.15-3.19.

[27] *Lord v Colvin* (1860) 23 D 111, approved in *Moss's Trs v Bramwell* 1936 SC (HL) 1. It makes no difference that the testator did not intend that income be accumulated: *Mackenzie v Mackenzie's Trs* (1877) 4 R 962 at 970, per Lord Shand.

[28] See Wilson and Duncan, para 9-20, for a list of examples.

[29] *Logan's Trs v Logan* (1896) 23 R 848: "If a truster directs that to be done which as a consequence leads to indefinite accumulation, he must, within the meaning of the statute, be taken to have directed accumulation", per Lord M'Laren at 852.

compensation, can be said to be responsible for the direction to accumulate then the rule does not apply. This is explained in the Encyclopaedia:[30]

> "It is only accumulation which the truster has directed expressly or impliedly that is struck at by the legislation. If accumulation can properly be regarded as directed by some other person, the prohibition has no application. When, for example, a liferenter directs that income due to him should be accumulated by the trustees and added to capital, that accumulation is unaffected by the prohibition, even if all the permitted periods have expired. Similarly, when a scheme of equitable compensation is approved by the court and is in a form that cannot be said to be one directed by the testator, the prohibition does not apply to any accumulations under the scheme.[31] Where, on the other hand, a scheme of equitable compensation is one that can be said to have been directed by the testator, even though the direction is implied from a forfeiture provision, the prohibition does apply and accumulation is restricted to twenty-one years from the date of death.[32]"

The distinctions involved in the equitable compensation cases (which admittedly do not arise frequently) are not only fine but also involve a determination of facts which are, by definition, unknowable from the truster's perspective. The uncertainty that this generates is unsatisfactory.

3.18 The second issue is whether the rule applies to a power – as opposed to a direction – to accumulate. Does a discretionary decision by the trustees which results in accumulation trigger the application of the rule? This was a matter on which there was some uncertainty,[33] and the Law Reform Committee, writing in 1956, recommended that the law be put beyond doubt:

> "[T]he opportunity might with advantage be taken of stating in terms that the restrictions on accumulation apply to powers to accumulate as well as to directions to accumulate. In *Re Robb* [1953] Ch 459 this was indeed held to be the existing law. However, it seems desirable that on so substantial a point the express wording of the statute should provide more patent support for the decision."[34]

3.19 The Committee's recommendation led to statutory provision being enacted.[35] As we have seen,[36] some decisions which predated the commencement of this provision sought to distinguish between directions and powers, with the latter being free from the limitations of the rule restricting accumulation. But the law is now clear, at least for deeds coming into effect after 1966: accumulations which occur following the exercise of a power – usually by the trustees[37] – are subject to the rule restricting accumulation in the same way as those which result from a direction by the truster.

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[30] Stair, vol 24, para 37 (with some footnotes omitted or abridged).
[31] *Moss's Trs v Bramwell* 1936 SC (HL) 1.
[32] *Hutchison v Grant's Trs* 1913 SC 1211; *Innes's Trs v Bowen* 1920 SC 133.
[33] See Burgess, pp 188-189 and *Watson's Trs v Brown* 1923 SC 228.
[34] Law Reform Committee Report, para 60.
[35] In Scotland this was in the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966, s 6(2) (which applies to deeds taking effect after 3 August 1966): see paras 2.28 and 2.31.
[36] See para 3.14.
[37] The power may be exercised by the donee of a special power of appointment: see Stair, vol 24, para 37.

(iii) For how long may income be lawfully accumulated?

3.20 In practice this is likely to be the most important question for anyone intending to establish an accumulation trust. It is unfortunate that the answers to the question are not always predictable and that they can at times be very much at variance with what a particular truster intended.

3.21 We saw in Part 2 that there are six different periods for which income may be accumulated,[38] and we explain in the following paragraphs how the period applicable to a given case is determined. The only exception is where the income is directed to be invested in land, in which case there is a single period which applies, regardless of what the truster may have specified.[39] It is for the truster to specify which period is to apply. Where a single permitted period is specified there is no difficulty. However, where more than one period is chosen or, as is more likely, where there is no explicit or obvious selection of any one period, the application of the rule is uncertain. The courts' approach is as follows:

3.22 First, it is not permissible to accumulate for more than one period. The periods are alternative and not cumulative. Section 5(2) of the Trusts (Scotland) Act 1961 prohibits the accumulation of income "for any longer period than *one* of the following …".[40] Attempts to set up consecutive periods will be rejected:

> "In my view, a grantor cannot get over the disabling effect of the Accumulation Acts by executing a second deed directing the illegal accumulations to be returned to the trustees acting under the first deed, so that they may be accumulated in the very way which has become illegal."[41]

3.23 Secondly, in determining which period applies, the statutory wording will be interpreted strictly. In *McIver's Trustees v Lord Advocate* a father had directed, by *inter vivos* deed, that income be accumulated for the benefit of his son until he attained the age of 22. It was held that the period which permits accumulation for the duration of the minority of the beneficiary was not applicable, as the truster had directed accumulation for longer than a minority.[42] Since accumulation had begun during the truster's lifetime the permitted accumulation period was held to be the life of the grantor,[43] thereby rendering it unlawful for accumulation to be continued after the truster's death.

3.24 Thirdly, if the period for which income is directed to be accumulated exceeds the relevant permitted period – but where the accumulation would be lawful in its entirely if only the period were shorter – accumulation is to take place for the permitted period and must then cease.[44]

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[38] At paras 2.26 and 2.28. However, not all (and in some cases only one) of the periods will be suitable in any given case. For a detailed examination see Wilson and Duncan, pp 131-134, and Burgess, pp 197-203.

[39] Ie the period specified in the Accumulations Act 1892: see para 2.22. We discuss this further at para 3.27.

[40] This was also the law before 1961. "It must, I think, be held to have been finally ascertained as a matter of construction, that only one, but not more than one, of these periods can be selected by the settlor": *Union Bank of Scotland v Campbell* 1929 SC 143 at 156, per Lord Ormidale.

[41] *Lady Gibson's Trs, Petrs* 1963 SC 350 at 355, per Lord Sorn.

[42] *McIver's Trs v LA* 1973 SC 189. The accumulation period which was disallowed was that in s 5(2)(d) of the Trusts (Scotland) Act 1961. Minority for the purposes of that Act ends at 21 years: s 5(6).

[43] Section 5(2)(a) of the Trusts (Scotland) Act 1961.

[44] *Edward's Trs v Edward* (1891) 18 R 535. Section 5(3) of the Trusts (Scotland) Act 1961, which restates the final part of s 1 of the Accumulations Act 1800 and provides that a direction which contravenes the statute is void, is to be read in this way.

3.25 Fourthly, where the truster does not specify a period, or (as in *McIver's Trustees*, discussed just above) specifies a period which is not one recognised by statute, the court will determine which period is applicable. Generally, where accumulation is directed to begin before the truster's death, it is likely that the permitted period will be taken to be the truster's lifetime (as it was in *McIver's Trustees*), and where accumulation is directed to begin on death the likelihood is that the period will be 21 years from that date. In reaching its determination the court will often use a process of elimination,[45] although authorities are divided as to the role which the intentions of the truster, so far as they can be determined, will play.[46]

3.26 Where the courts determine the applicable accumulation period, either by substituting a different period for one selected by the truster or by providing a period where none is expressly specified, it is clear that the result can be at odds with what the truster would have wished or what beneficiaries (and their advisors) anticipated would happen. Typically, the result will be that the estate is distributed other than as wished or anticipated;[47] and, as shown by *McIver's Trustees*,[48] there may also be substantial tax consequences. Given the potential for an unintended outcome, it is vital that the rule restricting accumulation be as clear and certain as possible and that it give rise to results which are reasonably predictable and foreseeable. Under the current state of the law, this is not always the case and there are numerous traps for the unwary, even where professional advice is taken.[49]

3.27 As a final point, we have already noticed that where a truster directs income to be accumulated for the purchase of land there is only one accumulation period available, namely the duration of the minority, or minorities, of any person(s) who would, if of full age, be entitled to the income.[50] This imposes a tight restriction on trusters, as the accumulation can only take place if the intended beneficiary is the person whose minority is the yardstick for the permitted duration.[51] What is *not* permissible is for a truster to direct accumulation in land for his or her lifetime, for example, or for 21 years after his or her death. Both of these options are available, as we have seen, for situations in which the 1892 Act does not apply. This produces an inconsistency: the rule restricting accumulation provides a wider choice of periods (and, potentially, a longer period of accumulation) if there is no direction that the

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[45] See, eg, *Union Bank of Scotland v Campbell* 1929 SC 143 at 156; *McIver's Trs v LA, supra* at 197.

[46] Contrast *Union Bank of Scotland v Campbell, supra* ("the intention of the grantor is of little account" at 156) and *Re Ransome* [1957] Ch 348 at 361-362 (which attempts, without much success, to ascertain the testatrix's intentions).

[47] It may be a highly complex matter to determine the resulting distribution. See Wilson and Duncan, pp 136-143, for a discussion of the issues. The professional advice which may be needed to determine who takes the income which can no longer be accumulated will be an added burden.

[48] *McIver's Trs v LA, supra*. The result of the decision was that estate duty became payable on the truster's death rather than at a later date.

[49] In a professional negligence claim (relating to the rules against alienation and perpetuities, rather than the accumulation rules) the Supreme Court of California held that an attorney who drafted a testamentary trust which turned out to be invalid for breach of the rules was not liable to those who were disadvantaged because of the invalidity: *Lucas v Hamm* (1961) 56 Cal. 2d 583. "In view of the state of the law relating to perpetuities and restraints on alienation and the nature of the error, if any, assertedly made by defendant in preparing the instrument, it would not be proper to hold that defendant failed to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly exercise. [ ] The possible occurrence of such a delay [which caused the trust to be invalid] was so remote and unlikely that an attorney of ordinary skill acting under the same circumstances might well have 'fallen into the net which the Rule spreads for the unwary' and failed to recognize the danger": *ibid* at 592-593. This decision cannot be used to determine the position of an adviser on the Scots rule restricting accumulation but it is a cautionary illustration of the real dangers which may ensnare even skilled professionals. Complex and uncertain rules are best avoided.

[50] See para 2.22.

[51] Compare, in this regard, some of the US states' accumulation statutes: see Appendix A, para 54.

income be invested in land. Such discrimination between directions to invest in land and other directions requires powerful justification, which we are at a loss to identify. Any concern which existed in the late Victorian era about accumulations of land as opposed to accumulations of cash or other moveable property does not hold fast today.

(iv) What application does the rule have in commercial contexts?

3.28 The expression 'commercial contexts' refers in particular to pension schemes, life assurance policies, partnership agreements, unit trusts and other trust-based investment schemes. The application of the rule to such instruments is a highly significant question which has been explored from various angles over the last century and a half. In the main the courts have held that the rule is not applicable, but it is regrettable that matters are not made clear by statute.[52] The result is confusion and uncertainty and it can only be damaging for the confidence in the commercial sector.[53] In an early decision the court had to decide whether the Accumulations Act 1800 – which even then had been in force for over half a century – applied to life assurance premiums.[54] A testator had directed that income from his estate be used to continue to meet the premiums due under life assurance policies he had effected on the lives of his sons. Was the payment of the premiums out of income restricted to one of the permitted periods? The court said not. Turner VC explained his decision in this way:

> "I do not see how the payment of the premiums to the insurance company out of the income is an accumulation of the income. The premiums when paid to the insurance company become part of their general funds, subject to all their expenses; and, although it is true that the funds in the hands of the companies do generally produce accumulations, it is impossible to say what accumulations arise from any particular premium."[55]

The judge was aware that his decision would have wider implications and that it might be used to get round the rule restricting accumulation. He was not, however, persuaded that this was realistic, adding that if he had decided the case otherwise then perfectly reasonable commercial arrangements would be struck at, such as "partnership agreements for long terms of years, where certain sums are to be drawn out annually and the remaining profits are to accumulate and be divided at the end of the terms".[56]

3.29 The decision is also of interest for its purposive interpretation of the Accumulations Act:

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[52] Contrast the application of the rule against perpetuities to pension schemes, where a statutory exemption has been enacted in the Pension Schemes Act 1993, s 163 (which can be traced back to an Act of 1927). Where a jurisdiction with a rule against perpetuities has not made similar provision, this defect may be subject to adverse comment by the courts: see the Privy Council's judgment in *Air Jamaica Ltd v Charlton* [1999] 1 WLR 1399 at 1414.

[53] As a concrete example, see the *AEG* case which is discussed more fully in para 3.29. Court action was needed in that case because of uncertainty over the validity of the accumulation power in the unit trust deed. The trust manager wrote: "[W]e understand that you have been advised that there is some doubt as to the validity of clause 21 [which allowed accumulations of income], and that an application to the court may be necessary. If this is so, may we suggest that you commence proceedings without delay to have the matter decided, because, until we know whether or not clause 21 is valid as it stands, it is impossible for us to frame our investment policy? [ ] You will also, of course, appreciate that while this doubt is unresolved we do not feel that we can properly invite the public to subscribe for units, so that, taken all round, the matter is one of considerable commercial urgency.": *Re AEG Unit Trust (Managers) Limited's Deed* [1957] Ch 415 at 418.

[54] *Bassil v Lister* (1851) 9 Hare 177. See para 3.10 for discussion of insurance connected with the trust assets.

[55] *Ibid* at 183.

[56] *Ibid* at 184.

> "It had its origin in dispositions for the accumulation of rents and profits *qua* rents and profits, and not in dispositions having any reference whatever to any bargains or contracts entered into for other purposes than the mere purpose of accumulation."[57]

This approach is strongly echoed in a decision of more than a century later about whether the rule restricting accumulation applied to unit trusts.[58] The case concerned the validity of a clause in a unit trust deed allowing the manager to decide, each year, whether to accumulate and capitalise some or all of the income of the fund. The judge decided that the clause was valid, and that the rule restricting accumulation did not apply, for two reasons. The first, to the effect that the rule was not intended to catch accumulations of the type allowed under the unit trust deed, was heavily influenced by the decision in *Bassil v Lister*, discussed just above, and several paragraphs of Turner VC's speech are quoted in support of this leg of the decision. The second reason was that the individual unit holders could demand the distribution of all of the income, which would mean that the manager would lose the power of accumulation, so rendering the rule restricting accumulation inapplicable.

3.30 *Bassil v Lister* was followed in Scotland on similar facts in *Cathcart's Trustees v Heneage's Trustees.*[59] It was held that the premiums payable on the life policy were not accumulated but expended, as the price of a future contingent benefit.[60] The amount of that benefit did not represent the payments made in any juridical sense, and was not necessarily related to the amount of the premiums actually paid. Consequently the payment of the premiums did not fall within the mischief at which the statutory prohibition was aimed. Lord Justice-Clerk Moncrieff stated:

> "A transaction of this kind has very little analogy to the evil which it was the object of the Thellusson Act to meet. A direction to effect an insurance on the life of one living at the testator's death, so far from savouring of perpetuity, is as temporary and transitory an application of income as could be devised. But a direction to keep up a policy on which twenty-one years had run seems as far as possible removed from the kind of accumulation prohibited by the statute. Accumulation is a term entirely inapplicable to the result of such a transaction. Any gain which the trust-estate could have acquired by it had been created contingently before, and so far were the continued payments from augmenting the estate that they only saved it from loss. By the time the twenty-one years were out a great part of the anticipated benefit had been swallowed up, and when nearly forty years had run it had wholly disappeared."[61]

Once again, the Lord Justice-Clerk's reasoning is an example of a purposive approach to the legislation. Nevertheless, it must be said that the approach of the court to some extent reflects the fact that a very traditional whole life policy was involved. More modern investment products can be used to produce a result that is essentially an accumulation of capital. The Lord Justice-Clerk indicates that the payments made to the life company were

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[57] *Ibid* at 181.
[58] *Re AEG Unit Trust (Managers) Limited's Deed* [1957] Ch 415. See fn 53 to para 3.28 for the commercial significance of this issue to the trust's operation.
[59] (1883) 10R 1205. The premiums due under the insurance policy, which was effected by the trustees after the testator's death, consumed most of the income of the trust. Lord Craighill, agreeing with Lord M'Laren's first instance decision, held that payment of the premiums represented an indirect accumulation and accordingly fell within the scope of the Accumulations Act. Wilson and Duncan call the majority decision "difficult to understand": Wilson and Duncan, p 127.
[60] *Ibid*, per Lord Justice-Clerk Moncrieff at 1216.
[61] At 1215. Lords Young and Rutherfurd Clark concurred, the latter with some reluctance; Lord Craighill dissented.

swallowed up over a period of 40 years; with other investment products the benefit to the trust might increase over the whole of that period (subject only to changes in the capital value of the underlying investments). Consequently *Cathcart's Trustees* cannot be regarded as laying down a universal rule that payments in respect of all categories of life policy fall outwith the rule. Finally, it should be noted that on this point the majority of the Second Division reversed the decision of Lord M'Laren, a judge of particular eminence in this field of law. This only serves to emphasise the uncertainty of the law on accumulations.

3.31 Lastly, it has only relatively recently been held that the rule restricting accumulation is restricted to natural persons and does not apply to legal persons.[62] As was pointed out by the Law Commission, "[i]f there were any economic objection to accumulations, it would apply as much to accumulations by a corporation as to those by an individual".[63] The rule restricting accumulation will therefore be inapplicable to settlements by a Scottish (but not an English) partnership. The distinction between Scottish and English partnerships merely emphasises the arbitrary way in which the rule applies.

B: Rule restricting successive liferents

3.32 We discuss in this section the statutory rule which we refer to as the rule restricting successive liferents. We set out the relevant law in Part 2.[64] Although not confined to liferent interests, that is the paradigmatic case; the effect of the rule is that an interest may validly be created only in favour of a person alive (or in the womb) at the time when the deed creating the interest comes into operation.

3.33 The origins of the rule lie in a mid-19th century reform of the entail system.[65] The Entail Amendment Act 1848 allowed those whose land was subject to an entail to disentail it. In order to prevent this reform being circumvented, the rule restricting successive liferents was introduced. It was, in effect, an anti-avoidance measure. We have already described that the rule was set out in three different sections, one dealing with the possession of land arising under a trust deed, one with proper liferents,[66] and the last one with leasehold interests (whether held in trust or not).[67] We have also mentioned that the rule was, at first, only concerned with heritable property but that an equivalent rule for moveable property was introduced in 1868,[68] and that the current legislation is contained in section 18 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968.[69] Whilst the rule no doubt helped to prevent the reform of the entail system from being subverted,[70] that system is no longer part of the current Scots legal landscape. If the rule has a future role to play, it must be justified on different grounds. We turn to an examination of the policy issues later in this Part. For

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[62] *Re Dodwell & Co Ltd's Trust Deed* [1979] Ch 301.
[63] Law Commission Report on *Perpetuities and Excessive Accumulations*, p 114, fn 26.
[64] See paras 2.36-2.46. The last of those paragraphs lists the current statutory provisions.
[65] See paras 2.36-2.40 in particular.
[66] It is not at all clear that it is competent to create a proper liferent in favour of an unborn person. We consider that this provision is not to be read as asserting that such liferents are competent; rather it is to be read as a precautionary measure which provides for what is to happen *on the assumption* that a liferent of this nature were competent. This is consistent with ss 47-49 being anti-avoidance measures: all possible eventualities are covered.
[67] See para 2.39.
[68] See para 2.41.
[69] See paras 2.44-2.45.
[70] See para 2.40 for a view that the reform was not entirely successful, but for reasons unconnected with the efficacy of the rule restricting successive liferents.

the moment we discuss some of the operational difficulties which have been experienced in connection with the rule. We focus on two criticisms.

3.34 The first criticism is that the rule is not always clear or consistent. We cite two examples which have led to reported decisions: (i) 'liferent' is not defined, and (ii) the description of those who may take advantage of the rule, as it is framed in section 9 of the Trusts (Scotland) Act 1921, is unclear.

3.35 Under head (i) it is by no means always clear what counts as a 'liferent'.[71] One question which arose was whether an annuity is subject to the rule restricting successive liferents. In *Drybrough's Trustee v Drybrough's Trustee* the court was in no doubt that the answer was no.[72] This, however, leaves the law open to the criticism of being inconsistent. Given that the rule has, at its heart, the aim of preventing perpetual settlements of a particular type it is not at all obvious why an annuity should be allowed to run freely without limit of time.

3.36 A further question had arisen a few years earlier in a case where a grandson of the testator became entitled to a share of his deceased parent's income under his grandfather's will. The grandson subsequently died before the estate became divisible in terms of the will. His representatives argued that he had been entitled to a fee interest in the estate, but the court held that his interest was that of a contingent fiar and not a liferenter, with the result that that rule restricting successive liferents did not apply.[73] Other cases in a similar vein can be cited from the late 19th and early 20th centuries, but in general they are far removed from the law of entails which, as we have seen just above, was the background and stimulus for the enactment of the rule restricting successive liferents.

3.37 Under head (ii) the drafting of section 9 of the Trusts (Scotland) Act 1921 has led to some uncertainty.[74] In *Reid's Trustees v Dashwood*[75] the court was required to determine whether a testator's posthumous daughter was "born" after his death. If so, she would benefit from the provisions of that section. The court unanimously held in her favour, even though this was hard to reconcile with the drafting of the earlier part of the section, but the doubts expressed by Lord Blackburn are illuminating:

> "I concur with your Lordships as to the difficulties of construing section 9 of the Trusts (Scotland) Act 1921, if read by itself. But I entertain some doubt whether the restriction placed by the testator upon the bequest to his daughters constitutes such a right of liferent as is within the meaning of the section – see *Shiell's Trustees*.[76] The section repeats the provisions of section 17 of the Entail Amendment (Scotland) Act 1868, the object of which I always understood to be the prevention of perpetuities by the creation of a series of bare liferents. In the present case the liferent to a single individual is coupled with a gift of the fee to her issue and, failing issue, of a power to herself to test – a class of gift which is far removed from any attempt to create a

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[71] See Wilson and Duncan, pp 115-117, for a fuller analysis. Under the heading *What is a liferent?* the first sentence reads: "Difficult questions have arisen as to whether a particular right is a 'liferent interest' within the meaning of the statute."

[72] "It seems to me that Robert Drybrough's right to share in the annuity can by no reasonable stretch of language be described as a liferent interest. The point is, in my judgment, so clear …" (*Drybrough's Tr v Drybrough's Tr* 1912 SC 939 at 945, per Lord Dundas).

[73] *Shiell's Trs v Shiell's Trs* 1906 8F 848.

[74] Section 9 is set out in para 2.42; as explained in para 2.45 it is restricted to deeds executed before 1968.

[75] 1929 SC 748.

[76] *Shiell's Trs v Shiell's Trs* 1906 8F 848. (This case is discussed in para 3.36.)

> perpetuity. Again, I entertain a doubt arising from the fact that the right of the [daughter] to her liferent depends upon the legal inference that a posthumous child must be treated [by the law of succession][77] as having been born before the death of the testator, an inference which clearly rests upon the desire of the law to give effect to what it is presumed must have been the intention of a parent. And, having acquired her liferent on that inference, it seems to me that she should not be allowed to defeat the intention of the testator by freeing herself of the restrictions upon which alone he intended that she should enjoy the liferent by maintaining that she was in fact born after the testator's death. In view, however, of your Lordships' opinions and of the express terms of section 9 of the Act of 1921, I do not feel such confidence in my doubts as to justify me in proposing to answer the questions otherwise than as your Lordships suggest."[78]

3.38 The observation that the case falls under legislation designed to prevent perpetuities again illustrates the unexpected side-effect of the statute. Its effect in this case was to allow a testator's posthumous child, having been admitted to the class of beneficiaries under her father's will, to be treated preferentially by (alone amongst the daughters) being entitled to a fee interest in the estate rather than a mere liferent interest. This seems an arbitrary result. In our view, if this rule is to continue to be part of the law of Scotland it must be justified for reasons other than a desire to prevent the creation of perpetuities.

3.39 The second criticism is that the boundaries of the various different statutory provisions which make up the rule restricting successive liferents are not clear. It was not until a House of Lords decision from the present century that the demarcation between sections 47 and 48 of the Entail Amendment Act 1848 was decided. In *Earl of Balfour, Petitioner*[79] the three Scottish Law Lords who heard the case held, unanimously (if obiter), that "section 47 is apt to cover a case such as the present where successive liferents are created in a trust disposition and settlement. Section 48, on the other hand, seems directed at proper liferents."[80] Less than two decades earlier the issue had been considered but not decided by the First Division.[81]

3.40 In practice, the fact that the two provisions are drafted in a very similar way means that it may make no difference to the outcome of the case which provision is applicable.[82] In addition, it hardly mattered for the purposes of the 1848 Act which provision was applicable: the main thing was to create an effective barrier to the creation of entails in all but name. Nevertheless, changes to the statutory provisions since 1848 have meant that the boundary between sections 47 and 48 may, of late, have some significance.

3.41 The critical provision is section 18 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, whose subsection (4) expressly supersedes both section 48 (but *not* section 47) of the 1848 Act and section 9 of the Trusts (Scotland) Act 1921. It reads:

> "(4) Section 48 of the Entail Amendment Act 1848 and section 9 of the Trusts (Scotland) Act 1921 shall not have effect in relation to any deed executed after the commencement of this Act [on 25 November 1968]."

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[77] This aspect of the case was discussed by Lord President Clyde, who remarked that the right was received into Scots law from the Civil Law (Digest, I.v.7): *ibid* at 751.
[78] *Ibid* at 756. The speech is quoted in full. Lord Blackburn was particularly noted as an authority on trust law.
[79] 2003 SC (HL) 1.
[80] Per Lord Rodger at 17.
[81] *Lord Binning, Petr* 1984 SLT 18. The speeches in *Earl of Balfour, Petr*, *supra* cite other relevant material.
[82] This was the view of the court in *Lord Binning, Petr*: "For the purposes of this petition it does not matter which of these two sections [s 47 or s 48] will be applicable." (*supra* at 20).

This means that, for a deed executed after 25 November 1968, it appears, on first looking, to matter whether it falls under section 47 of the 1848 Act or not.[83] That section is, apparently, unaffected by section 18 of the 1968 Act. We have just seen that, in terms of the decision in *Earl of Balfour, Petitioner*, section 47 applies to successive liferents set up by trust whereas section 48, which is now expressly superseded in relation to deeds executed after 1968, covers proper liferents. As proper liferents in favour of unborn liferenters are both highly unlikely in practice and of dubious competence in law,[84] it is the effect on trust liferents which is of real significance. However, in this regard there is a tension within section 18 of the 1968 Act: although, as we have noted, its subsection (4) does not disapply section 47, the terms of subsection (1)[85] are sufficiently broad so as to be capable of applying to deeds executed after 1968 which create a trust liferent. On the principle of statutory interpretation by which later legislation which is inconsistent with earlier legislation impliedly repeals it,[86] we consider that section 47 of the 1848 Act is to be understood as not applying to trust liferents set up after 1968; instead, section 18 applies. If this is correct, section 18(4) ought to be read as including section 47 too, at least in respect of deeds falling under section 18(1). However, it is unsatisfactory that the drafting does not reflect this, leading to residual uncertainty over the boundary between section 18 of the 1968 Act and section 47 of the 1848 Act.[87] Advisers in this highly specialised field will need to know which provisions are applicable.

3.42 A final issue is that there is an apparent ambiguity as to when ownership of heritable property covered by the current legislation is transferred.[88] Section 47 of the 1848 Act[89] provides that a person born after the date of the relevant settlement, of full age and in possession of the relevant land "shall be deemed and taken to be the proprietor of such land" and yet it goes on to provide a court procedure by which that person may obtain an "act and decree" which, on being recorded in the sasine register, "shall have all the operation and effect of the most formal and valid disposition to such party".[90] This contains what looks like a contradiction: it begins by saying that the liferenter becomes "proprietor", with the implication that ownership is transferred,[91] but it then provides for a court decree

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[83] The various deeds at issue in *Earl of Balfour, Petr*, *supra* were executed between 1923 and 1929 yet the questions only arose for the court in 2001. It is therefore possible that any difficulty disclosed by the issue set out in this paragraph will not become contentious for some time to come.

[84] See fn 66 to para 3.33.

[85] See para 2.44 for the full text of this section.

[86] *Leges posteriores priores contrarias abrogant* (later laws abrogate earlier contrary laws): see FAR Bennion, *Bennion on Statutory Interpretation* (5th ed, 2008), p 304.

[87] Lord Rodger notes that s 48 of the 1848 Act has been replaced by s 18 of the 1968 Act: 2003 SC (HL) 1 at 17. As we have already mentioned, the opinions on this point were obiter. It is not clear from the report to what extent the point was argued before the House.

[88] The legislation also extends to moveable property, where comparable questions can arise, though for simplicity our focus is confined to heritable property. Equally, we focus on trust liferents rather than proper liferents. We have noted, in fn 66 to para 3.33, that the competence of granting a proper liferent interest in favour of an unborn person is in doubt, but if the provisions discussed in this paragraph were applied to such a liferent we are less confident that the apparent ambiguity could be resolved in the way we describe. (However, one effect of the repeals under consideration at proposal 4 (in para 5.57) would be to remove this possible difficulty in respect of all liferents, including proper ones.)

[89] See Appendix D for the text.

[90] Section 48 is drafted in very similar terms, though of course it has been replaced by s 18 of the 1968 Act.

[91] Such a transfer, if it were to happen, would be "off register", ie it would take effect without the making of an entry in the register. Much the same would apply under s 18 of the 1968 Act, as we discuss later in this paragraph. At a policy level this is undesirable but, as we go on to suggest, a proper reading of the legislation means that this issue does not arise.

which operates as a conveyance. Section 18 of the 1968 Act[92] contains a similar tension: subsection (1) ends:

> "the said property shall [ ] belong absolutely to that person, and, if the property is vested in trustees, those trustees shall [ ] be bound to convey, deliver or make over the property to that person."

This means that, where property is vested in trustees, they are required to convey it to the person to whom it apparently already "belongs absolutely". We consider that the apparent contradiction can be resolved in each section by reading the first part ("shall be the proprietor" / "shall belong absolutely") not as an effective transfer of ownership but as a conferral of a personal right on the liferenter to have the property conveyed in his or her favour, free of the restrictions which the statute lifts. This is followed by a duty on the trustees in whom the property is vested to convey it to the liferenter.[93] On this reading, ownership transfers in the normal way on the registration of the conveyance or (under the 1848 Act) of the court decree.

C: Rules in Frog's Creditors and Newlands and section 8 of the Trusts (Scotland) Act 1921

3.43 The rule in *Frog's Creditors v His Children*[94] is explained in Part 2, along with the rule in *Newlands v Newlands' Creditors*[95] and its partial enactment in section 8 of the Trusts (Scotland) Act 1921.[96] It will be recalled that the effect of the rule in *Frog* is that, in certain circumstances, a conveyance of property in liferent with the fee to someone who is unborn (in *Frog* it was to the 9 year-old liferenter's heirs) or unascertained results in the liferent interest being converted into a full fee. Under the rule in *Newlands* the effect was different: instead of becoming a full fiar the liferenter is deemed to be a fiduciary fiar in whom the property vests on behalf of the beneficial fiar. Although both cases concerned challenges by creditors of the apparent liferenter, the decisions have important consequences in relation to perpetuities. The rule in *Frog's Creditors* means that a person cannot use a liferent to pass outright ownership of property to an unborn person in a future, and perhaps far-distant generation. As Burgess notes:

> "The strength of the rule in *Frog's Creditors* as a means of frustrating destinations tending to perpetuity was that it ensured that the fee went to a person in esse at the date of the coming into operation of the grant, enlarging that person's liferent so as to invest him with full power of disposition, thereby securing the alienability of the subjects. If, however, the liferent and the fee could effectively be prevented from lodging in the same person the alienability of the subjects would in practice be destroyed for the period of the separation."[97]

3.44 The scope of the rule in *Frog's Creditors* was greatly reduced by the decision in *Newlands* and successive decisions have gradually enlarged the scope of the latter, thereby confining the rule in *Frog's Creditors* to the narrowest bounds. The Scots word 'allenarly', so critical in *Newlands*, has been held not to be essential: alternatives such as 'only' and

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[92] See para 2.44 for the text. Section 9 of the Trusts (Scotland) Act 1921, whose effect is restricted by s 18 of the 1968 Act, is in almost identical terms.
[93] In the case of the 1848 Act there is a duty on the court to grant an appropriate decree for registration.
[94] (1735) M 4262; 3 Ross' Leading Cases 602.
[95] (1794) M 4289; 3 Ross' Leading Cases 634.
[96] See paras 2.47-2.58.
[97] Burgess, p 135.

'merely' are accepted by the courts. By the early 20th century Lord M'Laren, an experienced trust law judge, said:

> "By the general consent of Judges and lawyers, the rule of *Frog's* case has been recognised to be a purely arbitrary rule, incapable of extension, and not to be followed where the context shews that the word 'liferent' is used in its ordinary signification."[98]

3.45 Before turning to direct criticisms of the rules in *Frog's Creditors* and *Newlands* there is a point to mention about their scope. It concerns the use of trusts. Both *Frog* and *Newlands* involved a conveyance by the property owner, but the question soon arose of whether the rules in those cases applied if a trust were involved. In that situation the disposition would be by the trustees. It was held, in a series of decisions, that the rules would apply in some, but not by any means all such cases. Lord Moncrieff, in a decision from 1926, summarised the position in this way:

> "As regards the interposition of a trust, I find authority in the decisions in the cases of *Hutton's Trustees v Hutton and Others*,[99] and *Ferguson's Trustees v Hamilton*[100] for affirming that where the trust contains merely a direction to convey, this factor affords no ground for refusing to apply the general rule [ie the rule in *Frog's Creditors*]. I refer also to the opinion of Lord M'Laren in the case of *Gifford's Trustees v Gifford*.[101] In cases where the trustees are directed not to convey but to hold the estate, a different rule is applied. Such a trust direction has been held to exclude the operation of the doctrine of the leading case [ie *Frog's Creditors*]. It is, accordingly, not the fact of the interposition of a trust, but rather the exact terms in which the trust directions are conceived, which is determinative of the rule which is to be applied."[102]

3.46 In addition, all conveyances falling within the rule in *Newlands* will automatically result in trust-like consequences. This is because the liferenter becomes a fiduciary fiar,[103] regardless of whether the conveyance is at the hand of the property owner or trustees.

3.47 The rules in *Frog's Creditors* and *Newlands* can be criticised on a number of grounds. The first is a general one which can be levelled at both of them and concerns the limited application of each rule: they apply only where the liferenter and fiar are related in particular ways. The rule in *Frog's Creditors* applies only where the unnamed fiar is a child or heir of the body of the liferenter.[104] The rule in *Newlands* is slightly wider in that it applies

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[98] *Gifford's Trs v Gifford* (1903) 5F 723 at 730. See also the quotation from *Lockhart's Trs* (1921) in para 2.55, which was decided only months before the Trusts (Scotland) Act 1921 was passed.
[99] (1847) 9D 639.
[100] (1860) 22D 1442.
[101] (1903) 5F 723. Lord M'Laren remarked with regret that the court in *Hutton's Trs* had not taken the opportunity to rule that *Frog's Creditors* was inapplicable to trust settlements, and said: "I think it must be taken that where there is a direction [to trustees] to pay or convey in certain terms the construction of the bequest is the same as in the case of a direct gift in these terms" (at 731).
[102] *Mearns v Charles* 1926 SLT 118 at 121.
[103] This consequence was foreseen from the start. In his decision on *Newlands* in the House of Lords, Lord Loughborough is reported as having characterised (with some incredulity on his part) the effect of adding 'allenarly' to the grant of a liferent thus: "It is, by implication, a fee in the first taker, which gives him some species of interest, coupled with some species of trust for his children, when they come into existence." *Newlands v Newlands' Creditors* (1798; HL) M 4289 at 4294.
[104] *Cumstie v Cumstie's Trs* 1876 3 R 921 at 941, per Lord President Inglis.

where the fiar is an heir of the liferenter even if not an heir of the body.[105] But it does not extend further than this.[106] As Lord President Dunedin said:

> "I have never yet heard – and I do not think we ought to extend the doctrine – of the doctrine of a fiduciary fee for somebody who is neither a child nor an heir in any sense of the person in whom the fiduciary fee is created."[107]

3.48 Although this is not universally accepted,[108] the result is that where a fee is conveyed, subject to a liferent interest, to an unborn or unascertainable person who is not an heir of the liferenter, neither rule applies (regardless of whether the liferent is specified to be 'allenarly' or some suitable equivalent). In such a situation the liferent interest is properly constituted but the conveyance of the fee fails. An example can be seen in *Colvile's Trustees v Marindin*, from which the quotation in the paragraph above comes. It concerned the disposition of a heritable bond in liferent to a number of people and in fee to the heir of entail in possession, on the death of the last liferentrix, of a specified entailed estate. As it happened, on that death the specified estate was no longer entailed and so nobody answered the description of the heir, but the fact that the relationship between liferenter and fiar fell outwith the class recognised by *Newlands* was in itself sufficient to determine where the fee was to go. The Lord President said:

> "I am bound to say that I think Miss Margaret Blackburn [the disponer of the bond] attempted an impossibility in conveyancing. She, being in right of the bond and disposition in security, disponed that bond and disposition in security in favour of a certain number of unmarried liferentrices who were alive. That, of course, was quite good. … [But] the fee of this bond was not effectually given to anybody, and accordingly it remained in the *haereditas jacens* of, or with the heirs of, Miss Blackburn."[109]

If, instead, the fiar had been an heir of the liferentrix the *Newlands* rule is likely to have applied, leading to a very different result. It is unsatisfactory that dispositions such as this one are subject to rules which are as arbitrary as they are complex and which affect succession in unintended ways with potentially costly tax liabilities.

3.49 Further criticisms can be made of the individual rules. That in *Frog's Creditors* has been the subject of repeated adverse comment, and was followed only hesitantly even a handful of years after the original decision.[110] The unease which it engenders did not diminish over time. In *Mearns v Charles* Lord Moncrieff said:

> "[T]he pursuer invokes as an authority the well-known case of *Frog's Creditors v His Children*. The question between the parties is not as to the authority, but only as to the application of that decision. It is too late in the history of the law to question the rule which has been founded for almost two hundred years upon the authority of that case. It may be fairly said that no doctrine of the law has, at the same time, received

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[105] *Cumstie v Cumstie's Trs*, *supra*.
[106] But see Wilson and Duncan, para 6-13, for two counter-examples; see also fn 108 below on *Napier*.
[107] *Colvile's Trustees v Marindin* 1908 SC 911 at 919.
[108] Eg *Napier v Napiers* 1963 SLT 143 where the relationship between liferentrix and fiar was that between the widow of the testator and his nephew, failing whom his great nephew. Lord Kilbrandon disposed of the case without having to decide whether such relationships fell within the rule in *Newlands* but, if they were found not do so, the consequences "would have been discreditable to the law of Scotland".
[109] *Colvile's Trs*, *supra* at 919.
[110] See para 2.49.

more unfavourable comment from learned judges and yet been treated by them as of more unchallengeable authority."[111]

3.50 From a practical point of view, the force of the criticism levelled against the rule in *Frog's Creditors* is greatly diluted by the fact that it is doubtful whether the rule is much, if ever, applied nowadays. However, one situation mentioned in the books in which the rule will apply is where the fee is conveyed, subject to a liferent interest, to a person who is ascertainable but unnamed in the conveyance.[112] For example, a man makes a will leaving his estate in liferent to his only child, a girl aged 5, and in fee to her children (with provision for a destination over). He dies 60 years later, having not changed his will, survived by his daughter and her children. For the purposes of section 8 of the 1921 Act the conveyance comes into operation when the daughter first becomes entitled to receive the rents of income of the estate. At that point she is 65. As her children are neither "unborn or incapable of ascertainment" section 8 does not apply and it would be arguable that, under the rule in *Frog's Creditors*, the daughter's interest is that of full fiar rather than liferentrix and fiduciary fiar (which would have been the case had the man died soon after executing his will). Such a result is indefensible and in our view the rule should be revoked. It is almost impossible to imagine that anyone would draft a settlement in order to take deliberate advantage of it. At best, drafters will need to be aware of the rule simply in order to avoid it. The fact that it will very rarely apply is of no particular comfort, as its rarity means that advisers and those drawing up their own settlements will be all the less likely to be aware of its existence.

3.51 The rule in *Newlands* is also subject to criticism. We have already seen that the rule has been partly superseded by legislation:[113] there is a statutory presumption that, where a fee is conveyed to a person who is unborn or unascertainable at the time when the conveyance comes into operation, the creation of a liferent interest in favour of a third party is to be treated as being a liferent allenarly (ie one to which the *Newlands* rule applies) unless the contrary intention appears. This is provided by section 8(1) of the 1921 Act.[114] What that subsection does *not* do, however, is provide that the liferenter becomes a fiduciary fiar.[115] This important task is left to be done by the continuing effect of the rule in *Newlands*. This is clear from subsection (2) which mentions people who "according to the existing law" are "deemed to be fiduciary fiar". Nothing in subsection (2), or anywhere else in the section, attempts to alter, or even explain, the "existing law" on this point. The rule in *Newlands* whereby a liferenter is deemed to be a fiduciary fiar in certain situations is left intact. Instead of putting *Newlands* on a statutory footing, subsection (2) provides various measures which may be of assistance to a fiduciary fiar.[116]

3.52 It is not at all clear why those framing the 1921 Act decided to leave the crucial step of deeming a liferenter to be a fiduciary fiar to the common law. This is of particular concern given that *Newlands* is a decision which, even in 1921, was over 125 years old and was only approved with great reluctance by the House of Lords.[117]

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[111] *Mearns v Charles* 1926 SLT 118 at 120.
[112] See Dobie, p 34, and para 2.56.
[113] See para 2.53.
[114] Section 8 is set out in Appendix D; ss (1) only applies to conveyances under which the liferenter became entitled to income on or after 19 August 1921.
[115] Dobie seems to take a different view (at p 40), one with which Wilson and Duncan disagrees (at para 6-15).
[116] See para 2.54 for a fuller description.
[117] See para 2.52.

Policy justification

3.53 We have seen in the earlier paragraphs of this Part that the rules with which we are concerned do not always work well. There are areas where they are unclear, uncertain or inconsistent. This leads to a number of problems: increased costs and anxiety for trusters, beneficiaries and others and, at a more general level, a reduction in confidence in the legal system which in turn diminishes its competitiveness. In considering reforms, which we do in Part 5, one option is to modify the rules in order to resolve these difficulties. This is, however, only advisable to the extent that the rules, even when working well, still serve a useful purpose. They have all been in existence for at least a century and a half and came into being as a result of conditions which were very different from those of today. Do they still serve a useful purpose now and for the future? As Lord Kames wrote, in 1780:

> "The law of a country is in perfection when it corresponds to the manners of the people, their circumstances, their government. And as these are seldom stationary, law ought to accompany them in their changes. An institute of law accordingly, however perfect originally, cannot long continue so: A century, or perhaps a shorter time, will introduce innovations."[118]

3.54 We begin by recalling why each of the rules initially came into being. In the case of the rule restricting accumulation we have seen that it was enacted in response to various concerns in England in the late 18th century about the social and economic harm caused by accumulating income from property for many years.[119] It is clear that the legislation passed in 1800 to contain these ill effects has been problematic.[120] In fact, the attempts to restrict accumulations of wealth have led to a vast accumulation of cases, at great cost to the trusts concerned, without obviously preventing the sort of conduct at which the legislation was directed.[121] Legislative intention is not matched by the actual effect of the legislation. This was evident from the start: Mr Thellusson's trust fund, which precipitated the first statute in 1800, did not result in the towering wealth which was predicted.[122] Despite this gap between intention and effect, the rules have been subject to very little change over the last two centuries and any attempts at reform have tended to apply a legislative sticking plaster to problems which have arisen in practice, without regard for wholesale revision.[123]

3.55 The origin of the rule restricting successive liferents is rather different. As mentioned in Part 2,[124] its essential purpose was to prevent the circumvention of the reform of the system of entails brought about by the Entail Amendment Act 1848. The rule was seen as an essential element of that reform and there is no evidence to suggest it would otherwise have been found necessary. As entails are now a part of the history of Scots property law rather than a contemporary feature of it, if the rule restricting successive liferents is to remain in force it must be justified on its own strengths. Of course, that justification may include a

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[118] Extract from the preface to Lord Kames, *Select Decisions of the Court of Session from 1752 to 1768* (Edinburgh, 1780).
[119] See para 2.16.
[120] See para 3.6 and the criticisms of it and of the statutes which replaced it in paras 3.7-3.31.
[121] *McIver's Trs v LA* 1973 SC 189 (see para 3.23) is a relatively recent example of a case in which the rule is applied to accumulations which (if permitted in the form directed) would only exceed an allowable period by a very small margin. This is far removed from a 'dynasty trust', under which income is to be accumulated for many generations, which may reasonably be thought to have been the target of the rule restricting accumulation.
[122] See para 2.13.
[123] Eg the changes in the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966: see paras 2.28-2.32.
[124] See paras 2.36-2.40.

desire not to reintroduce something akin to a system of entails, if that were considered to be a possible or likely consequence of repealing the rule.

3.56 The final rule, that in *Frog's Creditors*,[125] is the oldest of the three rules and had a very different origin from either of the other two. It arose out of a case involving the law of debtor and creditor, and flowed from the requirement under feudal property law that a fee remain vested at all times. In its original form it did not concern trust law at all, but has since been held to be equally applicable to conveyances involving the use of a trust.[126]

3.57 Despite their different origins, the three rules all have the effect of setting limits on how long members of the current generation can exert control over property after their death. They generally do so by placing restrictions on the duration of certain trust purposes:[127] they restrict for how long income can be accumulated and how far into the future a fee can be conveyed without vesting in a beneficiary.

3.58 The justifications for the rules are varied. Some are specific to a particular rule: for instance, the rule restricting successive liferents owes its origins to a determination to prevent entail reform from being subverted. There are, however, some general justifications and these can be seen most clearly when the rules are viewed, as mentioned in the preceding paragraph, as ways of constraining the power of current owners of property. The justifications relating to the rule restricting accumulation are the most prominent, mainly because of the extensive contemporary accounts, in the reports of the Thellusson litigation and elsewhere, and also because of the consideration of the rule in recent times by law reform bodies, academics and others. So it is convenient to use the arguments used to support that rule as the basis for our examination, but many of the arguments are also relevant to one or both of the other rules under discussion.

3.59 The main arguments used in support of the rule restricting accumulation are:

(i) it prevents distortions in the economy which may be caused by large amounts of wealth being held in trust for a long period;

(ii) it prevents the accumulation of vast wealth for the benefit of a limited number of individuals far in the future;

(iii) it prevents trusters from disinheriting their immediate family by amassing fortunes for unknown future descendants.

These arguments date from the time of the Accumulations Act 1800 and, to varying degrees, the first and third of them also apply to the rule restricting successive liferents and the rule in *Frog's Creditors*. They all require re-examination to assess their relevance and strength in today's conditions. In addition we examine a more recent justification for the rule restricting accumulation:

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[125] (1735) M 4262, 3 Ross' Leading Cases 602. See paras 2.47-2.58.
[126] See para 3.45.
[127] It is not necessary that there be a trust (eg the rule restricting successive liferents applies whether or not a trust is used) and in other cases a trust-like relationship will be created by virtue of the rule (as happens with the creation of a fiduciary fiar under the rule in *Newlands*: see para 2.50).

(iv) it provides a satisfactory balance between 'dead hand' control, ie the ability of the current generation to impose conditions on their property which will last long after their death, and the ability of the living to control property free of restrictions imposed by past generations.

This reason also applies to the rule restricting successive liferents and the rule in *Frog's Creditors*. We examine each of the arguments in turn, beginning with the historic ones.

(i) prevention of distortion in the economy

3.60 This argument is based on two suppositions: first, that the income will be put to a different use while it is being accumulated to the use to which it will be put once distributed; and, secondly, that this difference of use will adversely affect the general economy. The first supposition is readily credible: it contrasts the uses to which a trustee is permitted to put the trust assets with the uses a beneficiary might be expected to make of them.[128] The fiduciary duties incumbent on the former mean that only certain investments may be made, although it is significant that trustees' powers of investment have been greatly extended recently.[129] A trustee must still invest according to the standards of a person of ordinary prudence, but that is scarcely a significant restriction on any sensible investment policy. Nevertheless, depending on the terms of the trust deed, it is likely that some investments still cannot be made by a trustee. For instance, if income were distributed, a beneficiary might use it as seed capital for a small business, whereas a trustee would probably be precluded from making such a high risk investment. Alternatively, the beneficiary might use the distribution to buy consumer goods, such as a car, whereas a trustee is not permitted to apply accumulated income in that way.

3.61 The second supposition – that there will be a discernible effect on the economy – is open to considerable doubt. The funds being accumulated by trustees at any one time would need to make up a significant part of the overall economy. It is very hard to conceive of such a situation occurring today. Even so, the extent to which it would distort the overall economy is not at all clear.[130] There are those who consider that distortions are likely to result, and use this as an argument in favour of limiting the period of accumulation;[131] whereas others see the likelihood of distortion as insignificant.[132] For the reasons already given, we are inclined to take the latter view: trust income arising from Scottish private trusts is (and is likely to remain) very small in comparison with the overall economy and the wide range of investment powers open to trustees means that the accumulation of income cannot

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[128] In the Thellusson litigation there was brief discussion of a related argument, namely that income would be withdrawn from the economy while it was being accumulated. This was roundly dismissed, it being recognised that the accumulated income would remain in circulation. "If", however, "the rents and interest of the personalty were locked up in an iron chest, and were unusable by any one, I should feel great weight in the argument": *Thellusson v Woodford* 4 Ves Jun 227 at 318, per Lawrence J.

[129] See the amendments made by the Charities and Trustee Investment (Scotland) Act 2005 to the Trustee Investments Act 1961. Consequently, the investment restrictions which apply to trustees nowadays are very different from those applicable in the 19th century.

[130] See para 3.65 for a discussion of the difficulties of obtaining reliable economic data in this area.

[131] See, for example, Simes, at p 724, where the risk-averse nature of trustees' investment powers (in the USA in the early 1950s) are used to support a limitation of 'dead hand' control. (We discuss the 'dead hand' argument in paras 3.64-3.74.)

[132] Professor Sitkoff concludes his discussion of concerns that the rule restricting accumulation would cause investment distortion (from the perspective of the current trustee investment powers typically available in the USA): "In sum, the shift in the nature of wealth from land to financial assets and the revolution in trust investment law, taken together, render obsolete the concern over economic distortions stemming from accumulations in trust": Sitkoff, p 516.

realistically be seen as likely to cause any discernible distortion in the national (and international) economy.

(ii) prevention of the accumulation of a 'vast fortune' for the benefit of a beneficiary who is not yet born

3.62 The second argument in favour of the rule restricting accumulation is that it prevents the creation of a 'vast fortune'[133] to be given to a person or people at some far distant time in the future. Mr Thellusson's will is a good example of a case where this concern arose: the duration of the requirement to accumulate income meant that the beneficiaries would all be people born after his death.[134] Leaving on one side the virtue or otherwise of providing riches for a yet-unborn descendant of the truster (which is covered by the third argument), this argument is predicated on the ability to produce a 'vast fortune' by accumulating income over a long period. It is far from clear in practice that this is a realistic concern. In order for a trustee to be able to accumulate a sum that is disproportionate to the amount originally bequeathed he or she must be in a position to outperform other investments almost all the time. This does not happen: "trust investments do not outperform all other investments; trustees do not have systematically better information than other capital market investors", writes Sitkoff in a recent article.[135] He continues by suggesting that tax law has a far greater influence than trustees' investment decisions: "Today the issue of wealth accumulation and distribution has become a question of tax policy to be dealt with, if at all, through the income and estate taxes, not through obscure property rules of limited application."[136] This is not just true of the United States: the changes made by the Finance Act 2006 which limit the fiscal advantages of accumulation to periods of no more than 18 years are relevant in the UK.[137]

(iii) prevention of disinheritance of living family members in favour of future generations

3.63 The third argument in support of a rule restricting accumulation is that it prevents trusters from passing money to unborn descendants at the expense of living descendants and other family members. As it was put, rather theatrically, in the litigation on Mr Thellusson's will, by the counsel for his widow and children: "No one, who had ever breathed the same air with him, could inherit."[138] There is, however, a more specific objection: the current formulation is too blunt and the rule can in some cases prevent proper

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[133] A 'vast fortune' can be understood in one of two ways, and elements of both are intertwined in this argument. First, it may be understood in an absolute sense (eg a national lottery winning prize). To achieve a vast fortune in this sense one would generally need to start at the very least with a small fortune. Alternatively (and this is the sense in which the phrase is predominantly understood in this paragraph), the vastness is a reference to the relative speed at which the fund grows: the thought is that compound accumulation produces results which far exceed the results of other methods of investment. In this sense, a vast fortune requires a fund which, relatively speaking, has increased over time at an exceptional rate.

[134] See para 2.12.

[135] Sitkoff, p 514. The article is based on experience in the USA but it doubtless reflects the position in Scotland too. Of course, in some cases the income produced by a particular asset might be exceptionally large, in which case compound accumulation may indeed produce a vast fortune over time. But the resulting riches would not be due to the power to accumulate so much as to the good judgement or fortune to have produced exceptional levels of income.

[136] *Ibid*. The footnote, which has been omitted, refers to a number of studies on the interaction between intergenerational wealth transfer and estate tax in the USA. In addition to the effects of tax, inflation is also generally a relevant factor.

[137] In broad outline, one effect of the 2006 Act is that, if the trustees of an accumulation and maintenance trust which was created before 22 March 2006 wish it to continue to be subject to the favourable tax treatment of such trusts, they must ensure that the beneficiary becomes absolutely entitled to the property on or before his or her 18th birthday.

[138] *Thellusson v Woodford* 4 Ves Jun 227 at 238.

and laudable family arrangements from being made. Take the case of a woman who has a recently born and severely disabled grandson. He is assessed as having a near normal life expectancy but a significant need for income, especially when he reaches middle age. As part of her provision for him, the grandmother wishes to create an accumulation fund which will vest in him when he is, say, 40. The current rules make this impossible to plan with any degree of certainty at all. It is lawful to accumulate for the grandson's minority (which is not long enough) and it is also lawful to accumulate either for the grandmother's lifetime or for 21 years after her death (but not both, and of course she cannot be confident that she will live long enough to make either of these periods last until her grandson's middle age). More generally, the rule prevents a person from setting up an accumulation fund which will be guaranteed to vest in a child at any point after he or she turns 21. There may be good reason why a higher age is desired. If the rule's aim is to prevent unborn beneficiaries being preferred over the truster's existing relatives its current formulation is too crude.

(iv) prevention of 'dead hand' control

3.64 It will be clear that, for differing reasons, we do not find any of the policy arguments considered so far to be persuasive. There is, though, a further argument which is commonly used nowadays to justify restrictions on the ability of trusters to influence events long after their death: the so called 'dead hand' argument.[139] There are different angles from which this argument can be supported: it may, for example, be viewed from an economic angle, or from a philosophical or moral one, or a practical one. These approaches (and others which may be chosen) are not exclusive: each contributes to an overall assessment of the extent to which restrictions on 'dead hand' control are justifiable. In addition, the arguments overlap to some degree with those considered above when we examined the justifications advanced in support of the 1800 Act.

3.65 At first blush, an economic approach might be thought to be promising. We have already explored, in paragraphs 3.60-3.61, one aspect of this: our conclusion was that the restrictions on trustee investment options are most unlikely to lead to any measurable effect on the economy if income could be accumulated in trust for periods longer than currently permitted. Taking a different tack, could it be shown that the living make better economic use of assets, free from restrictions imposed by earlier generations? Or alternatively that better economic decisions are made if owners are able to plan for long periods in the future? This information would be valuable in deciding what balance ought to be struck between the living and dead hand roles. It has proved, however, to be very hard to obtain relevant data. The Law Commission sought expert advice but it did not lead to any particularly firm conclusions.[140] Separately, Professor Ogus, in an article published in 1986, discusses different ways in which the interests of beneficiaries (living hand control) might be balanced

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[139] The term, as used in the field of property law, is an ancient one: in its medieval French form it can be seen in the title of the various Mortmain Acts from the 13th century onwards. (It is also used in other areas of law, eg company law, and in many other disciplines, such as psychology and economics.) The role of the 'dead hand' features prominently in property law debates between those who consider that property should be controlled by the current owners, who may dispose of it with whatever restrictions they see fit, and those who take the view that each succeeding generation should have full control. In modern times it has been developed by Professor Lewis M Simes in *Public Policy and the Dead Hand* (1955). As Scots law does not have an equivalent to the perpetuities rule in English law, the rule restricting accumulation serves as a restraint on 'dead hand' control to a greater degree in Scotland than in England (where the rule against perpetuities is the major restraint).

[140] This was in relation to the rule against perpetuities but it would seem to have relevance to the rule restricting accumulation too. The expert, Professor Vickers, suggested that the position in Scotland, where there is no comparable perpetuities rule, should be examined. See the Law Commission Report on *Perpetuities and Excessive Accumulations*, paras 2.30-2.32.

with those of the truster (dead hand control) and what the economic effects might be. He concludes: "How one should proceed to compare the costs arising from, respectively, dead hand and living hand control is beyond my competence; and I would not venture even on an intuitive answer."[141]

3.66 If it is not possible to collect economic data which might assist in formulating a suitable policy,[142] can an economic approach contribute at a theoretical level? This question is addressed, in relation to the rule restricting accumulation, in the article by Professor Ogus cited in the previous paragraph. The conclusion is no more optimistic:

> "The relevant economic question is … whether major accumulations of this kind [ie as directed by Mr Thellusson, unrestrained by the rule restricting accumulation] lead to a sub-optimal level of current consumption and whether constraints of the power of accumulation would, in contrast, encourage a sub-optimal level of savings. This is, unfortunately, yet another elusive question, for it appears that economists have been unable to agree on what is socially optimal in this area. Even if the question could be answered, it is not obvious that limiting the power of settlors is the most efficient solution; taxation might be the more viable alternative."[143]

3.67 If, though, it is unclear what benefits, if any, a change to the rule restricting accumulation might bring to the economy as a whole, a separate but related question is whether the changes might improve the competitiveness of the Scottish trust law sector. If the changes led to more trusts being created and the value of trust assets increasing there would be consequential benefits to the Scottish economy (and indeed to the UK economy, to the extent that trust business was attracted from overseas). Although it is difficult to predict, we consider that keeping the current law unchanged is likely to put Scottish trusts at a commercial disadvantage, given the recent reforms in England and Wales and, to a lesser extent, those in Ireland.[144] Furthermore, we reasonably expect that changes to Scots law to relax the current restrictions would prove attractive for the trust sector. This is a theme which we develop in Part 5.[145]

3.68 We turn now to a philosophical or moral approach to the question of dead hand control. The Law Commission's recommendations for reform of the English law of accumulations and perpetuities have been subject to analysis from a philosophical perspective by Professor Gallanis.[146] His conclusion is that the recommended reforms "cannot be supported by abstract concepts, such as liberty, equality, or property rights" but that, instead, "economic arguments provide the key to the Rule's defense".[147] The arguments presented in the article, together with its conclusion, merit closer examination; we provide this in Appendix C. We accept the (negative) conclusion that trying to justify a rule on dead hand control on the basis of concepts such as freedom or equality is likely to be fruitless. However, we believe that the search for a fair and reasonable balance in relation to

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[141] AI Ogus, "The Trust as Governance Structure", (1986) 36 U Toronto LJ 186 at p 216.
[142] There is an argument that relevant economic data might become available over time, given that some jurisdictions have radically reformed or abolished the rule in recent years. This is the holy grail held out, in relation to economic data on the rule against perpetuities, by Gallanis at p 292. (His article is fully discussed in Appendix C.)
[143] *Op cit* at p 218.
[144] See Appendix A, paras 27-34 and 38-45.
[145] See paras 5.13 and 5.50.
[146] TP Gallanis, "The Rule against Perpetuities and the Law Commission's flawed philosophy", [2000] CLJ 284.
[147] *Ibid* at p 292. Gallanis is discussing the English rule against perpetuities but the argument can be applied, in Scots law, to the rule restricting accumulation, which – in the absence of a rule against perpetuities – forms a restraint on long-term trusts.

dead hand control cannot ignore moral considerations. By 'moral' we mean socially desirable and productive of the common good. This assessment of the common good will inevitably include – but will be far from limited to – economic factors.

3.69 Professor Simes, in a famous series of lectures in the 1950s, concluded that the rule against perpetuities was justified on two grounds: first, it "strikes a fair balance between the desires of members of the present generation, and similar desires of succeeding generations, to do what they wish with the property which they enjoy"; and secondly, and more importantly in his view, "it is socially desirable that the wealth of the world be controlled by its living members and not by the dead".[148] (We have already mentioned that, as Scots law has no equivalent rule against perpetuities, it is the rules restricting accumulation and successive liferents which are the major restraints on dead hand control.)

3.70 These are, at their heart, moral arguments. A reason which "strikes a fair balance" between generations, or one which is based on what is "socially desirable" is one which embodies moral worth. Can the moral worth of the current rule restricting accumulation be drawn out in a similar way? And are there changes which would increase its worth?

3.71 If we take a step back we can see that, in many contexts, accumulation (or saving) is a desirable activity for a society, even bordering on a necessary one.[149] It has a moral value. To take an example, the act of saving up money for something implies that the end result is considered – by the saver, at any rate – to be worth the effort and sacrifice; this applies at an individual level (saving up to buy a new computer game or a holiday) as well as at the level of a community (to buy sports equipment for a club or to build a local hall) or a nation. In the commercial sector companies or partnerships will typically retain profits and not pay dividends or allow withdrawals in their early years in order to build up capital and to grow. Of course the moral value of the act of accumulation is ultimately subordinate to the moral worth of the goal: for instance, if one is saving up to buy a black-market weapon, or to build up a company to deal in proscribed drugs, the ability to accumulate is unlikely to be seen as a virtue. We are not here concerned, though, with that issue, as other branches of the law seek to regulate it. What is important for present purposes is that, if saving or accumulation is prohibited or severely restricted, then even a morally desirable aim may be unobtainable. To that extent, there is a moral value in allowing accumulation; indeed there may be a moral obligation to permit it.

3.72 To develop this argument further, morality can be cited in support of an extension of the current limitations on accumulation in Scots law. We have seen an example in paragraph 3.63 in which the current accumulation periods do not permit family members to undertake what they may reasonably see as a moral obligation. Other similar examples can be given. This, however, begs the question of what limits, if any, should be put on the power to accumulate. Is there an objection to allowing very much greater – or unlimited – freedom of accumulation in the context of a trust? We have seen that, historically, the answer has been in the affirmative: the power to accumulate beyond certain limits has given rise to concerns about the possibility of damaging results.[150] If there were unlimited power to

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[148] Simes, p 723. See also para 5.16.

[149] In a decision of the Alberta Supreme Court, Porter JA, in an obiter passage, said: "The whole history of the country indicates that it was settled by people who came here for no other purpose than to accumulate. [ ] None of their enterprises could have survived without accumulation": *Re Burns* (1961) 25 DLR (2nd) 427 at 437.

[150] These have had moral undertones: see the reactions to the Thellusson will described, eg, in para 2.16.

accumulate it would be competent to arrange that trust assets – to the extent of capital *and* income – are kept out of the hands of any beneficiary for very long periods and, in extreme cases, indefinitely.

3.73 We have seen that this sort of arrangement can be highly desirable for a short period, such as while a beneficiary is a minor or even until a sufficient fund has accumulated for a specific purpose, but the moral value of withholding trust assets, including income, from any beneficial use for very long periods is not at all obvious. Such an arrangement privileges the truster, who is permitted to regulate the use which can be made of his or her assets for many generations, over those people who might otherwise benefit from them. (During the period when beneficiaries are denied any payment from the trust assets, the trustees will, in the normal case, be remunerated from those assets in respect of their trusteeship.) In extreme cases, the moral case for a truster to be able to control assets long after death is very weak. A balance must be struck which preserves the freedom of the current asset holder to control his or her property at will but, at the same time, protects the interests of future generations who might otherwise have a share of those assets.

3.74 There is, naturally, a question as to how the limitation should be framed. The current statutory rule restricts the amount of time during which income can be added to capital to approximately 20 years.[151] After that time future income must be distributed. We are not persuaded that this is adequate, for the reasons which are set out earlier in this Part. We are, though, not in favour of complete freedom being afforded to trusters to direct accumulation for as long as they wish. That, in our view, fails to respect the interests of the generations to come and it would be a dereliction of duty not to take reasonable account of their likely wishes. We are, therefore, in favour of a balance under which members of the current generation are given a greater freedom to accumulate than they presently have but which also allows the claims of future generations to be adequately met. We set out our detailed proposals for reform in Part 5.

Common law rule governing the lifetime of private trusts

3.75 We discuss the common law rule restricting the lifetime of private trusts at the end of Part 2.[152] The rule can be seen operating from at least the mid-18th century up until much more modern times.[153] Although the jurisdiction of the court in this area is not one with fixed boundaries, certain grounds of challenge have emerged over time and we mention in Part 2 those of unintelligibility, impracticability and unreasonableness.

3.76 In our view the lack of fixed boundaries, which ordinarily might be criticised as leading to uncertainty, is not a failing in this instance. Indeed, the flexibility of the common law rule is one of its great strengths. It is capable of determining varied and unpredictable questions which arise from time to time. These questions broadly centre on contentions that a truster has made what is generally considered to be an unreasonable settlement. As a matter of policy, we consider that it is desirable that such questions be capable of being determined judicially. There would, though, be a clear danger to the freedom of testation, and the freedom to establish trusts during lifetime, if courts were to intervene too heavily in

[151] It is possible that accumulations may last for considerably longer: eg see *Re Maber* [1928] Ch 88.
[152] See paras 2.59-2.76.
[153] The earliest case we cite is *M'Culloch of Barholm* (1752) and the latest, *Sutherland's Tr v Verschoyle*, is from the late 1960s.

determining these issues. What one truster considers reasonable may very well be criticised, in good faith and with conviction, by others and in some cases by a majority opinion. Yet that, by itself, should not afford a ground of setting aside the trust or the will. Were there any signs that courts use the common law to strike down settlements too readily we would have concerns about the continued viability of the rule. In our view, however, the courts take a measured and restrained approach in this area. As we discuss in Part 5,[154] we see no reason to make any changes to the common law rule.

[154] See para 5.73 and proposal 16.

Part 4 Comparative law

Introduction

4.1 Most common law jurisdictions have at one time or another recognised, or still recognise, a rule restricting accumulation. The spread of the rule can largely be attributed to the influence of English law in the development of many of the common law systems across the globe. The Accumulations Act 1800 was directly received by many systems, including a number of jurisdictions in Canada and Australia, that were thereafter developed upon the basis of English law. Other legal systems, including those of the United States of America, did not directly receive the Act but were influenced by the legislation to the extent that several states enacted statutes closely based upon it which have themselves been instrumental in the development of the law in those states. Detailed treatment of each of the jurisdictions discussed in this Part can be found in Appendix A.

4.2 In relation to the rule restricting successive liferents we have found that civilian and mixed law jurisdictions offer the most useful comparative material. This is largely because the rule's main aim, ie the limitation of the time for which restrictions on full ownership can be effective, is generally achieved in common law systems by the rule against perpetuities (and, to some extent, by the rule restricting accumulation). The perpetuities rule, however, is not a direct comparator for the rule against successive liferents: they differ in too many respects. Instead, we find that a number of civilian jurisdictions, and the mixed system of South Africa, have rules which operate in ways which achieve a similar effect to that of the rule against successive liferents. We set out our findings in Appendix B.

4.3 The value which we can extract from the civilian comparators is, though, somewhat less than the benefit we derive from the comparative study of the accumulations rule. There are a number of reasons for this.[1] First, the main civilian systems do not generally recognise the trust.[2] Secondly, they tend to restrict, to a greater extent than is the case under Scots law and common law systems, the proportion of a person's estate which may be freely disposed of by will.[3] This diminishes the scope for creating perpetuities. The third reason is less concrete and is more cultural: the way in which land is regarded in continental countries differs subtly but distinctly from the way it is (or, more particularly, has been) viewed in the UK. It should be remembered that the origin of the rule against successive liferents lay in the early Victorian reform of the entail system. The way land reform proceeded in Scotland and the UK is very different, in general, from that followed in continental countries. One result is that, not surprisingly, the rules regarding the period for which land may be tied up by the current owner have taken a different course in many continental jurisdictions from that applicable in Scots law.

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[1] We explore this in more detail in Appendix B at paras 1-7.
[2] There are exceptions to this: trust-like devices such as fideicommissary substitutions are both common and long-standing parts of many systems, and also some systems have recently introduced institutions which are, in many ways, the equivalent of a trust.
[3] This applies most particularly to testators who are survived by close family members.

Reform of the rule restricting accumulation

4.4 In recent decades, the subject of accumulation of income by a trust has received widespread attention from law reform organisations and legislatures across the common law world. The subject has also attracted a great deal of attention in academic circles, and from trust law practitioners.[4] Reform proposals have been made in several jurisdictions, a number of which have been enacted while others are currently under legislative consideration. A variety of reasons underpin this flurry of activity, but two common themes are readily identifiable: several jurisdictions have reformed their rules in order to maintain pace with the rapidly increasing use of trusts for business purposes or as the legal basis for investment products, and to maintain competition with neighbouring states; while other jurisdictions have approached reform on a more traditional footing, considering the continued utility of the rules and their underlying policies in a modern economic, political and social climate. We examine each of these in turn.

Commercial and fiscal incentives for reform

4.5 A variety of reasons underpin the widespread consideration of the rule restricting accumulation which has taken place in recent years. It is clear, however, that in several jurisdictions reform has been motivated principally by commercial and financial aspirations. This is particularly true of several US jurisdictions.

4.6 It appears that reform of the rule restricting accumulation in the United States of America has been a by-product of a large-scale movement directed at reform of the rule against perpetuities, rather than a movement in its own right.[5] Over the course of the last two decades or more, the rule against perpetuities has come to be viewed with distaste by many US states due to the stifling effect it has been considered to have on the growth of trust business within their boundaries. Such a view stemmed largely from the effects of a series of changes made to the Federal Tax Code in 1986. These reforms resulted in the provision of a large exemption from the federal wealth transfer taxes for interests held in trust, thereby almost instantaneously rendering the creation of long-term trusts and the transferring of assets therein a very attractive prospect for those involved in trust business. The only impediment to this arrangement was the state-based rule against perpetuities which imposed a restriction on the length of time during which assets could be held in trust before they were required to vest. States which were keen to promote themselves as trust-friendly jurisdictions quickly came to view the rule against perpetuities as a serious block to the growth of trust business. In order that such business might flourish within their boundaries, therefore, these states began to repeal their rules against perpetuities (and, in several cases, their rules restricting accumulation) shortly after the tax reforms of 1986. The effect of those reforms is that a growing number of states now recognise no rule restricting either perpetuities or accumulation. The absence of the rules has resulted in a substantial increase in trust investment in those states.[6]

4.7 Reform generated by financial or commercial objectives is not, however, confined to the US. Several offshore jurisdictions have also looked upon reform of these rules with

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[4] Academic interest in the subject of accumulations (and, more prominently, perpetuities) is especially notable in the USA. See the discussion in Appendix A at paras 47-59 for more details.
[5] See, generally, Sitkoff.
[6] See Appendix A, para 52.

financial motives in mind. The Channel Islands of Jersey and Guernsey exemplify such an approach.[7] Neither Jersey nor Guernsey now recognises either a rule against perpetuities, or a rule restricting accumulation.[8] Both were abolished in 2006 and 2007 respectively with the result that in either jurisdiction a trust may endure for an unlimited amount of time, with no restriction on the period for which income may be accumulated. This relaxation of the rules restricting perpetuities and accumulations appears to form part of a general push to attract and maintain inward financial investment. Recent decades have witnessed the considerable growth of the offshore finance industry, including significant increases in the use of trusts.[9] Of particular note is the position in Jersey, where a fifth set of amendments to the Trusts (Jersey) Act 1984 is currently under consideration:

> "The Trusts Law has been to a great extent the engine for the growth of our financial services industry in the last 20 years. Our Law was the first in the market place and others have followed our lead. Subsequently, trusts laws in other places have evolved and in some cases moved ahead of our own product. This consultation is designed to see how we should develop our Trusts Law so as to hone our competitiveness."[10]

4.8 Another offshore jurisdiction to have made changes in this area, apparently for financial reasons, is Bermuda. As of 2009, Bermuda has abolished its rules restricting perpetuities and accumulation.[11] Bermuda has long been viewed as an active centre of offshore trust activity, and the reforms to the rules restricting accumulations and perpetuities perhaps signify an intention to maintain its position as a leader in that field.[12]

'Classic case' reform

4.9 From a comparative perspective, it is clear that reform to the rule restricting accumulation may stem from reasons beyond a desire to maintain the law of trusts in good repair. The financial and commercial incentives discussed above have proved themselves to be serious drivers of reform in this area, especially in the United States of America, where states have used reform of the rules as a platform from which to attract out-of-state trust investment. Nevertheless, reform in its more traditional sense has not been completely displaced. Several jurisdictions have approached their own rules restricting accumulation and perpetuities on a rather different footing, concerned principally with the utility of the rules as working components of the law. In these cases, the commercial and financial motivations for reform do not appear to have been significant.

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[7] See Appendix A, paras 20-26.

[8] Both jurisdictions previously limited the duration of a trust to 100 years. The accumulation of income was permitted, subject to the restriction on the duration of a trust.

[9] It is clear, however, that the push to attract investment is not confined to trust business. The Foundations (Jersey) Law 2009 introduces to Jersey the civilian concept of the private foundation, a hybrid of the corporation and the trust. The foundation is popular in many of the legal systems of continental Europe and also the Middle East. Its entry into Jersey law will enable the Island to attract foundations business from these jurisdictions.

[10] These are the words of Senator Philip Ozouf, the former Minister for Economic Development on Jersey. Senator Ozouf was speaking on Jersey's Trust Law Consultation at its launch in the summer of 2008: http://www.gov.je/EconomicDevelopment/PolicyRegulation/FinanceIndustryDevelopment/ConsultationPotentialRevisionstoJerseysTrustsLaw.htm (last accessed on 4 December 2009).

[11] See Appendix A, para 11.

[12] A useful account of Bermuda's position as an offshore trust leader can be found in M Lupoi, *Trusts, A Comparative Study* (2000), pp 208-209.

4.10 In 1983 the Canadian province of Manitoba abolished without replacement both its rule against perpetuities, and its rule restricting accumulation.[13] The Manitoba Law Reform Commission, whose recommendations formed the basis for the abolishing legislation, justified its proposals on the basis that the rules no longer served any useful purpose as part of the law of modern-day Manitoba. Its Report does not give any indication that the recommendations were in any way based upon commercial or financial motivations. Further, since the rules were abolished in 1983 there does not appear to have been a notable increase in the use of the trust as a business tool within the province. This stands in contrast to the position in Delaware, and a number of other US states where the removal of the rule against perpetuities in particular has generated an immense surge of activity in the trusts sector.

4.11 It is clear that Manitoba took a relatively radical stance by abolishing without replacement both the rule restricting accumulation and that prohibiting perpetuities. A number of other jurisdictions have since sought to follow this lead. In 1996 South Australia abolished its rules restricting perpetuities and accumulations following the recommendations of the South Australia Law Reform Committee.[14] The reasons given for the South Australian reforms to the rules restricting perpetuities and accumulation are broadly similar to those given by the Manitoba Law Reform Commission in its 1983 Report, focusing mainly on the premise that the rules are outdated, and unnecessary in a modern context.

4.12 At the same time as it abolished the rules against perpetuities and accumulation, however, the South Australian legislature introduced a court power to order the early vesting of property interests upon application by one of several specified parties. The presence of this power in South Australian law marks a significant difference from the position in Manitoba, where no such power exists. In effect, the power to order vesting perpetuates the spirit of the rule against perpetuities within South Australian law, but on an optional basis: vesting can be ordered by the court on the application of a party specified in the legislation. The power therefore has the effect of substantially tempering a set of reforms which would otherwise closely resemble the more radical approach taken in the Canadian province. Consequently, despite the similarity in the reasoning underpinning the reforms in these two jurisdictions, the practical changes made by the legislatures in each have resulted in two very different effects.

4.13 Although the reforms in Manitoba and South Australia were implemented in 1983 and 1996 respectively, review of the rules restricting accumulation and perpetuities on the basis of their utility in a modern context is an ongoing process. More recently, the Irish Parliament passed an Act abolishing both the rule against perpetuities and that restricting accumulation without replacement.[15] In similar vein to both Manitoba and South Australia, the abolition of the rules follows the recommendations of the relevant law reform body, the Irish Law Reform Commission, made in a Report published in 2000. The Canadian province of Saskatchewan has also abolished its rules restricting both perpetuities and accumulations without replacement.[16]

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[13] See Appendix A, paras 12-17, for further detail.
[14] See Appendix A, paras 4-10.
[15] See Appendix A, paras 38-45.
[16] See Appendix A, paras 18-19.

4.14 In November 2009 the UK Parliament passed an Act abolishing the rule restricting accumulation as it applied in England and Wales.[17] The legislation follows upon recommendations made by the Law Commission of England and Wales in 1998, whereby it was considered that the rule restricting accumulation no longer served a useful purpose, and should therefore be abolished. Abolition of the rule restricting accumulation is, however, predicated upon the retention in England and Wales of the rule against perpetuities, albeit with a single perpetuity period of 125 years, supplemented by a 'wait and see' provision. The Law Commission opined that the retention of the rule against perpetuities would provide a safety net in view of which the abolition of the statutory rule restricting accumulation could safely be recommended. It is not clear whether the Commission would have been keen to recommend the abolition of the rule restricting accumulation had the continued existence of the rule against perpetuities as a tool against dead hand control not also been proposed.

No rule restricting accumulation: South Africa and the DCFR

4.15 It is certainly true that much of the comparative material in relation to accumulations of income focuses on jurisdictions which have had, at one time or another, a rule restricting accumulation, and which have then taken steps either to reform or abolish that rule, for varying reasons. It is notable, however, that South Africa has never recognised either a rule restricting accumulation or a rule against perpetuities.[18] Despite the criticisms of several academic commentators of the absence of a rule restricting accumulation or one against perpetuities, South Africa does not appear to have experienced any adverse consequences as a result of never having had a place for either rule within its law. The law is not, however, completely without regulation. The South African courts have power to delete or vary the provisions of a trust, on application of a trustee or any person who, in the opinion of the court, has a sufficient interest in the property concerned. This power is exercisable where a trust instrument contains any provision which brings about consequences which the court considers that the founder did not contemplate or foresee. If the court decides that such consequences hamper the achievement of the objects of the founder, or prejudice the interests of beneficiaries, or conflict with the public interest, it may delete or vary the provision concerned.[19]

4.16 We turn now to the recently published Draft Common Frame of Reference, which deals with trusts in Book X.[20] It imposes no restriction upon the accumulation of income, nor is there any prohibition on the creation of successive liferents. It does, however, provide a comprehensive set of rules by which trust provisions may be varied.[21] This includes provision for the variation of a term in a 'trust for beneficiaries' which confers a right to benefit or eligibility for benefit upon a person who does not yet exist or who "does not presently conform to a description, such as membership of a class, on which the right

[17] Perpetuities and Accumulations Act 2009. See Appendix A paras 27-34.
[18] See Appendix A, para 46 and Appendix B, paras 43-56.
[19] The court may also make any order in respect of the provision concerned, including an order for the substitution of trust property, or an order terminating the trust altogether.
[20] C von Bar, E Clive and H Schulte-Nölke (eds), *Principles, Definitions and Model Rules of European Private Law*, *Draft Common Frame of Reference*, *Outline Edition* (2009) ("DCFR"). This provides an academic model for the future development of a European Common Frame of Reference, and it is also hoped that it will develop and expand knowledge and awareness of European private law: see para 7 of the Introduction to the DCFR.
[21] DCFR X. –9:201 to X. –9:204.

depends".[22] The same applies where the benefit is conferred "at a remote time in the future" or the benefit is "conditional on the occurrence of a improbable event"[23]. An application for variation under this rule may be made by any party to the trust or any person who would benefit if the term to be varied were removed. In the absence of a rule restricting accumulation this provision operates as a method of avoiding dead hand control, with the result that identifiable present interests may be preferred to uncertain future ones.

Conclusion

4.17 It is clear that there is no uniform approach to be taken to reform of the rule restricting accumulation. Reform of the law in this area from a comparative perspective is diverse, not only in terms of the motivations underpinning such reform but also in terms of its practical effects. In some states the rule has been viewed as an impediment to the creation of long-term trusts, which has led to the frustration of certain commercial and financial objectives. Where this is the case, the rule has faced abolition in order to allow trust business to flourish. This approach to reform is evident in the United States, and also in several small offshore jurisdictions such as the Channel Islands and Bermuda. In our view, such reasoning strengthens the case for reform of the Scots law rule restricting accumulation and also that governing successive liferents, so that Scotland can maintain its position as a trust-friendly jurisdiction in the face of competition from neighbouring jurisdictions.

4.18 A separate, yet equally important driver of reform is identified in the work of many jurisdictions to keep their trust laws under continuous review. Where this has been the case, the rule restricting accumulation, and, in several cases, the rule against perpetuities, have been viewed as relics of a past time, for which the current law holds no place. In several jurisdictions, therefore, the rules have been consigned to history principally on the basis that they are no longer needed. Examples of such an approach to reform can be identified in Manitoba and South Australia, and, more recently, England and Wales, and the Republic of Ireland. Despite the apparent simplicity of the motivations behind the reforms in these states, however, it is clear that the practical routes taken to achieve broadly similar objectives can in themselves produce widely differing results.

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[22] DCFR X. –9:203 (1). There is separate provision for the variation of public trusts which is exercisable where a change of circumstances has rendered the advancement of the particular purpose for which the trust has been set up unsuitable and ineffective: DCFR X. –9:204.
[23] DCFR X. –9:203(2).

Part 5 What restrictions should the law impose on the duration of trust purposes?

Introduction

5.1 The fundamental issue for consideration in this Discussion Paper is the extent to which Scots law should impose restrictions on the duration of trust purposes. At present two such restrictions are imposed: the rule restricting accumulation and the rule prohibiting the creation of a liferent in favour of a person who is not in life or in utero at the time.[1] Two fundamental questions arise. First, are the present Scottish rules satisfactory? Secondly, if they are not, what should be put in their place? This second question can be broken down into two further issues: is any rule or procedure required to restrict the duration of trust purposes, and if so what form should it take? We will consider these issues in turn; our views are summarised at paragraph 1.17 above. Before doing so, however, it is appropriate to deal separately with the question of trusts used in commercial transactions, which we think are quite distinct from ordinary family trusts. Even if rules restricting the duration of trust purposes are retained in Scots law, we are of opinion that it should be made clear that they have no application to any trust forming part of a commercial transaction.

Commercial transactions

5.2 We have already considered some of the difficulties and anomalies that the rule restricting accumulation may create in a commercial context.[2] A wide variety of commercial transactions may potentially be affected by the rule. Pension schemes and life assurance policies are obvious examples, but the rule can also apply to partnership agreements and to unit trusts and other trust-based investment schemes. All of these involve transactions that are set up in order to achieve specific commercial objectives. They are far removed from the traditional form of family trust. It is in the context of the traditional family trust, however, that the rules restricting accumulation and successive liferents came into being. We can see no justification for the application of those rules to transactions that are designed to achieve commercial objectives. A transaction in the latter category will almost inevitably be set up by a contract including more than one party, and it can be expected that the parties will negotiate an appropriate bargain designed to achieve their commercial objectives.[3] These are not cases where a truster attempts to set up a dynastic trust, or to tie up property far into the future. To the extent that property is tied up in future, that is merely the bargain that the parties have reached. Consequently it seems to us that the essential rationale of the two rules simply does not apply.

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[1] The rules in their present form are stated at paras 2.25-2.33 and paras 2.44-2.46.
[2] See paras 3.28-3.31.
[3] Even where, for example, a life assurance company offers a standard type of policy that can be taken up by members of the public, every time that a policy is taken out there is a contract between the company and the policyholder, designed to achieve specific commercial objectives. While the detailed terms of such a contract are unlikely to be individually negotiated, the policy will normally be chosen by the policyholder because it meets his or her commercial objectives.

5.3 It seems likely that at present the rules restricting accumulation and successive liferents do not apply to most commercial transactions,[4] but the matter is not entirely clear. The practical difficulties that can arise are well illustrated by *Re AEG Unit Trust (Managers) Ltd's Deed*,[5] where clarity as to the application of the rule restricting accumulation was necessary before the unit trust's investment policy could be framed. Likewise, while it has been held both in Scotland,[6] and in England,[7] that life assurance policies did not fall within the Accumulations Act, those cases concerned very traditional whole life policies, whereas the policies found today will more frequently be endowment policies or policies that function essentially as an investment vehicle. In these cases the income accruing under an individual policy will usually be accumulated; the entitlement of the assured is not confined to a defined sum payable on a defined event. Consequently the argument for the application of the rule restricting accumulation is stronger. The same is true of many pension scheme trusts, where the beneficiary's entitlement is to payments out of a fund that accumulates during his or her working life. It should also be noted that the leading cases[8] on life assurance policies both adopted a highly purposive construction of the 1800 Act;[9] on a strictly literal construction of the legislation it is arguable that the result should have been otherwise. Finally, it is noteworthy that in *Cathcart's Trustees* two of five judges who heard the case, Lord Craighill and Lord M'Laren, took a different view from the majority; Lord M'Laren was of course well known for his mastery of the law of trusts. In these circumstances it cannot be said that the law is entirely clear. The same can be said of trusts that are set up as part of partnership agreements, and also of unit trusts and other investment funds that use a trust as their vehicle.

5.4 We do not consider this to be a satisfactory situation. For the reasons stated above, we are of opinion that any rules restricting the duration of trust purposes should have no application to any trust set up as part of a commercial transaction. We are further of opinion that any uncertainty in this area of the law should be removed completely, in order that parties may have total freedom to negotiate the arrangements that best achieve their commercial purposes. The trust has proved to be an enormously flexible legal institution, and in commercial transactions it can be a simple and convenient device for having property held by one person for the benefit of another. We consider that anything that inhibits the use of trusts in commercial transactions is highly undesirable. We accordingly propose:

1. Any rules restricting the duration of trust purposes should not apply to any commercial trust. This should be made clear by an express statutory provision.

5.5 The next question is the definition of a commercial trust. It seems to us that two possible approaches can be taken to this issue. The first is to rely on the expression 'commercial' as having a meaning that is generally understood in the context of trust law. On this approach, a commercial trust might be defined as a trust forming part of a larger commercial arrangement, whose purposes are intended to give effect to that arrangement. The second possible approach is to adopt as the essential criterion for a commercial trust that it is set up in terms of or in connection with a bilateral (or multilateral) contract. In such

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[4] See paras 3.28-3.31.
[5] [1957] Ch 415; see para 3.28 and its fn 53.
[6] See para 3.30.
[7] See para 3.28.
[8] *Bassil v Lister* (1851) 9 Hare 177 and *Cathcart's Trs v Heneage's Trs* (1883) 10R 1205.
[9] See paras 3.29-3.30.

a case the parties have concluded a truly commercial bargain, and the trust is designed to give effect to that bargain. That, as explained above, would exclude the rationale of the rules restricting the duration of trust purposes. A possible difficulty with the first approach is that it puts too much weight on the ordinary meaning of the word 'commercial', although it can be said that this should not present any difficulty in the great majority of cases; borderline cases will exist on any definition. The difficulty with the second approach is that family trusts that include a contractual element might fall within the definition. Indeed, it is possible that a person wishing to set up a family trust could, by including a contractual element involving one or more of the beneficiaries, take the trust into the definition of a commercial trust, thus avoiding such restrictions as the law may impose on family trusts. We ask which of these two approaches is preferred. Whichever approach is taken to the question, the normal categories of commercial trust should be quite clear. Thus trusts set up as part of a life assurance policy or pension scheme, unit trusts and other trust-based investment schemes would be commercial trusts. So, clearly, would trusts set up to facilitate the working of a commercial contract or security agreement, such as a debt-factoring agreement or a securitisation agreement, although the non-application of the existing rules is probably already clear in such cases. Partnership agreements call for special comment, in that they are frequently concluded among members of a family and any trusts involve the holding of 'family' property. Thus it is common for a farm to be held on trust for a family partnership. It seems to us, however, that in all such cases the fundamental relationship is that of partnership, and the trust is essentially a device to facilitate the holding of property for the use of the partnership. That is very obvious in non-family partnerships, but the same point applies to family partnerships: the partnership is the fundamental relationship, and the trust is essentially ancillary. Consequently, we think that all trusts set up in terms of or in connection with a partnership agreement should be treated as commercial trusts. In the foregoing circumstances we ask the following questions:

2. (a) Should a 'commercial trust' be defined as a trust forming part of a larger commercial arrangement, whose purposes are intended to give effect to that arrangement?

(b) Alternatively, should a 'commercial trust' be defined as a trust set up under a bilateral (or multilateral) contract?

(c) Should the relevant definition be expanded by stating that it extends to, but is not restricted to, the following categories: trusts set up under or in connection with pension schemes, life assurance policies, unit trusts and other trust-based investment schemes, and partnership agreements?

3. Is the preferred definition of the expression 'commercial trust' adequate? Could it usefully be modified or extended in any way? Is there any other suitable way of marking the distinction between commercial and non-commercial trusts?

The foregoing proposals would only have effect, however, in the event that the rules restricting the duration of trust purposes are retained in some form. We now turn to the question of whether such rules should be retained.

Are the existing Scottish rules restricting the duration of trust purposes satisfactory?

Summary of criticisms

5.6 The criticisms of the existing rules are set out at length in Part 3 of this Discussion Paper.[10] These criticisms may be summarised as follows:

(i) The rules are highly technical and complex. They are properly understood by a relatively limited number of practitioners, and detailed and careful advice is required in any case where they may apply. This inevitably imposes costs on both trusters and trustees. It also makes it difficult for the average family solicitor to give definitive advice on the validity of a trust if there is any possibility that it might infringe either rule.

(ii) Since 1800 the rule restricting accumulation, in particular, has given rise to a large amount of litigation.[11] The same is true, albeit to a lesser extent, of the rule restricting successive liferents.[12] That again indicates the financial cost of the rules.

(iii) The application of the rules is frequently uncertain; this is clearly illustrated by the large amount of case-law that has been generated.

(iv) Because of the complexity of the rules, it is relatively easy for a trust to infringe them inadvertently. This can have serious consequences, both in frustrating the truster's wishes and in imposing tax charges on the trust.[13]

5.7 A further line of criticism is of importance. The original reasons for the enactment of both the rule restricting accumulation and the rule restricting successive liferents are clearly no longer valid (to the extent that they ever were valid).

(i) In relation to accumulations, the Thellusson Act was a reaction to one particular will and the ensuing litigation.[14] One of the main concerns appears to have been the possibility of building up large landed estates, with the political and economic power that the ownership of land accorded at the end of the 18th century. Economic conditions have changed enormously (and indeed were changing rapidly even in 1800), and the ownership of landed estates can no longer be regarded as a source of power, or indeed as a major source of wealth; shares and other forms of incorporeal property have clearly replaced land as the main form in which wealth is held.

(ii) Moreover, such empirical evidence as there is relating to trusts for long-term accumulation suggests that they are not particularly successful in building up

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[10] See paras 3.4-3.31 for the rule restriction accumulation, and paras 3.32-3.52 for the rule restricting successive liferents and the rule in *Frog's Creditors*.
[11] See para 3.4.
[12] See the extensive case law cited in paras 3.32-3.42.
[13] An excellent example of this is found in *McIver's Trs v Lord Advocate* 1973 SC 189, where a substantial charge to estate duty was triggered. See paras 3.23 and 3.26.
[14] See paras 2.15-2.16. It seems, however, that a number of other testators were considering wills in similar terms.

wealth. That is true of Thellusson's trust;[15] it is also true of the trust set up in Pennsylvania by Benjamin Franklin.[16] The fundamental point is that there is no reason that assets held in trust should out-perform the rest of the economy, and indeed it is extremely difficult to maintain substantial growth over long periods. Thus the fears that actuated the 1800 Act have not proved substantial.[17]

(iii) It has been argued,[18] although more with hindsight than at the time when the Accumulations Act was passed, that the result of accumulation is to inhibit or even prevent the proper economic exploitation of assets. That in turn is said to have an effect on the general economy. At a time when trustees' investment powers were severely limited there might well have been some force in this argument. At the present day, however, the investment powers of trustees have been greatly extended by the Trustee Investments Act 1961 as amended by schedule 3 to the Charities and Trustee Investment (Scotland) Act 2005. Moreover, it is standard practice in modern trust deeds to confer on trustees a power to invest the trust property "as if they were the absolute beneficial owners thereof". In these circumstances it seems most unlikely that the existence of a long-term accumulation trust would significantly impair the proper economic exploitation of trust assets.[19]

(iv) A further argument used at the time when the Accumulations Act 1800 was passed was that it prevented trusters from disinheriting living descendents in order to favour later, unborn, generations. While we agree that some sort of balance has to be struck between the present and future generations,[20] we consider that the current formulation of the rule restricting accumulation is too blunt and inflexible, and can prevent perfectly reasonable trust arrangements from being made.[21] We return to this point at a later stage in the discussion.[22]

(v) In relation to successive liferents, it is noteworthy that the prohibition has its origins in the Rutherfurd Act of 1848 as an anti-avoidance measure in the legislation on entails. That is a strange source for what is now a free-standing rule. Entails have now been abolished by the Abolition of Feudal Tenure etc. (Scotland) Act 2000.[23]

(vi) While the rule against successive liferents can be regarded as a mechanism to prevent the creation of a perpetual trust, it cannot be said to have achieved this result in anything like a comprehensive manner. Thus annuities fall outwith the rule, and other anomalous cases have arisen.[24] As with the rule

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[15] See para 2.13.
[16] See Appendix A, para 54, fn 127.
[17] See para 3.62.
[18] See paras 3.60-3.61.
[19] *Ibid*.
[20] See paras 5.16-5.21.
[21] See para 3.63.
[22] See para 5.11.
[23] Before that the creation of new entails was prohibited by s 8 of the Entail (Scotland) Act 1914, and very few remained even prior to the Act of 2000.
[24] See paras 3.35-3.37.

restricting accumulation, the rule against successive liferents is blunt and inflexible in its operation.

Developments in other jurisdictions

5.8 It is also noteworthy that a substantial number of other jurisdictions have taken steps to remove or simplify the legal rules that impose restrictions on the duration of trust purposes.[25] While these are jurisdictions where, following English law, the primary restriction on the duration of trust purposes was the rule against perpetuities, it is possible to see a widespread movement towards simplifying restrictions on duration; in this respect, the rule against perpetuities is a restriction on duration of more widespread significance than either of the two Scottish rules. In a number of jurisdictions, notably Manitoba, South Australia, Jersey and Guernsey and certain states within the United States, the movement for reform has gone further and the restrictions on the duration of trusts have been all but removed.[26] South Africa has never had any rules restricting accumulation. In the Irish Republic the Law Reform Commission recommended in 2000 the abolition of both the rule against perpetuities and the rule restricting accumulations, and its recommendations were enacted by the Land and Conveyancing Law Reform Act 2009. In other jurisdictions, including, as of November 2009, England and Wales, the rules governing the duration of trust purposes have been greatly simplified and the periods during which a trust purpose may subsist have been substantially extended; in England and Wales, for example, the Perpetuities and Accumulations Act 2009[27] abolishes the rule restricting accumulation and provides for a single perpetuity period of 125 years. While a period of that length can be seen as preventing a truly perpetual trust, it is most unlikely to impose any practical restriction on the average settlor. In the United States the movement for reform has largely been driven by reforms to the Federal Tax Code that made perpetual trusts attractive,[28] but the fact is that restrictions on trust duration are being widely removed, and this is generally welcomed by settlors. Professor Sitkoff sees the rule against perpetuities as "dying an ignoble death", and concludes that the rule restricting accumulation is probably going the same way.[29] In a number of jurisdictions, notably Manitoba and certain of the US states, the abolition of restrictions has been in force for a considerable number of years, and disastrous consequences do not appear to have ensued. The same can be said of South Africa, where there has never been a rule restricting accumulation. The US states that have abolished restrictions appear to have attracted very substantial volumes of trust business,[30] although this has obviously been driven by federal tax law. The reforms in Manitoba do not appear to have made so great an impact upon the volume of trust business taking place within the province, although competition to attract trust business within the Canadian provinces does not appear to be as prominent a consideration as it has been shown to be in many of the American states. The reforms in Jersey in 2006[31] were explicitly driven by a desire to attract

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[25] See Part 4 and Appendix A generally.
[26] See, generally, paras 4.4-4.14. For a detailed analysis of the US position, see Sitkoff and also Appendix A, paras 47-59.
[27] The Act is based on the recommendations of the Law Commission and was passed by the Westminster Parliament on 2 November 2009. See Law Commission Report on *Perpetuities and Excessive Accumulations*.
[28] See paras 4.5-4.8 and Appendix A, paras 47-59.
[29] Sitkoff, p 501. See also G Monitz, *Dynasty Trusts and the Rule Against Perpetuities* (2002-3) 116 Harv L Rev 2588; Sterk; and Appendix A, paras 53-59.
[30] See paras 4.5-4.7; it has been calculated that by 2003 approximately $100 billion in trust assets had been invested in states that abolished the rule against perpetuities.
[31] See Appendix A, paras 22-24.

trust business, which were described as "key products used by the island's finance industry".[32]

5.9 The movement in other jurisdictions towards the simplification or restriction or abolition of the rules restricting the duration of trust purposes is not, of course, a decisive consideration so far as Scots law is concerned. Nevertheless, this movement is an indication of a widespread view that significant restrictions on the duration of trust purposes are unnecessary. This is borne out by the consequences of abolishing such restrictions and the experience of jurisdictions that have never had any restriction: apart from the special case of trusts set up in US states for fiscal reasons,[33] the clear indication is that trusters very rarely set up trusts of very long duration. The reason is obvious: the overwhelming majority of trusters wish to benefit their families in a sensible manner, and passing over immediate descendents in order to favour later generations simply does not make sense.[34] Consequently it is possible for the law to rely on the good sense of the normal truster. This point was made by the Manitoba Law Reform Commission in their Report on Perpetuities:[35]

> "We also cannot believe that even an eccentric would choose an accumulation trust in today's conditions for the attempted purpose of building a fortune for an unknown heir sometime in the remote future. In an era of corporate enterprise, diversification and take-over acquisitions leading to multi-national corporate activity, the accumulation trust wears more the appearance of the horse and buggy."[36]

We agree with that view.

Disadvantages of fixed rules restricting duration of trust purposes

5.10 A further argument against the existing rules restricting the duration of trust purposes is that they are inflexible and liable to produce arbitrary results. Various examples of this are given in Part 3.[37] Often the result of the statutory prohibitions turns on very fine distinctions. While these can give great pleasure to lawyers of an intellectual cast of mind, it cannot be said that they leave the law in a satisfactory state.

5.11 Yet a further reason for regarding the existing rules restricting accumulation and successive liferents as unsatisfactory is that they can prevent perfectly reasonable arrangements from taking effect, sometimes with serious tax consequences. An example of this is *McIver's Trustees v Lord Advocate*[38] where an *inter vivos* trust deed directed accumulation until the truster's son was 22, when the estate, including accumulations, was to be made over to him. The truster died during the period of accumulation. It was held that the accumulation period directed by the truster could not receive effect because it extended beyond the majority of the son. Consequently accumulation became unlawful on the father's death. It seems to us that the scheme devised by the truster in this case was quite reasonable. Moreover, the arbitrary nature of the existing rules can be seen in the fact that it

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[32] This quotation is reproduced in full in Appendix A, para 22.
[33] Where specific forms of trust are used, and there is generally no intention to deprive future generations of any benefit from the family patrimony.
[34] This is obviously subject to tax considerations. At present within the UK it will often be desirable to pass parts of a truster's estate directly to grandchildren, but that is clearly a reasonable disposal of property.
[35] Manitoba Law Reform Commission, *Report on the Rules Against Accumulations and Perpetuities* (1983).
[36] *Ibid* at p 7.
[37] See, eg, paras 3.17, 3.23, 3.26-3.27, 3.30, 3.35-3.38 and 3.41.
[38] 1973 SC 189.

was only the father's death prior to the son's 22nd birthday that prevented the first of the accumulation periods (to the lifetime of the granter of the deed) from applying.

5.12 Any rule that sets fixed periods for the duration of trust purposes is likely to be inflexible and, largely in consequence of that inflexibility, arbitrary in its practical operation. This point is relevant not only to the Scottish rules restricting accumulations and successive liferents; it applies equally to other rules, such as the rule against perpetuities, that set limits either on permissible periods of vesting or on the permissible duration of a trust. These appear to us to be significant disadvantages of any fixed rule restricting the duration of trust purposes. The justification for such rules in modern conditions might be a policy of ensuring that property is passed on through successive generations, so that a truster's immediate descendants are not passed over in favour of more distant descendants; in that way it might be thought that family responsibilities are encouraged. If that is so, it seems to us that the existing rules of Scots law are quite disproportionate to the desired end. They are technical and complex, frequently uncertain, and often arbitrary and inflexible in their operation. At the same time, they do little to compel a truster to benefit his immediate descendants, who can readily be passed over in favour of later generations. In addition, of course, apart from alimentary obligations and the entitlement of a spouse or issue to legal rights or legal share,[39] a person can disinherit his family entirely. If it is considered important that the owner of property should bequeath a significant part of that property to his immediate descendants, that can best be achieved through the rules relating to legal rights or legal share. Attempting to achieve that result through rules regulating the life of trust purposes is in our opinion a singularly ineffective means of achieving that objective.

5.13 The Scots common law was not hostile to trusts of long duration, and the two rules with which this Discussion Paper is concerned were introduced by statute in the late 18th and mid-19th centuries, for reasons which, if they were ever good, no longer appear so. Those rules are open to major criticisms, including their technicality, complexity and uncertainty, and their inflexibility and the arbitrary results which they can easily produce. We are also conscious of the reforms that have been carried out in Jersey, Guernsey and the Isle of Man and, most importantly, the recent reforms in England and Wales; if Scots law retains rules that are widely perceived as outdated there is a danger that trust business will simply move out of the jurisdiction to other more accommodating jurisdictions within the British Isles. In these circumstances we are of opinion that Scots law should abolish the existing rules restricting accumulation and successive liferents. A proposal to that effect is made at paragraph 5.57 below.[40]

5.14 There remains, of course, the possibility that a small number of trusters may set up trusts containing purposes of excessively long duration; one example might be a trust purpose that directed accumulation of the whole income for 200 years. In Scots law a trust or testamentary purpose can be reduced by the Court of Session on the ground that it is unreasonable.[41] It seems to us that, if a trust purpose is thought to be of excessively long duration, the most appropriate means of control is through this jurisdiction, which is inherently flexible and can take account of the particular circumstances of the trust. We do not think that such cases will occur frequently, but the mechanism is already there to deal with them.

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[39] These matters are considered more fully in our Report on *Succession* (Scot Law Com No 215; 2009), Part 3.
[40] Proposal 4.
[41] See paras 2.59-2.76. We propose at paras 5.73-5.74 that the Court should continue to have such a power.

5.15 We should mention one further argument that has been advanced for the repeal of rules restricting the duration of trust purposes. In a number of jurisdictions law reform bodies have pointed out that the current tax regime makes trusts of very long duration undesirable, and have relied on this as a factor supporting abolition of the rules on duration of trust purposes.[42] Under the present United Kingdom tax legislation, trusts of long duration are generally fiscally undesirable. Nevertheless, tax law can change, and the example of the United States[43] indicates how a fiscal regime can in some circumstances favour accumulation trusts designed to last for many years. For this reason we do not think that tax considerations can be relied on as a factor that inevitably supports abolition of rules restricting the duration of trust purposes; they seem to us to be essentially neutral. Nevertheless, in present conditions within the United Kingdom, it is highly unlikely that the abolition of the rules restricting accumulation and successive liferents would result in the creation of large numbers of private trusts of very long duration.[44]

Policy considerations that remain relevant today

'Dead hand' control

5.16 In our opinion the most important justification for restricting the duration of trusts purposes is found in the 'dead hand' argument developed by Professor Lewis M Simes, notably in his article, based on lectures, "The Policy against Perpetuities".[45] This was explained (in relation to the rule against perpetuities) as follows:

> "First, the Rule against Perpetuities strikes a fair balance between the desires of members of the present generation, and similar desires of succeeding generations, to do what they wish with the property which they enjoy. [ ] But, in my opinion, a second and even more important reason for the Rule is this: it is socially desirable that the wealth of the world be controlled by its living members and not by the dead. I know of no better statement of that doctrine than the language of Thomas Jefferson, contained in a letter to James Madison, when he said: 'The earth belongs always to the living generation. They may manage it then, and what proceeds from it, as they please, during their usufruct.'"[46]

Simes used those arguments as a justification for the rule against perpetuities, in the form that it took in most US states during the 1950s. We are firmly of the view that there would be no demand in Scotland for introduction of the rule against perpetuities which, as explained above, is currently subject to far-reaching processes of simplification and even abolition. Nevertheless, it seems to us that there is a point in Simes' argument: the law must strike some balance between the absolute freedom of a truster to do as he wants with his own property and the freedom of future generations to use the world's resources as they think best.

5.17 This is a fundamental conflict. On the one hand is a truster's freedom to dispose of his own property; on the other is the freedom of, usually, his descendants to make use of the family patrimony in a manner that is suited to contemporary conditions. Those conditions may obviously differ from those that applied when the trust was set up. The personal

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[42] This point was considered by the Manitoba Law Reform Commission in its Report: see Appendix A, para 16.
[43] See paras 4.5-4.6 and Appendix A, paras 47-59.
[44] Commercial trusts of long duration might be set up, but we do not regard that as undesirable.
[45] (1955) 103 U Pa L Rev 707.
[46] *Ibid* at 723.

circumstances of the family, or individual members of the family, may have changed; for example, a breadwinner may have died prematurely, leaving a surviving spouse and young children in dire need of financial support; or a descendant of the truster may be severely handicapped, necessitating financial support throughout his or her life. Those changes will not have been foreseen by the truster; indeed, in many cases they may have been, in objective terms, unforeseeable. Alternatively, the trust's financial circumstances may have changed. For example,[47] the main asset of the trust may have been shares in a company that operated a malt whisky distillery; the value of the company, which owns one of the few remaining independent distilleries, rises dramatically; ultimately the company is sold to an international group of companies, greatly increasing the value of the trust fund. Changes of that nature may require fundamental reconsideration of the uses to which the funds are put; long-term trust purposes that are perfectly reasonable when applied to a fairly modest fund invested predominantly in a single family asset may become wholly inappropriate when the trust comes to own liquid assets of a much greater amount. A third possibility is that the financial circumstances of the family or individual members of the family may change. This may apply either to the family's needs or to the resources that are available to satisfy those needs. For example, a member of the family may lose his job just at the time when he requires significant funds to enable his daughter to go to university. Another member of the family might require funds urgently to set up a business. The family's needs and resources are clearly of an individual nature, but they may be heavily affected by changes in general economic circumstances. The recession that started in 2008 provides very clear examples of how this can happen, as where a family business fails and at the same time bank shares held by the family as an asset lose nearly all of their value. In all of these cases the needs of the current generation may come into genuine conflict with the wishes of the truster. The question is how that conflict can be reconciled.

5.18 In answering that question two points appear to us to be important. First, the type of trust where such a conflict is liable to arise will almost invariably be set up for the benefit of a family. Indeed, the classic version of the problem is that the truster decides to benefit distant generations rather than his children and grandchildren. There may, of course, be cases where a charity or a person who is not a member of the family is a residuary beneficiary, but even in those cases the beneficiaries first called will be members of the family.[48] Consequently, in attempting to devise a practical solution to the conflict, it is important to treat the family trust as the paradigm.

5.19 Secondly, the 'freedoms' of the truster on one hand and of future generations on the other hand are not precisely equivalent. The freedom of the truster to do as he wishes with his own property[49] is a liberty, or more strictly a power[50] recognised by Scots law.[51] The power is far reaching; the owner of property can, generally speaking, give it to anyone that he wishes to benefit. In this respect he is free to prefer animal charities, or the alleviation of poverty and famine in Africa, to the interests of his own family. The freedom of future

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[47] The following example is based on *R S Macdonald Charitable Trust Trs v Scottish Society for the Prevention of Cruelty to Animals* 2009 SC 6.

[48] The family need not be that of the truster or testator; it may be the family of a collateral relative or friend.

[49] Subject of course to claims of creditors, obligations of aliment, legal rights or legal share, and the like.

[50] See WN Hohfeld, "Fundamental Legal Conceptions" (1913) 23 Yale LJ 16, esp at p 45 ("X [the owner of an item of corporeal movable property] has the power to transfer his interest to Y, – that is, to extinguish his own interest and concomitantly create in Y a new and corresponding interest.") In Hohfeld's analysis, a legal power is the opposite of a legal disability.

[51] Stair, *Institutions of the Law of Scotland* (ed DM Walker, 1981) III, 4, 2.

generations, on the other hand, cannot be regarded as more than a moral freedom; it is not a liberty (or a power) in the legal sense. Consequently, in a legal context, the freedom of the truster is primary, and the question becomes how far that freedom should be restricted in the interests of future generations.

Rules limiting 'dead hand' control

5.20 The restriction of a truster's freedom has traditionally taken the form of definite legal rules. In the common law systems the most prominent of these has been the rule against perpetuities, that any future interest "must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest".[52] That rule, both in its original form and as modified by, for example, the 'wait and see' principle or the use of a fixed period rather than lives, functions as a restraint on the vesting of future interests. An alternative would be to limit the time during which a trust might subsist. In practice the rule against perpetuities probably tends to function in this way in cases where a fixed period of years is used. A similar result is achieved in South Australia,[53] where the rules against perpetuities and accumulation were abolished by legislation in 1996, subject to the introduction of a power in the court to order the premature vesting of property in certain circumstances. That power is exercisable 80 years or more after the relevant disposition of property was made. Although the court's power is framed in terms of vesting, the practical effect is to bring the trust to an end.

5.21 In Scotland there have never been any general rules restricting the date of vesting or limiting the period during which a trust may subsist. At common law a truster appears to have enjoyed absolute freedom to create future interests, subject only to the overriding power of the court to reduce a provision as unreasonable.[54] Two restrictions have been introduced by statute, on the period during which accumulation may take place and on the creation of future liferent interests. These can be seen as a piecemeal response to particular problems: the dangers that were perceived in long-term accumulation at the end of the 18th century and the need to prevent avoidance of the rules governing entails in the mid-19th century. There is no evidence of any systematic approach to the fundamental question of how far freedom of donation should be restricted in the interests of future generations.

A suggested solution

The problem

5.22 It seems to us that the time has come to address that issue. The starting point in our opinion is the power of the owner of property to dispose of it in any manner that he thinks fit.[55] That is the traditional starting point of Scots law, and it is reflected in the absence at common law of any restrictions on the duration of trust purposes. Restricting that freedom by means of fixed legal rules, such as the rule against perpetuities or possibly a straightforward rule on the permitted duration of a trust, appears to us to have two major disadvantages. In the first place, the effects of such a rule can be very arbitrary. This is illustrated by the history of the rule against perpetuities, both in England and Wales and in

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[52] Gray, p 191.
[53] See Appendix A, paras 4-10.
[54] See paras 2.59-2.76 and 5.73-5.74.
[55] See para 5.19. There are, of course, restrictions at common law on trusts which are unintelligible, impracticable or unreasonable: see paras 5.73-5.74.

other jurisdictions that have adopted the rule. The extensive case-law that has followed the Thellusson Act is more than matched by the litigation that has been conducted on the rule against perpetuities. The same point can be illustrated by an example based on the simpler type of rule that merely limits the permissible duration of a trust. If, for example, the law declares that a trust may only subsist for 80 years, and a trust has not come to an end after the expiry of that period, something must be done to dispose of the trust property. That can only be by means of immediate vesting in the current presumptive beneficiaries. Those will, however, be subject to the vicissitudes of survivorship; if, for example, one descendant dies shortly before the 80th anniversary, his estate will take nothing, and if he has no issue the share will usually accrue to collateral beneficiaries who have survived that date. That result may not be fair, especially if the predeceasing beneficiary leaves a surviving spouse.

5.23 In the second place, the tendency in jurisdictions that have adopted fixed rules has been to extend the period during which vesting must occur; thus in England and Wales the Perpetuities and Accumulations Act 2009 introduces a uniform period of 125 years. If a period of that length is permitted, it is difficult to see that much is achieved by the restriction. If, by contrast, the period during which vesting must occur is short, that operates as a significant barrier to trusters who wish to achieve long-term trust purposes, and there is little doubt that at the present day restrictions of that nature are perceived by many potential trusters as undesirable (and may affect their decisions as to where to set up a trust). Consequently it seems that any attempt to make use of fixed periods faces a dilemma: if the period is too short it is a deterrent to the reasonable wishes of trusters, and tends to produce arbitrary and inflexible results; and if it is too long there is little point. We are accordingly of opinion that it is better not to restrict the life of trust purposes or the vesting of trust property to any period fixed by law and we make a proposal to that effect.[56] We invite comments on this proposal. If, contrary to our proposal, there is support for restricting either vesting or the life of trust purposes to a fixed period, we would obviously welcome comment on what the fixed period should be, and how it should operate. We further ask whether there is any support for the proposed English rule that requires vesting within a fixed period of 125 years.[57]

5.24 Trusts of very long duration are objectionable because they fail to have regard to the wishes and needs of future generations. In this connection 'wishes' and 'needs' should perhaps be regarded objectively: it is not eccentric whims that are in issue but the reasonable requirements and desires of future generations. On this approach, the fundamental mischief is perhaps that the original trust purposes are rendered inappropriate by changing circumstances. Obviously, the longer the trust has subsisted, the greater the potential for change and the more radical any change is likely to be. Examples of such changes are given in paragraph 5.17 above; essentially they relate to changes in the personal circumstances of the family, or in the trust property, or in the financial circumstances of the family. What is required is a mechanism that permits changes of that nature to be dealt with while still respecting the fundamental wishes of the truster, insofar as those remain relevant.

[56] Proposal 5(a) at para 5.57.
[57] Question 5(b) at para 5.57.

A possible solution

5.25 We are of opinion that an appropriate mechanism would be as follows: after a trust had been in existence for a set number of years, possibly 25, the Court of Session would have power to alter the trust purposes to the extent that such alteration is clearly expedient in order to take account of any material changes in circumstances that had occurred since the trust was created. The power would be exercisable on the application of either the trustees or any one or more of the members of the truster's family, whether or not they are beneficiaries.[58] As mentioned in the paragraph above, the underlying mischief of long-term trusts appears to us to be that the original trust purposes become inappropriate in the light of a material change of circumstances. We should emphasise that this mischief is not confined to long-term accumulation trusts or to trusts that provide for a long sequence of successive liferents; it applies to all long-term trusts of every sort.[59] Consequently it is thought that our proposed jurisdiction should apply to all long-term trusts, and not only to those that would have infringed the existing rules restricting accumulation and successive liferents.

(i) material change of circumstances

5.26 It would be a necessary condition for the exercise of the Court's jurisdiction that a material change in circumstances should be demonstrated. The relevant categories of change of circumstances would at least extend to changes in the personal or financial circumstances of one or more members of the truster's family or changes in the nature or amount of the trust property. We ask whether the relevant categories of change of circumstances should be defined on a comprehensive basis, or alternatively whether it would be preferable merely to rely on the general concept of a change in the circumstances of the trust.[60] A comprehensive definition would avoid uncertainty or doubt as to what is relevant. On the other hand it might exclude some, unforeseen, changes that do amount to a material change in the circumstances of the trust. If it is thought that a definition should be provided, we suggest that an appropriate formulation might be 'a change in the personal or financial circumstances of any one or more members of the truster's family (or any family that is benefited by the trust) or a change in the nature or amount of the trust property or a change in the tax regime'. We invite comments on such a definition.[61] In every case, the change would be measured by reference to the circumstances that obtained when the trust was set up, that is, at the date of execution of the trust deed or in the case of a testamentary trust the date of death of the testator. Any change in circumstances would require to be material, in the sense that, considered objectively, it is likely to have a significant impact on the reasonable requirements or resources of the beneficiaries or it consists of a significant change in the nature or amount of the trust property. For the avoidance of doubt, we think that it should be made clear that changes in the tax regime applicable to the trust or family members are relevant changes of circumstances. It would also be appropriate to provide that prospective changes of circumstances may be relevant, although in this case the degree of likelihood that the particular change will occur is clearly a matter that the Court must take into account.

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[58] We discuss the identity of possible petitioners at paras 5.35-5.37.
[59] With the exception of public trusts and commercial trusts: see paras 5.71-5.72.
[60] See question 8(a) at para 5.57.
[61] See proposal 6(b) and questions 8(a) and (b) at para 5.57.

(ii) intentions of the truster

5.27 In altering the trust purposes, we propose that the Court would be subject to the constraint that the alterations to trust purposes should be restricted to those that are clearly expedient in order to deal with the relevant changes in circumstances. In addition, in determining which alterations should be approved, the Court should have regard to the intentions of the truster, so far as these can be ascertained; we do not, however, think that those intentions should be binding on the Court. In considering the intentions of the truster, the Court would obviously have regard to the terms of the trust deed. We think in addition that it would be appropriate for the Court to have regard to any other evidence as to the truster's intentions that is available; for this purpose extrinsic evidence would be admissible. Because a material change of circumstances is essential, it will usually be impossible to determine the truster's actual intentions with regard to the new circumstances that have arisen. In such cases the Court should determine the probable intentions that a reasonable person in the truster's place would have had in the changed circumstances. That test is obviously objective, but in applying it the Court should take into account such indications as exist as to the truster's general intentions in setting up the trust. In other words, the standard that is to be applied is that of a reasonable truster who had the same initial general intentions as the actual truster, so far as the latter can be ascertained. The foregoing constraints are broadly modelled on the Court's existing cy-près jurisdiction in relation to public trusts.[62]

(iii) position of trustees, beneficiaries and members of the truster's family

5.28 Although the Court is to have regard to the intentions of the truster, whether expressed in the trust deed or elsewhere, those intentions are not to be binding, and in an appropriate case the Court could wholly override them. It is possible that a truster might declare that he wishes to exclude the proposed jurisdiction to alter the trust purposes, or might declare that his intentions are to be carried out regardless of any change of circumstances. We are of opinion that the Court should be expressly empowered to disregard any such provision. The proposed jurisdiction is an attempt to deal with the 'dead hand' problem. That involves a significant element of public policy: a truster should not be entitled to tie up property for a long period in a manner that, through change of circumstances, fails to meet the reasonable needs and wishes of the living generation. Consequently the jurisdiction should apply regardless of the wishes of the truster. Nevertheless, we invite comments as to whether this is appropriate.[63]

5.29 It is not intended that the consent of all of the beneficiaries should be required for the exercise of the proposed jurisdiction. Indeed, it would be competent for the Court to alter trust purposes despite the opposition of one or more of the beneficiaries, or of the trustees. In this respect this jurisdiction is quite distinct from the existing power under section 1 of the Trusts (Scotland) Act 1961, or the corresponding jurisdiction that is proposed in our Report on *Variation and Termination of Trusts*.[64] It is thought, however, that the Court should be required to have regard to two further matters: the extent to which existing beneficiaries and the trustees have consented to the proposed alterations, and whether the proposed alterations can be considered fair, objectively speaking, as among the existing beneficiaries

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[62] See *R S Macdonald Charitable Trust Trs v Scottish Society for the Prevention of Cruelty to Animals* 2009 SC 6.
[63] See question 9 at para 5.57.
[64] At paras 5.34-5.37.

and members of the truster's family and the children, including subsequently born children, of existing beneficiaries and members of the truster's family. These requirements will, it is hoped, avoid the possibility that a minority of beneficiaries will attempt to force through changes that are beneficial to them but detrimental to the remaining beneficiaries. It should be noted, however, that the requirement of fairness among the beneficiaries only extends to existing beneficiaries and their children; there is no requirement to take into account later generations. This is a frank recognition of the underlying rationale of the Court's power: to take account of the requirements and wishes of the current beneficiaries, even where that may conflict with the interests of generations yet to be born.

(iv) period during which trust is immune from jurisdiction

5.30 At this point we should mention the length of the period that it is suggested must elapse before the proposed jurisdiction of the Court can be exercised. We think that some such period is necessary for three main reasons. First, the jurisdiction is designed to deal with a mischief that exists in long-term trusts, and the requirement that a trust should have been in existence for a substantial period emphasises this important feature. Secondly, we think that this requirement should help to avoid the risk that family members who are unhappy with a trust will mount an early application to have its terms altered before any material change of circumstances has occurred; the need for the lapse of a substantial period serves to emphasise the fact that such a change is the basis of the proposed jurisdiction. Thirdly, the proposed jurisdiction, unlike that under section 1 of the Trusts (Scotland) Act 1961, does not require the consent of all of the beneficiaries who are of full age and mentally capax. We think that this fairly radical[65] step should be counter-balanced by a requirement that a substantial period should have elapsed before the jurisdiction can be exercised. This seems to us to achieve a reasonable balance among the interests of the beneficiaries, and in particular between those who might want an alteration and those who might want to resist it.

5.31 Our provisional view is that a period of 25 years might be appropriate, but we would welcome views as to what an appropriate period might be. The justification for 25 years is that it can be considered a 'short' generation. By the time a generation has elapsed, the members of the family will almost inevitably differ substantially from those that the truster knew at the time when the trust was set up. Moreover, during that period it is quite likely that the needs and resources of the family will change to a significant extent, as may the trust property and indeed general economic conditions. This accordingly seemed to us to be the minimum period that is required to produce conditions that can be considered fundamentally different from those that the truster had in contemplation. The likelihood of a significant change of circumstances must obviously increase as the years pass, and a case for an alteration may be much stronger for a trust that has existed for, say 75 years as against a trust that has merely existed for 25 years. Nevertheless, the critical question for the Court is whether there has been a material change of circumstances. Dramatic changes can occur very suddenly, for example, as a result of a death or the birth of a disabled child, and we think that the proposed jurisdiction should be able to deal with such events at a relatively early stage in the lifetime of a trust. 25 years appears to us to be a reasonable compromise.

[65] Although the consent of all of the beneficiaries is not required under the cy-près jurisdiction.

5.32 We are further of opinion that the period that must elapse before the Court's jurisdiction can be exercised should run from the date when the trust was created, that is to say, the date when the original trust deed was executed or, if that deed was testamentary in nature, the date of the testator's death. In some cases trustees may be empowered to exercise a wide-ranging power of appointment that effectively permits the resettlement of the trust funds. We do not think that the exercise of such a power should alter the period that must elapse; the justification for that period is that it should be of such a length as to permit a significant likelihood that new circumstances, differing from those at the time when the trust was set up, will emerge. That likelihood is not affected by the exercise of a power of appointment. Nevertheless, if a power of appointment is exercised by the trustees at any time before an application is made to the Court, that exercise is clearly a factor that must be taken into account by the Court in deciding whether and in what terms to exercise its power to alter the trust purposes.[66]

(v) scope of Court's power

5.33 For the avoidance of doubt, we think that it should be made clear that the power to alter trust purposes includes power to bring the trust to an end, in whole or in part, to provide for the immediate vesting of trust property in any person, and to postpone vesting. These powers are probably implicit in the notion of a general power to alter trust purposes, but as they may be of considerable practical importance we are of opinion that the point should be made clear.

(vi) Court of Session

5.34 It is proposed that the new jurisdiction to alter trust purposes should be exercised exclusively by the Court of Session. This is in accordance with the existing law relating to trust variations under section 1 of the Trusts (Scotland) Act 1961 and petitions for the approval of cy-près schemes. It also accords with the powers of the Court proposed in our Report on *Variation and Termination of Trusts*; in both Part 1 of the Bill attached to that Report, dealing with arrangements to vary or terminate private trusts, and Part 2 of the Bill, dealing with the reorganisation of public trusts, it is proposed that the powers of the Court should be exercised by the Court of Session. We think that this is desirable for three reasons. First, the proposed jurisdiction confers a considerable measure of discretion on the Court, and it is essential that this should be exercised in a consistent and principled manner. That can best be achieved if a single court is responsible for the exercise of the jurisdiction.[67] Secondly, it is important that the jurisdiction should be exercised by a court that has a detailed and comprehensive knowledge of trust law. Trust law tends to be a very specialised area, and the existing trust jurisdictions are generally exercised only in the Court of Session. Thirdly, those interested in a trust may reside in different parts of Scotland, and indeed in other parts of the world; consequently problems of jurisdiction or venue[68] would be liable to arise if more than one court were empowered to exercise the proposed jurisdiction. For these reasons we think that the Court of Session alone should have the proposed power to alter trust purposes. We would expect, however, that the Court's jurisdiction would be

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[66] See para 5.41 on discretionary trusts.

[67] It is possible that a specialised judge might be appointed to deal all such applications, as already occurs with existing Outer House trust business, including the cy-près jurisdiction. The decisions of such a judge are, of course, subject to review by the Inner House.

[68] Venue would be important if a single unitary jurisdiction were conferred on the Sheriff Court.

delegated to the Outer House, presumably to the designated trust judge. We made a similar recommendation in our Report on *Variation and Termination of Trusts*.[69] Finally, we note that the Gill Report[70] refers to the existing trust jurisdiction of the Court of Session and does not recommend any change to it.

(vii) parties to proceedings

5.35 An issue arises as to who may be a petitioner in any proceedings for alteration of trust purposes in the light of a material change of circumstances. Any person who has an interest in the trust should clearly be a competent petitioner. This would cover both the trustees and all present or contingent beneficiaries. In addition, however, we are of opinion that those who can reasonably be regarded as disinherited by the truster's disposal of the estate should also be potential parties. The significance of such an extension can be seen in a case where the truster directs a long period of accumulation, followed by distribution of the capital.[71] By way of example, a truster might direct accumulation until the first of his great grandchildren attains the age of 21, whereupon the trust fund is to be distributed among his great grandchildren then alive. It might transpire that, before any great grandchild had been born, the financial circumstances of the family suffer an abrupt reverse, with the result that the truster's children and grandchildren are left in dire need of additional funds. That is precisely the type of situation that our proposed power is intended to meet. In such a case, however, there is no living beneficiary who could be a petitioner, and the trustees might take the view that their function is to implement the truster's directions, which disinherit all of the family members who are then alive. In such a case, we are of opinion that it is reasonable that the truster's children and grandchildren should be entitled to petition the Court to alter the trust purposes. They are members of the truster's family, and the trust is clearly intended as a family trust; moreover, the beneficiaries selected by the truster are the descendants of the children and grandchildren, and their upbringing and maintenance in their youth will be the responsibility of the grandchildren. We are accordingly of opinion that the competent petitioners should include all descendants of the truster; this recognises the fundamental point[72] that a family trust is involved, designed to operate for the benefit of the family. We are further of opinion that any person who is an ancestor of an actual or potential beneficiary should be entitled to petition; this is to cover cases where a truster sets up a trust to benefit not his own descendants but, for example, the family of a brother or sister.

5.36 Nevertheless, although we favour a wide class of potential petitioners, we expect that the Court would in general look more favourably on applications made by beneficiaries or by members of the truster's family more closely related to beneficiaries, for two reasons: first, the Court is required to have regard to the truster's intentions, and these are to benefit one particular part of his family; and secondly, the Court is directed to ensure fairness across the family, and in this regard it can be said that the interest of members closely related to beneficiaries is, at least in a moral sense, greater than that of those with a more peripheral connection. Thus, if a trust is set up to benefit the children and grandchildren of the truster's daughter, the Court might be expected to look favourably on an application by the truster's daughter on account of a sudden need for funds, but it might look less favourably on an

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[69] At paras 5.43-5.44; recommendation 14.
[70] Report of the Scottish Civil Courts Review by the Rt Hon Lord Gill, Lord Justice Clerk, published in September 2009, paras 137-141.
[71] This is broadly similar to the Thellusson will, which provided for accumulation until the death of the last survivor of certain family members: see para 2.12.
[72] See para 5.18.

application by the truster's son or his children. The fundamental object of the trust that is contemplated by the truster is the benefit of the daughter's family, not the son's. This is, however, a matter on which the Court can exercise its discretion, and exceptional cases may arise. For the avoidance of doubt, we should indicate that the practice that has grown up as to petitioners in trust variation petitions[73] does not seem appropriate to our proposed procedure; we contemplate that the petitioners will normally be one or more of the members of the truster's family, including beneficiaries where that is appropriate.

5.37 We are further of opinion that any of those entitled to be a petitioner should also be entitled to appear as a respondent, to oppose the petitioner's proposals in whole or in part. This seems to us to be essential if conflicting views within the family are to be properly represented. Finally, we think that the Court should have power in appropriate cases to appoint a curator *ad litem* to protect the interests of minor or unborn beneficiaries; the curator should be entitled to present submissions to the Court. This is merely an application of existing practice in trust petitions, and will probably not require legislation.

Further discussion of criteria for exercise of the proposed jurisdiction

Material change of circumstances

5.38 The criteria that we have proposed for the exercise of the proposed jurisdiction call for further comment. Apart from the requirement that the trust should have been in existence for 25 years, or some other specified period,[74] the essential criterion for the exercise of the jurisdiction is that there should have been a material change of circumstances since the trust was created. We think that this is essential in order to define the problem that the jurisdiction is intended to address; we see the risk of a material change of circumstances as the fundamental mischief arising out of 'dead hand' control.[75] The proposed jurisdiction is not a general power to alter the purposes of a trust after 25 years; that would be open to the charge that it is too vague a power and would involve unwarrantable interference with the truster's intentions. In addition, the alterations that may be effected under the new jurisdiction are those that are clearly expedient in order to deal with the relevant changes in circumstances.[76] In this way we think that the proposed jurisdiction is sufficiently precise to enable prospective petitioners to know whether an application to the Court is likely to be worthwhile and to set reasonable limits to the Court's power.

Intentions of the truster

5.39 We have also proposed that the Court should have regard to the intentions of the truster so far as these can be ascertained; if the truster's intentions cannot be ascertained we propose that the Court should have regard to the probable intentions of a reasonable truster in the current circumstances of the trust. Those actual or deemed intentions are not, however, to be binding on the Court; they are merely a factor to be taken into account in the

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[73] In the case of a liferent trust the petitioner is the liferenter; in other cases, including discretionary trusts, the petitioners are normally the trustees.
[74] See paras 5.30-5.32.
[75] In this respect there is a clear parallel between the proposed jurisdiction and the law relating to frustration of contract, and also with the *clausula rebus sic stantibus* of Roman law.
[76] That is the test for the cy-près jurisdiction: see *R S Macdonald Charitable Trust Trs v Scottish Society for the Prevention of Cruelty to Animals* 2009 SC 6.

exercise of the Court's discretion. We are of opinion, however, that this factor may be important in some cases. If, for example, a truster sets up a trust to benefit his son's family but not his daughter's, that is an important consideration in deciding how trust purposes should be altered in future, and might well be decisive against any application by a member of the daughter's family designed to secure an alteration of the trust purposes in his or her favour. Any other result would be liable to be unfair. Nevertheless, we think that the truster's intentions cannot be binding on the Court, because the basic purpose of the proposed jurisdiction is to enable a trust to adapt to meet circumstances that have changed in a material respect since the truster set it up; thus the truster's intentions may be irrelevant to the essential problem that is faced. In these respects we think that the proposed jurisdiction is broadly similar to the cy-près jurisdiction, where regard must be had to the truster's intentions but those intentions are overridden where that is clearly expedient in the light of changed circumstances.

5.40 In our Report on *Variation and Termination of Trusts* we recommended[77] that the consent of the truster should not be required for a trust variation. We further recommended[78] that it should not be relevant that a variation was inconsistent with a material purpose of the trust. That approach is obviously different from the approach that we now recommend. The reason for this is that the theoretical underpinning for the trust variation jurisdiction is fundamentally different from that underlying the jurisdiction that we now propose. The basis for a trust variation is an agreement among all of the beneficiaries who are of full legal capacity to change the trust purposes;[79] what the Court does is to supply the consent of actual or potential beneficiaries who are not of full legal capacity or are unborn or unascertainable. Thus what is involved is essentially an agreement among the beneficiaries, that agreement having contractual effect. Under our proposed jurisdiction, however, as with the cy-près jurisdiction, no agreement is involved; instead the Court exercises a power to alter trust purposes to deal with changing circumstances. In doing so it exercises a discretion, but subject to a number of constraints: the alterations must be designed to deal with the change of circumstances, and the Court must have regard to the extent to which the beneficiaries and the trustees have consented and whether the alterations are fair, objectively speaking, as among existing beneficiaries and existing members of the truster's family and the children of each of the latter groups. It seems to us that the intentions of the truster are relevant to the exercise of such a discretion, as one of the factors to which the Court should have regard. The Court should not, however, be bound by those intentions.

Discretionary trusts

5.41 We should also mention discretionary trusts. In such trusts the truster may confer wide powers on the trustees to modify the operation of the trust purposes, by accumulating income or directing payment to one or more beneficiaries, or by advancing capital to beneficiaries. It is obvious that provisions of that nature may give the trustees power to alter the operation of the trust in order to deal with changing circumstances. Consequently we would not expect such trusts to require the proposed jurisdiction very frequently. Nevertheless on occasion it might be useful, for example where the trustees' powers are

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[77] At para 5.38.
[78] At para 3.9.
[79] The basis for that is found in the decisions of the Court of Session in *Miller's Trs v Miller* (1890) 18 R 301 and *Yuill's Trs v Thomson* (1902) 4 F 815; those cases are discussed in our Report on *Variation and Termination of Trusts* at paras 2.1-2.5.

significantly circumscribed; moreover, discretionary trusts vary greatly in the width of the powers conferred on trustees, and in the narrower sort of discretionary trust the trustees may not find it easy to deal with all material changes of circumstances. We can accordingly see no advantage in excluding discretionary trusts from the power of the Court to alter trust purposes.

5.42 Finally, we should record that we would not expect the proposed power of the Court to be exercised very often. After 25 years most trusts will either have terminated or be moving towards termination, in circumstances that are not greatly different from those that were objectively foreseeable at the time when the trust was set up. It is likely that the majority of trusts designed to exist for a significantly longer period will confer extensive discretionary powers on the trustees, and these can be used to deal with changes of circumstances. Nevertheless, some trusts will not fit into these categories, and it is there that the proposed jurisdiction may be useful, although almost certainly in a minority of cases.

Comparable jurisdictions

Cy-près

5.43 The jurisdiction that is proposed for the Court of Session bears an obvious resemblance to the jurisdiction that the Court already exercises in relation to public trusts, the so-called cy-près jurisdiction.[80] The latter jurisdiction is exercisable in cases where, as a result of changes that have occurred since the trust was created, it is clearly expedient that the trust purposes should be altered in order to permit the trust to function in a manner that is as close as is reasonably possible to what was originally contemplated by the truster. In a number of common law jurisdictions[81] a form of cy-près jurisdiction has been created to deal with problems arising under the rule against perpetuities. Typically, this form of jurisdiction is rather restricted, and merely permits the modification of dispositions that would infringe the rule in such a way that they are made to conform with the rule. What is proposed in Scotland is of significantly wider application than that, and is indeed much more closely akin to the traditional form of jurisdiction exercised by the courts in relation to public or charitable trusts. In practice that jurisdiction has operated fairly successfully. There have been disagreements among judges over the years as to the precise scope of the jurisdiction,[82] but it is hoped that, by laying down clear criteria for the jurisdiction that is now proposed, the difficulties that have arisen historically in relation to the cy-près jurisdiction can be largely avoided. It is on that basis, for example, that the test that is proposed for the exercise of the jurisdiction is one of clear expediency to deal with certain categories of change of circumstances; that largely repeats the modern cy-près test.[83] Of course borderline cases are likely to occur from time to time, but that will happen under almost any power of the court, and it is simply one of the Court's functions to decide those borderline cases.

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[80] See Stair, vol 24, paras 102-111.
[81] A number of US states and Canadian provinces, New Zealand and Tasmania.
[82] The case-law is reviewed in *R S Macdonald Charitable Trust Trs v Scottish Society for the Prevention of Cruelty to Animals* 2009 SC 6, where an attempt is made to determine the proper criterion for the exercise of the jurisdiction.
[83] A test which is essentially that laid down by the House of Lords in *Clephane v Magistrates of Edinburgh* (1866-69) LR 1 Sc 417.

Trusts (Scotland) Act 1961, section 1

5.44 As has already been mentioned, the proposed jurisdiction differs in certain fundamental respects from the jurisdiction of the Court to vary trusts under section 1 of the Trusts (Scotland) Act 1961, or the power that is proposed in our Report on *Variation and Termination of Trusts*. The latter jurisdiction essentially involves an agreement among all of the beneficiaries who are *sui juris* that the trust purposes should be varied, and the Court consents to the arrangement varying the trust purposes on behalf of other actual or potential beneficiaries, those who are not *sui juris* and potential beneficiaries who are unborn or unascertainable. In order to consent in this way the Court must be satisfied that the arrangement is not prejudicial to the interests of such beneficiaries. Under the proposed jurisdiction, by contrast, the Court has power to override the interests of future beneficiaries, and is only required to have regard to the existing beneficiaries and their children in determining the overall fairness of the proposed alterations. That is clearly a much more far-reaching power. The existing power would not, however, deal with such problems as the type of trust set up by Peter Thellusson. In such a case, the beneficiaries are the descendants of the testator who are alive at the end of the trust period (the lifetime of the last to die of the testator's descendants in life at the date of his death). If there is an early distribution of the trust funds, those beneficiaries will clearly suffer potential, if not actual, prejudice, if only because such a distribution will inevitably involve payment to one or more persons who might die before the end of the trust period (and hence the date of distribution). Consequently the existing jurisdiction is only of very limited application. It does not appear to us to be designed to achieve our fundamental objective of ensuring a reasonable balance as between the power of a truster to do as he wants with his own property and the freedom of future generations to make use of that property as they think best. To achieve that objective a wider jurisdiction is required. The justification for that jurisdiction is the time that must elapse before it can be exercised,[84] and the need that a material change of circumstances be demonstrated during that period.[85]

Trusts (Scotland) Act 1921, section 5

5.45 In addition to the foregoing general jurisdictions, the Court of Session has power under section 5 of the Trusts (Scotland) Act 1921 to grant authority to trustees to do any of the acts specified in section 4 of the Act, the section that confers a range of general administrative powers on trustees, notwithstanding that such act is at variance with the terms or purposes of the trust. Section 4 contains a wide list of general administrative powers, including the sale or leasing of the trust property, the borrowing of money on the security of the trust property, the acquisition of a residence for a beneficiary, the appointment of factors and agents, power to uplift, compromise or assign debts due to the trust, power to pay debts due by the trust, and power to concur in certain types of scheme or transaction in relation to any company in which the trust has shares. The Court may authorise the exercise of such a power, even when at variance with the terms of purposes of the trust, if it is satisfied that such act is in all the circumstances expedient for the execution of the trust. Section 5 thus confers a discretionary power on the Court which is exercisable on the basis of expediency, and is to that extent similar to our proposed power. Nevertheless, the acts that may be authorised under section 5 are essentially administrative in nature, whereas our proposed

[84] See paras 5.30-5.32.
[85] See paras 5.24 and 5.26.

jurisdiction extends much more widely and in particular covers the substantive purposes of the trust.

South Africa

5.46 In South Africa, a power to vary trust purposes is found in section 13 of the Trust Property Control Act 1988.[86] That section provides as follows:

> "13. Power of court to vary trust provisions
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> If a trust instrument contains any provision which brings about consequences which in the opinion of the court the founder did not contemplate or foresee and which-
>
> a) hampers the achievement of the objects of the founder; or
>
> b) prejudices the interests of beneficiaries; or
>
> c) is in conflict with the public interest,
>
> the court may, on application of the trustee or any person who in the opinion of the court has a sufficient interest in the trust property, delete or vary any such provision or make in respect thereof any order which such court deems just, including an order whereby particular trust property is substituted for particular other property, or an order terminating the trust."

The power conferred by that section extends well beyond the existing power of the Court of Session to vary trust purposes, and is in some respects comparable to the new power to alter trust purposes that we propose. In particular, the consent of all the beneficiaries is not required, and on occasion the South African courts have exercised the power under section 13 against the opposition of beneficiaries.[87] In the reported cases the power has been used to vary the purposes of what in Scotland would be considered public trusts;[88] in these cases a similar result could be achieved in Scotland through the use of the cy-près jurisdiction. Nevertheless, the Court's power under section 13 extends to all trusts.

5.47 The section 13 power differs from the power that we propose in four respects. First, it is not based on a change of circumstances, but rather on impediment to the truster's objects, or the prejudice of beneficiaries, or the public interest. Secondly, the provision that is varied must bring about consequences that the founder did not contemplate or foresee. Thirdly, no time is required to elapse before the power can be exercised. Fourthly, the power does not permit the Court to take account of the interests of the truster's family as a whole, whether or not they are beneficiaries. In relation to the first of these differences, our proposed power is based on the view that the fundamental problem with long-lasting trusts is the possibility of a material change of circumstances, and our proposal is specifically designed to deal with that. Nevertheless, it seems likely that a change of circumstances will exist before the power would be exercised on either of the first two grounds in section 13,

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[86] See Appendix B, paras 48-51.

[87] *Minister of Education v Syfrets Trust Limited NO* 2006 (4) SA 205. In that case the Court granted an application to vary a trust to provide university bursaries to persons of European descent, but excluding persons of Jewish descent and females of all nationalities; it authorised the removal of all of those restrictions. The opposition to the application was not, one suspects, pursued with great enthusiasm, but copious authorities were cited, no doubt to ensure that due process of law was observed.

[88] *Minister of Education v Syfrets Trust Limited NO*, *supra*; *Ex parte President of the Conference of the Methodist Church* 1993 (2) SA 697.

while the third is more likely to be relevant to public trusts. In relation to the second of the differences, we have deliberately avoided a subjective approach to the Court's jurisdiction based on what the truster foresaw or intended. We think that an objective approach based on changes of circumstances will be easier to apply. In relation to the third difference we think that a far-reaching power to alter trust purposes on account of a change of circumstances should not be exercisable immediately after a trust is set up for the reasons set out above at paragraph 5.30. In short, our proposed power is intended to deal with long-term trusts of every sort, and in particular to deal with a change of circumstances in such a trust; it is not designed to permit disgruntled beneficiaries to mount an immediate challenge to a trust that they do not like. In relation to the fourth difference, our proposed power is specifically designed to deal with private trusts set up to benefit a family;[89] it is not to apply to public or commercial trusts. This allows the power to be more precisely targeted than the South African power, and we think that the Court of Session should be able to take account of all members of the family, not merely the nominated beneficiaries.

5.48 For these reasons the South African power in section 13 of the Trust Property Control Act 1988 cannot be regarded as directly comparable to the power that we propose for the Court of Session. Nevertheless, there are similarities between the two powers. Section 13 has been operated for more than 20 years without, so far as we can discover, any significant adverse comment.[90] This suggests that far-reaching powers to alter trust purposes can operate in a satisfactory manner.

5.49 In South Africa a further power that enables a court to alter trust purposes is found in section 2(1) of the Immovable Property (Removal or Modification of Restrictions) Act 1965.[91] The circumstances where this power may be exercised are in some respects more limited than those specified in the 1988 Act, and are confined to immovable (heritable) property. Nevertheless, the power is clearly consistent with the policy of the latter statute.

General arguments in favour of the proposed new jurisdiction

5.50 In conclusion we should mention two further arguments that, we think, support our proposed reforms. In the first place, we consider that the removal of all restrictions on the duration of trust purposes should significantly improve Scotland's competitiveness as a preferred jurisdiction for trust business. There is evidence[92] that restrictions on the duration of trust purposes are seen by potential trusters as anachronistic and undesirable. This explains the widespread moves in other jurisdictions to remove or loosen such restrictions.[93] The recent extension of the perpetuity period in England and Wales, and the abolition of any specific restrictions on accumulation, is especially significant, as is the removal of all restrictions on the duration of trust purposes in Jersey and Guernsey. All of these jurisdictions can be regarded as in competition with Scotland for trust business, and we think it important that Scotland should not be perceived as retaining anachronistic restrictions on trust purposes. The main difficulty presented by a long-term trust, however, is that the trust purposes are rendered unsuitable by changes of circumstances. We think that the existence of a power in the Court of Session to deal with such changes of circumstances by altering

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[89] See para 5.18.
[90] For a discussion of s 13 and its application, see Honoré, pp 517-519.
[91] See Appendix B, paras 45-47.
[92] See, eg, the discussion of the Channel Islands in Appendix A, paras 20-26.
[93] See, generally, Part 4 and Appendices A and B.

the trust purposes will be an attractive solution to this problem, and will further improve competitiveness in this area.

5.51 In the second place, we are of opinion that our suggested solution addresses the moral problems of 'dead hand' control.[94] Ultimately, the moral argument is that each generation should be free in its own time to deal as it thinks fit with the world's resources; that is a fundamental aspect of human free will. As we have indicated,[95] we are of opinion that there is considerable force in this argument. We think, however, that it is largely addressed by the suggested jurisdiction of the Court of Session to alter trust purposes to deal with changes of circumstances. In such a case the Court must consider what, objectively, is best in the new circumstances that have arisen. That decision will be made in the light of submissions by the current members of the family. In this way, we think, the moral freedom of the current generation will be adequately recognised. No doubt the solution will not be perfect; as we have pointed out[96] reconciling the interests of a truster and the interests of future generations presents a fundamental conflict. Nevertheless, we think that our proposed jurisdiction, with its inherent flexibility, will provide as good a solution as can reasonably be achieved.

Arguments against the proposed solution

5.52 It seems to us that three main arguments exist against a jurisdiction along the lines suggested in the proceeding paragraphs. The first of these is the far-reaching nature of the proposed power, which permits the Court to re-write the trust purposes, even without the consent of all of the beneficiaries.[97] The answer to this is threefold: first, a very considerable time must elapse before the jurisdiction can be invoked; secondly, before the jurisdiction can be exercised it must be established that during the period there has been a material change of circumstances involving the truster's family, or their financial circumstances, or the trust property; and thirdly, any alterations to the trust purposes may only be such as are clearly expedient in order to deal with the demonstrated change of circumstances. We consider that these conditions significantly limit the jurisdiction that the Court will exercise, and do no more than is required to permit the trust to operate in a manner that a reasonable truster, objectively speaking, might have wished. Moreover, the jurisdiction is close in concept to the traditional cy-près jurisdiction that has long been exercised in relation to charitable trusts. That jurisdiction has been exercised successfully for many years, and we would not envisage any greater difficulty in relation to our proposed jurisdiction. No doubt it can be said that one difference between a family and a group of charities is that the personal preferences of the truster may be significantly more marked in relation to his relatives, some of whom he may like very much and others he may detest. If there is clear evidence of personal preferences, however, that is a factor that may be taken into account by the Court. Moreover, after 25 years, the relevant members of the family are likely to have changed substantially from those that the truster knew when the trust was set up; that should minimise any danger arising out of personal preferences.

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[94] See paras 3.64-3.74.
[95] See paras 5.16-5.21.
[96] See para 5.17.
[97] This was considered material in a number of jurisdictions in the US: see Law Commission Consultation Paper No 133, *The Rules Against Perpetuities and Excessive Accumulations*, para 5.71.

5.53 A variant of the foregoing argument focuses on the fact that the proposed jurisdiction would interfere with the truster's dispositions. The response to that is that this is quite deliberate. The essential purpose of the proposed jurisdiction is to strike a reasonable balance between the truster's freedom to dispose of his property as he thinks fit and the interest of future generations in making the best use of that property in current circumstances. Achieving that purpose necessarily involves the possibility of interference with the truster's dispositions. It can be added that exactly the same is true of the fixed rules that have been used in the past, including the rules restricting accumulation and successive liferents in Scotland and the rule against perpetuities in common law jurisdictions; all of these interfere with the truster's intentions, on occasion in a manner that is arbitrary. The virtue of a court-based power such as we propose is that its application in any particular case will be properly considered on a rational basis, and, if the Court performs its function properly, the result should be what a reasonable truster would have wanted in changed circumstances.

5.54 The second argument against our proposed jurisdiction is that it would produce uncertainty; given the nature of the Court's power, neither trustees nor beneficiaries would know where they stood. This point is made by the Law Commission for England and Wales in their Consultation Paper on the Rules Against Perpetuities and Excessive Accumulations:[98]

> "Reforms of this kind would confer extensive discretionary powers on the courts. There are a number of reasons why that might be considered undesirable. It could increase uncertainty among trustees and contingent beneficiaries, result in excessive interference with the intention of settlors and generate a large volume of litigation. Such consequences would be unjustifiable … "

In our opinion these fears are exaggerated, provided that the Court's power is carefully defined. In the first place, the truster's intentions must be given effect for the first 25 years (or other appropriate period) of the trust's existence. In the second place, before the Court's jurisdiction can be exercised, it must be shown that there have been material changes in the circumstances of the family or trust, and that it is clearly expedient that the trust purposes should be altered in the light of those changes. In the third place, the only alterations that can be made by the Court are those that are clearly expedient to deal with the changes that have occurred. We think that restricting the jurisdiction in this way will produce a reasonable level of certainty. In this connection, the analogy with the cy-près jurisdiction is material; that jurisdiction confers a certain degree of discretion on the Court, and could be regarded as promoting uncertainty in public or charitable trusts, but in practice it has worked out fairly well, provided that the Court has taken a sensible view as to what changes are expedient in the light of changed circumstances. We have no reason to suppose that the proposed jurisdiction will be any different in this respect.

5.55 The third argument against the type of jurisdiction that we propose is that the Court is unable to discover the truster's intention in the circumstances that have developed; these will usually be something that he has not thought about, or if he has thought about them he has discounted the possibility.[99] In our opinion this problem only arises if a subjective approach is taken to the truster's intentions in the changed circumstances. We propose, however, that

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[98] *Ibid* at para 5.56.
[99] *Ibid* at para 5.73.

the approach should be objective, although based on the terms of the trust deed and such evidence as is available about the truster's original intentions. The circumstances that have developed will usually be something that he has not thought about, and accordingly what the Court must do in such a case is to consider what a reasonable person having the truster's original intentions would have done in those changed circumstances. A broadly similar approach is used in cy-près applications, and it cannot be said that it causes any difficulty in practice. In this connection, it must be borne in mind that in any contentious case the Court should hear detailed submissions from both (or all) sides, and that is always of great assistance in forming a balanced view as to what a reasonable person would have done.

5.56 For the foregoing reasons we are of opinion that the jurisdiction that we propose should be workable in practice, and should not give rise to undue uncertainty. The alternative, if the existing rules restricting accumulation and successive liferents are abolished without replacement, is that a long-term trust will be unable to deal with changing circumstances. That is a classic example of the disadvantage of the 'dead hand'. If a replacement is found for those rules, we consider that one of two results will follow: if the replacement involves a relatively short period (less than, say, 50 years) the difficulties that have arisen with the existing rules will continue, albeit in different form, and trusters will be deterred in current circumstances from setting up trusts in Scotland; alternatively, if the replacement involves a substantial lengthening of the period of restriction (as with extending the perpetuity period to 125 years), the results will be largely useless in protecting the interests of future generations in ensuring that trusts adapt to deal with changed circumstances. We consider that our proposed solution, with its inherent flexibility, represents the best solution to this problem.

Proposals and questions

5.57 In the light of the foregoing discussions, we put forward the following proposals and questions, on which we invite comment:

4. The existing rules restricting accumulation and successive liferents should be repealed, with the result that a trust containing purposes of any duration is permissible.

5. (a) Scots law should not adopt any rule, such as the rule against perpetuities, that restricts the duration of trust purposes to a fixed period or requires that vesting should take place within a fixed period.

(b) Alternatively, if a rule restricting the duration of the trust purposes or vesting to a fixed period is thought desirable, what form should the relevant rule take, and what should be the relevant period? In particular, should Scots law adopt the proposed English rule that requires vesting within a fixed period of 125 years?

6. When a private trust has been in existence for 25 years or longer, the Court of Session should have power to alter its purposes in order to take account of any material changes of circumstances that have occurred since the trust was created. In relation to such power:

(a) The permitted alterations should be those that are clearly expedient in order to deal with the relevant changes in circumstances.

(b) The relevant categories of change of circumstances should at least extend to:

- **(i) changes in the personal or financial circumstances of one or more members of the truster's family (or the family that is intended to be benefited by the trust);**
- **(ii) changes in the nature or amount of the trust property; and**
- **(iii) changes in the tax regime.**

Prospective changes would also be relevant.

(c) In order to justify the alteration of trust purposes, any change in circumstances would require to be material, in the sense that, considered objectively, it has had or is likely to have a significant impact on the matters referred to in paragraph (b) above.

(d) In determining whether an alteration should be approved, the Court should have regard to the intentions of the truster, so far as these can be ascertained. To the extent that the truster's actual intentions cannot be ascertained, the Court should have regard to the probable intentions of a reasonable truster in the current circumstances of the trust. The intentions of the truster, or the probable intentions of a reasonable truster, are not to be binding on Court; they are merely a factor to be taken into account in the exercise of the Court's discretion.

(e) In ascertaining the intentions of the truster, the Court may have regard both to the trust deed or testamentary writing that created the trust and to any other evidence that appears relevant to the issue.

(f) Although the Court may have regard to the intentions of the truster, it should be expressly permitted to disregard any provision in a trust deed or any other document that purports to exclude the proposed jurisdiction.

(g) The Court's power should be exercisable on the application of the trustees or of any one or more of the beneficiaries or of any descendant of the truster or of any ancestor or descendant or guardian of an actual or potential beneficiary. Any of the foregoing persons may also appear as a respondent to oppose a petition, in whole or in part.

(h) It should not be necessary that either the trustees or all of the beneficiaries consent to any proposed alteration. Nevertheless, in determining whether to authorise an alteration, the Court may have regard to the following factors:

(i) the extent to which the existing beneficiaries and trustees have consented to the proposed alterations; and

(ii) whether the proposed alterations can be considered fair, objectively speaking, as among the existing beneficiaries and existing members of the truster's family and the children, including subsequently born children, of existing beneficiaries and existing members of the truster's family.

(i) The Court's power to alter trust purposes should permit it to terminate the trust or to provide for the immediate vesting of trust property in any person, or to postpone vesting.

7. If such a jurisdiction is conferred on the Court, is it appropriate that a period of years should elapse before the jurisdiction can be exercised? (Reference is made to paragraph 5.30.) If so, is our proposed period of 25 years appropriate? If not, what period would be appropriate?

8. (a) Is it appropriate to define the categories of change of circumstances that are relevant for the exercise of the proposed jurisdiction? Alternatively, is it preferable to rely merely on the general concept of a change in the circumstances of the trust?

(b) If it is appropriate to define the categories of change of circumstances, would a suitable definition be that in Proposal 6(b)?

(c) If the relevant categories of change of circumstances are defined, should the definition be exclusive? Alternatively, would it be preferable to refer to a change in the circumstances of the trust including the categories set out at paragraph (b) above?

(d) Should the expression 'family' be defined? If so, would it be appropriate to refer to the following categories:

(i) the descendants of the truster;

(ii) any beneficiaries named or otherwise identified in the trust deed;

(iii) the descendants of any such beneficiaries;

(iv) the spouse of any of the above persons?

Alternatively, what other definition might be used?

9. Is it appropriate that the intentions of the truster should be taken into account in the manner suggested at paragraphs (e) to (g) of Proposal 6?

10. Is it appropriate that the persons identified at paragraph (h) of Proposal 6 should be entitled to present an application to the Court or to oppose such an application? Should any of the identified categories be excluded, or should any other categories be included?

11. Are the proposals at paragraph (i) of Proposal 6 appropriate?

The rules in Frog's Creditors and Newlands

5.58 We explain the content of these two rules in paragraphs 2.47-2.58 and set out a number of criticisms of each of them in paragraphs 3.47-3.52. Both rules are of great antiquity, the one in *Frog's Creditors* dating back to the first half of the 18th century. The rule in *Newlands* dates from the end of that century and was, in part, superseded by statute in 1921. There has been very little review of the rules in recent times. One reason for this is that their application is, in practice, tightly limited. The *Newlands* rule is restricted to situations where a fee is conveyed, subject to a liferent interest, to a person who is unborn or unascertainable at the time when the liferent interest opens. The rule in *Frog's Creditors* is still more limited: we give examples of where it might apply in paragraphs 2.56 and 3.50.

5.59 On one view, therefore, the rules are already dead law. We would be interested, though, to hear whether they ever arise in practice. Even if the rules have, for all practical purposes, fallen into desuetude they continue to exist and their highly unsatisfactory nature demands reform. We see no reason to make technical changes to them whilst preserving the underlying policy (if indeed it can be called a policy at all), because the long and arbitrary development which the rules have experienced leaves that policy incoherent and untenable.

5.60 We consider that there are two viable options for reform. Under the first option the rule in *Frog's Creditors* would be abolished and the *Newlands* rule and section 8 of the Trusts (Scotland) Act 1921 would be kept in modified form. The abolition of *Frog* would mean that, where a conveyance falls within the very limited scope which the rule has today,[100] it would not result in the liferenter taking the full fee. Instead, the rule in *Newlands* would apply, though (if this option is adopted) we propose that it be made clear that the rule would cover any fiar and liferenter, regardless of the relationship between them.[101]

5.61 The liferenter would continue to assume a fiduciary role of some sort in relation to the property. Thereafter there are two separate ways of proceeding. One is to deem the liferenter to be a fiduciary whose powers and duties are not exactly commensurate with those of a trustee. That is the current position, with section 8(2) of the 1921 Act defining the relationship between a fiduciary fiar and a trustee. The alternative is simply to deem the liferenter to be a trustee, with the full range of statutory and common law powers and duties. There are a number of advantages to the second of these alternatives:

(i) The status of fiduciary fiar within the meaning of the *Newlands* rule and section 8 of the 1921 Act is particular to the situations to which those legal rules apply. There need to be good reasons why the bespoke status of quasi-trustee is appropriate for this (rare) type of situation and we cannot see any.

[100] See para 3.50.
[101] See paras 3.47-3.48.

(ii) The powers and duties of a fiduciary are not clear under the current law and recourse to court, by application under section 8(2) of the 1921 Act, is a time-consuming and costly process.

(iii) The court is restricted in what it may grant on such application: in particular it is incompetent to grant the fiduciary fiar the power of sale.[102] There may be good reason why sale is advantageous, for instance where it would be in the fiar's interests. If this restriction were relaxed the distinction between a fiduciary fiar and a trustee would be eroded, thereby weakening the case for there being a distinction at all.

5.62 More generally, a conveyance to which this option applies would automatically result in a deemed trust (or perhaps a quasi-trust, if the liferenter remains a fiduciary fiar and not a full trustee). This may be considered appropriate because the more obvious, convenient and reliable method of conveying property in fee to an unborn or unascertainable person would be by means of an express trust. It is therefore arguable that it would be suitable for a direct conveyance of property in fee to an unborn person to lead to a deemed trust being established along with all the tools needed for the conveyance to be successfully performed.

5.63 We do not favour this option. First, although an express trust would have been an obvious alternative way for the disponer to have proceeded, it was not the method which was in fact chosen. To deem a trust, or quasi-trust to have been established is, in our view, an undue interference with the choice which the disponer actually made. Linked to this is a second reason: the creation of a deemed trust would result in the liferenter being subject to fiduciary duties in circumstances where this may never have been intended by the disponer. It is an onerous position and it is unlikely that the grant of a liferent, especially in favour of an elderly person, would be expected to be accompanied by the sudden and heavy burden of being a fiduciary. Lastly, where the property which is conveyed is registrable it will be necessary to set up arrangements to take account of the fact that the fee is being held subject to fiduciary duties for an as yet unidentifiable person.

5.64 The second option has the effect of providing the liferenter with a liferent interest and no more. It begins, as did the first one, with the abolition of the rule in *Frog's Creditors* but in addition the rule in *Newlands* would be abolished too. By reference to the two rules of property law set out in paragraph 2.48 this option would have the effect of removing the current exception to the second of those rules. This is best illustrated by means of an example: suppose that X conveys property in liferent to Y with the fee to Z (who is non-existent or unascertainable at the point of the conveyance). The conveyance of the fee to Z would fail,[103] thereby leaving the fee with X or, where X is dead, with X's estate. However,

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[102] See para 2.54.

[103] See rule (ii) in para 2.48. However, a Z who was conceived at the time of the conveyance and who is subsequently born alive will take the fee at birth. This follows the long-standing rule of Scots law sometimes known as *nasciturus pro iam nato habetur*, by which those who are in the womb at the relevant time are considered to be alive if this is in their interest: see M'Laren, p 696. The rule formed part of Roman law and was widely accepted by the institutional writers. It is generally found in succession law, but is capable of being applied in other fields too; it is also important to recall that it is "only a notional recognition of the unborn child for a limited purpose, and not a general proposition that legal personality commences with conception": Stair, vol 25, para 660. (This means, eg, that it does not apply in relation to embryos which are covered by the human fertilisation and embryology legislation: see AB Wilkinson and KMcK Norrie, *Parent and Child* (2nd ed, 1999), para 2.23.) So, the effect of what we are proposing is that, in the highly unlikely event that someone conveys property in fee to a person who, at the time, is still in the womb, that person will take the fee at birth; in the meantime the liferent will open when the conveyance is granted

the conveyance of the liferent interest to Y would succeed (as happened in *Colvile's Trustees v Marindin*,[104] discussed in paragraph 3.48).

5.65 In our view this option has three main advantages. First, it is simple. Secondly, it is principled, as it is in accordance with existing Scots law. Lastly, if a person wishes to avoid its effect this is easy to achieve. In our example, if X wants to secure the transfer of the fee to Z this can be done simply by establishing a trust and conveying the property to trustees with appropriate instructions.

5.66 One result of this option is that the attempt to convey the fee subject to the creation of a proper liferent will give rise only to the creation of the liferent. We have considered whether this is likely to lead to any consequences which might need to be addressed. However, the current law provides for the situation in which a person grants a proper liferent (without attempting to convey the fee) and it regulates the resulting relationship between fiar and liferenter. It covers, for example, the powers of the liferenter, the way in which improvements to the property are to be treated and the manner in which burdens such as rates or repairs are to be handled.[105] We consider that this body of law will apply to liferents which will result if the second option is chosen and that no specific amendment is necessary.

5.67 Finally, we emphasise that the second option, whilst defeating the interest which the purported fiar would enjoy under the first option, is not to be seen as denying such a fiar his or her rights if the intention is that they be enjoyed. All that is required in order to secure those rights is that the property owner set up a trust. The existence of the trust as an option – and it is a simple, inexpensive and readily available one – leads us to conclude that where a trust is not used the law should not attempt to create something like a trust in an effort to secure the interests of the person who, when born or ascertained, would be the fiar. In addition, as we have mentioned this also preserves the general rule of Scots property law (which is a rule widely recognised across other legal systems) that where ownership is ostensibly transferred to a non-existent or unidentifiable person the conveyance fails.[106]

5.68 Accordingly we make the following proposals:

12. The common law rules in *Frog's Creditors v His Children* and *Newlands v Newlands' Creditors* should be abolished and section 8 of the Trusts (Scotland) Act 1921 should be repealed.

13. Where a person conveys property to Y in liferent and to Z in fee and Z is non-existent or unidentifiable at the time of the conveyance, Y should take a liferent interest (but no more) and the conveyance to Z should fail.

In the latter proposal, "non-existent" should be read in the light of the footnote to paragraph 5.64, ie it does not include those who are in the womb at the relevant time.

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[104] 1908 SC 911.
[105] For an extended treatment of this see, eg, Dobie, pp 63-249, on "enjoyment of the gift".
[106] See rule (ii) in para 2.48.

Retrospective application

5.69 We have proposed the repeal of the existing rules governing the duration of trust purposes and the introduction of a new jurisdiction that would permit the Court of Session to authorise alterations to trust purposes in order to meet a change of circumstances. If such reforms were implemented, the question arises as to whether they should be made retrospective. In our opinion it would be appropriate to make the proposed new jurisdiction retrospective, in the sense that it should apply to all Scottish private trusts, whenever created, but the abolition of the rules restricting accumulation and successive liferents should only operate in respect of trusts set up in future. The abolition of the rules on the duration of trusts would validate trusts that at present infringe either or both of those rules; it would not invalidate any existing trust. In view of the complexity and technical nature of the rules, we think it almost certain that the purposes of some existing trusts infringe the rules. In such cases, as a result of the invalidity of the trust purposes, certain beneficiaries will have acquired default rights in the trust property (even though such rights were not intended by the truster).[107] If the abolition of statutory prohibitions were to apply retrospectively, the beneficiaries with default rights to the trust estate would lose those rights. That would amount to the retrospective confiscation of a property right, which is undesirable as a matter of general principle and would in any event infringe Article 1 of the First Protocol to the European Convention on Human Rights. The new jurisdiction to alter trust purposes is in a different position, however. In this case the exercise of the jurisdiction will be decided by the Court on a case-by-case basis, and if the result of an application will be to deprive a beneficiary of rights that he enjoyed under a trust set up prior to the Act that creates the jurisdiction that is a factor that may cause the Court to refuse the application. In some cases, however, no problem may arise, because the beneficiary deprived of rights under the trust can be said to benefit in another way. For example, in the case of a trust set up to benefit the truster's grandchildren when they attain 30, it might turn out that, while the grandchildren are still under 30, funds are required for their education. In such a case the Court might be willing to grant an application for the use of trust funds in that way, because it is clearly to the advantage of the beneficiaries whose rights are, in a sense, defeated by the application. We are accordingly of opinion that the Court's power to authorise alterations to trust purposes might be useful in relation to existing trusts, and that that proposed reform should apply to all Scottish private trusts, whenever created.

5.70 We accordingly put forward the following proposal:

14. (a) Proposals 4, 12 and 13 should only apply to trusts set up, or to other dispositions of property taking effect, after legislation implementing those proposals has been brought into force.

(b) Proposal 6 should apply to all Scottish private trusts whenever created.

Scope of reforms

5.71 A further question concerns the categories of trust to which any power of the Court of Session to authorise alterations should apply. We have indicated that the paradigm case should be a family trust, and that is certainly the type of trust that is most likely to need such

[107] In some cases, these persons will be the truster's heirs on intestacy.

a power. It seems to us that public and charitable trusts have no need of any such power, because the existing cy-près jurisdiction of the Court of Session and the various statutory powers that apply to charitable trusts should be sufficient to deal with any changes of circumstances. In relation to commercial trusts,[108] we are of opinion that the proposed power would be inappropriate. The fundamental point about such trusts is that they result from a bargain concluded between the parties, and the Court should not be accorded power to alter the parties' bargain. To the extent that parties consider that a power to alter trust purposes would be desirable, it is open to them to make appropriate provision in their contract. In the case of trusts that are private in part and public or commercial in part, we think that our proposed jurisdiction should be applicable to the part of the trust that is private in nature, but not to the remainder.

5.72 We accordingly put forward the following proposal:

15. Proposal 6 should not extend to public trusts or commercial trusts, nor should it extend to any part of a trust that is public or commercial in nature (the meaning of 'commercial trust' being the subject of questions 2 and 3).

The power of the Court to hold a trust purpose to be unreasonable

5.73 As we have already mentioned, the Court has power to reduce any provision in a trust that can be considered unintelligible, impracticable or unreasonable.[109] This jurisdiction is only exercised in exceptional cases, but we think that it is necessary in order to deal with the occasional problem of the unreasonable truster. The decided cases, which are infrequent, illustrate the sort of problems that can arise. We do not propose that any change should be made to this jurisdiction. We have considered the possibility that, in exercising its jurisdiction to alter trust purposes more than 25 years into the existence of a trust, the Court might be authorised to alter any trust purposes that appear unintelligible, impracticable or unreasonable. On reflection, however, we think that this would unduly complicate that jurisdiction, which is essentially concerned with changes in circumstances, not unreasonable decisions made by trusters. The latter type of case can better be dealt with, at any time in the life of the trust, under the Court's existing powers.

5.74 We therefore make the following proposal:

16. The Court should continue to have power to reduce any trust purpose on the ground that it is unintelligible, impracticable or unreasonable. That jurisdiction should continue to be exercisable at any time, and should not be affected by the jurisdiction described at Proposal 6.

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[108] As described in para 5.5. That discussion, and questions 2 and 3, are relevant to the present issue.
[109] See paras 2.59-2.76.

Part 6 List of proposals and questions

1. Any rules restricting the duration of trust purposes should not apply to any commercial trust. This should be made clear by an express statutory provision.

(Paragraph 5.4)

2. (a) Should a 'commercial trust' be defined as a trust forming part of a larger commercial arrangement, whose purposes are intended to give effect to that arrangement?

(b) Alternatively, should a 'commercial trust' be defined as a trust set up under a bilateral (or multilateral) contract?

(c) Should the relevant definition be expanded by stating that it extends to, but is not restricted to, the following categories: trusts set up under or in connection with pension schemes, life assurance policies, unit trusts and other trust-based investment schemes, and partnership agreements?

(Paragraph 5.5)

3. Is the preferred definition of the expression 'commercial trust' adequate? Could it usefully be modified or extended in any way? Is there any other suitable way of marking the distinction between commercial and con-commercial trusts?

(Paragraph 5.5)

4. The existing rules restricting accumulation and successive liferents should be repealed, with the result that a trust containing purposes of any duration is permissible.

(Paragraph 5.57)

5. (a) Scots law should not adopt any rule, such as the rule against perpetuities, that restricts the duration of trust purposes to a fixed period or requires that vesting should take place within a fixed period.

(b) Alternatively, if a rule restricting the duration of the trust purposes or vesting to a fixed period is thought desirable, what form should the relevant rule take, and what should be the relevant period? In particular, should Scots law adopt the proposed English rule that requires vesting within a fixed period of 125 years?

(Paragraph 5.57)

6. When a private trust has been in existence for 25 years or longer, the Court of Session should have power to alter its purposes in order to take account of any material changes of circumstances that have occurred since the trust was created. In relation to such power:

(a) The permitted alterations should be those that are clearly expedient in order to deal with the relevant changes in circumstances.

(b) The relevant categories of change of circumstances should at least extend to:

(i) changes in the personal or financial circumstances of one or more members of the truster's family (or the family that is intended to be benefited by the trust);

(ii) changes in the nature or amount of the trust property; and

(iii) changes in the tax regime.

Prospective changes would also be relevant.

(c) In order to justify the alteration of trust purposes, any change in circumstances would require to be material, in the sense that, considered objectively, it has had or is likely to have a significant impact on the matters referred to in paragraph (b) above.

(d) In determining whether an alteration should be approved, the Court should have regard to the intentions of the truster, so far as these can be ascertained. To the extent that the truster's actual intentions cannot be ascertained, the Court should have regard to the probable intentions of a reasonable truster in the current circumstances of the trust. The intentions of the truster, or the probable intentions of a reasonable truster, are not to be binding on Court; they are merely a factor to be taken into account in the exercise of the Court's discretion.

(e) In ascertaining the intentions of the truster, the Court may have regard both to the trust deed or testamentary writing that created the trust and to any other evidence that appears relevant to the issue.

(f) Although the Court may have regard to the intentions of the truster, it should be expressly permitted to disregard any provision in a trust deed or any other document that purports to exclude the proposed jurisdiction.

(g) The Court's power should be exercisable on the application of the trustees or of any one or more of the beneficiaries or of any descendant of the truster or of any ancestor or descendant or guardian of an actual or potential beneficiary. Any of the foregoing persons may also appear as a respondent to oppose a petition, in whole or in part.

(h) It should not be necessary that either the trustees or all of the beneficiaries consent to any proposed alteration. Nevertheless, in determining whether to authorise an alteration, the Court may have regard to the following factors:

(i) the extent to which the existing beneficiaries and trustees have consented to the proposed alterations; and

(ii) whether the proposed alterations can be considered fair, objectively speaking, as among the existing beneficiaries and existing members

of the truster's family and the children, including subsequently born children, of existing beneficiaries and existing members of the truster's family.

(i) The Court's power to alter trust purposes should permit it to terminate the trust or to provide for the immediate vesting of trust property in any person, or to postpone vesting.

(Paragraph 5.57)

7. If such a jurisdiction is conferred on the Court, is it appropriate that a period of years should elapse before the jurisdiction can be exercised? (Reference is made to paragraph 5.30.) If so, is our proposed period of 25 years appropriate? If not, what period would be appropriate?

(Paragraph 5.57)

8. (a) Is it appropriate to define the categories of change of circumstances that are relevant for the exercise of the proposed jurisdiction? Alternatively, is it preferable to rely merely on the general concept of a change in the circumstances of the trust?

(b) If it is appropriate to define the categories of change of circumstances, would a suitable definition be that in Proposal 6(b)?

(c) If the relevant categories of change of circumstances are defined, should the definition be exclusive? Alternatively, would it be preferable to refer to a change in the circumstances of the trust including the categories set out at paragraph (b) above?

(d) Should the expression 'family' be defined? If so, would it be appropriate to refer to the following categories:

(i) the descendants of the truster;

(ii) any beneficiaries named or otherwise identified in the trust deed;

(iii) the descendants of any such beneficiaries;

(iv) the spouse of any of the above persons?

Alternatively, what other definition might be used?

(Paragraph 5.57)

9. Is it appropriate that the intentions of the truster should be taken into account in the manner suggested at paragraphs (e) to (g) of Proposal 6?

(Paragraph 5.57)

10. Is it appropriate that the persons identified at paragraph (h) of Proposal 6 should be entitled to present an application to the Court or to oppose such an application? Should any of the identified categories be excluded, or should any other categories be included?

(Paragraph 5.57)

11. Are the proposals at paragraph (i) of Proposal 6 appropriate?

(Paragraph 5.57)

12. The common law rules in *Frog's Creditors v His Children* and *Newlands v Newlands' Creditors* should be abolished and section 8 of the Trusts (Scotland) Act 1921 should be repealed.

(Paragraph 5.68)

13. Where a person conveys property to Y in liferent and to Z in fee and Z is non-existent or unidentifiable at the time of the conveyance, Y should take a liferent interest (but no more) and the conveyance to Z should fail.

(Paragraph 5.68)

14. (a) Proposals 4, 12 and 13 should only apply to trusts set up, or to other dispositions of property taking effect, after legislation implementing those proposals has been brought into force.

(b) Proposal 6 should apply to all Scottish private trusts whenever created.

(Paragraph 5.70)

15. Proposal 6 should not extend to public trusts or commercial trusts, nor should it extend to any part of a trust that is public or commercial in nature (the meaning of 'commercial trust' being the subject of questions 2 and 3).

(Paragraph 5.72)

16. The Court should continue to have power to reduce any trust purpose on the ground that it is unintelligible, impracticable or unreasonable. That jurisdiction should continue to be exercisable at any time, and should not be affected by the jurisdiction described at Proposal 6.

(Paragraph 5.74)

Appendix A

Comparative material on rules restricting the accumulation of income

Introduction

1. In this Appendix we examine the rules governing accumulation of income in various jurisdictions,[1] mainly in Commonwealth or former Commonwealth countries. This is intended to complement the discussion in Part 4. We cover the following jurisdictions, which are set out in alphabetical order: **Australia**, **Bermuda**, **Canada (Manitoba and Saskatchewan)**, **Channel Islands**, **England and Wales**, **Isle of Man**, **New Zealand**, **Republic of Ireland**, **South Africa** and **United States of America**. Comparative material on the rule restricting successive liferents, which focuses mainly on civilian and mixed legal systems, can be found in Appendix B.

Australia

Jurisdictions other than South Australia

2. The Accumulations Act 1800 operated directly in South Australia (which we deal with separately),[2] Queensland, Western Australia, Tasmania, the Australian Capital Territory and the Northern Territory while New South Wales and Victoria enacted their own provisions.[3] Neither that Act, however, nor either of the domestic counterparts now form part of the current law of any of the Australian jurisdictions. The modern approach to accumulations is that directions to accumulate will be valid provided that the underlying disposition of property is itself valid. This policy has given rise to almost identical statutes in each of the states. In Victoria, for example, the Perpetuities and Accumulations Act 1968 provides:

> "Where property is settled or disposed of in such manner that the income thereof may be or is directed to be accumulated wholly or in part the power or direction to accumulate that income shall be valid if the disposition of the accumulated income is or may be valid but not otherwise."[4]

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[1] Our comparative studies have been limited to this rule largely because it is the one which has a counterpart in a wide range of other jurisdictions.

[2] See paras 4-10.

[3] Conveyancing Act 1919, ss 31, 31A and 36 (NSW); Property Law Act 1958, ss 164-166 (Vic). These provisions (which have now been repealed) were very similar to those in the Thellusson Act. See also Ford and Lee, para 7480.

[4] Section 19(1). Similar provisions obtain in: Perpetuities Act 1984, s 18 (NSW); Property Law Act 1969 s 113 (WA); Perpetuities and Accumulations Act 1985, s 19 (ACT); Property Law Act 1974, s 222 (QLD); Perpetuities and Accumulations Act 1992, s 22 (Tas); and Law of Property Act, s 202 (NT).

3. The rule against perpetuities determines whether "the disposition of the accumulated income is or may be valid". With the exception of South Australia and the Northern Territories,[5] the rule is infringed only if an interest cannot, or (by application of the 'wait and see' principle) does not, vest within an 80-year period.[6]

South Australia

4. South Australia received the common law rule against perpetuities and the rule restricting accumulation as well as the Accumulations Act 1800 from English law.[7] Following recommendations made by the Law Reform Committee of South Australia in 1984,[8] these rules were abolished by the South Australian legislature in 1996 subject to the introduction of a court power to order the premature vesting of property in certain circumstances.[9]

5. The Law Reform Committee's recommendations were made shortly after those of the Manitoba Law Reform Commission in 1984,[10] and the Australian body expressly stated that the reforms in Manitoba had strengthened its own view that the rule against perpetuities and the accumulations rule should be abolished.[11] In relation to perpetuities, the Law Reform Committee considered, with sentiments similar to those expressed by the Manitoba Law Reform Commission, that the rule prohibiting the creation of perpetual interests often yielded unbelievable results:[12]

> "[A]s has well been said, a civil case is decided on the balance of probabilities; a criminal case is decided on proof beyond reasonable doubt; the rule against perpetuities goes beyond either of those standards of proof and is decided upon proof of any possible, however highly improbable, contingency: not what has happened but what could have happened at any time after the commencement of the limitation, a method of proof not used anywhere else in English law."[13]

6. In light of its dissatisfaction with the rule against perpetuities, the Committee considered two options for reform: the introduction of either a 'wait and see' approach or a cy-près scheme. The Committee opined that the 'wait and see' approach, which had already been introduced in England and several other Australian jurisdictions, created too many unreasonable problems for trustees because of its inherent uncertainties.[14] A cy-près scheme, on the other hand, while free from such uncertainties, required the intention of the donor or testator to be discerned by the court which could of itself be problematic:

> "The cy-près method of reforming a possible perpetuity has one great advantage over the wait and see method; namely that the trustee knows as soon as he gets his

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[5] In NT the perpetuity period is either 80 years (which is the default period) or a life in being plus 21 years: Law of Property Act, s 187. The 'wait and see' principle also applies: *ibid*, s 190. We deal with SA in paras 4-10.
[6] Perpetuities Act 1984, ss 7(1) and 8 (NSW); Perpetuities and Accumulations Act 1985, ss 8(1) and 9 (ACT); Property Law Act 1974, ss 209 and 210 (QLD); Perpetuities and Accumulations Act 1992, ss 6(1) and 9 (Tas); Perpetuities and Accumulations Act 1968, ss 5 and 6 (Vic); Property Law Act 1969, ss 101 and 103 (WA).
[7] See para 2.6 for a discussion of the common law rule.
[8] *Seventy-third Report Relating to the Reform of the Law of Perpetuities* (1984).
[9] Law of Property Act 1936, ss 61-62, as amended by the Law of Property (Perpetuities and Accumulations) Act 1996.
[10] See paras 12-17 for a discussion of the Manitoban reforms.
[11] *Report Relating to the Reform of the Law of Perpetuities*, p 12.
[12] Examples of such results included the "stupidities of the fertile octogenarian" and "the magic gravel pit which everybody knew had already been exhausted before the case ever came to trial but which was held to create a perpetuity because it might not be exhausted in twenty one years".
[13] *Ibid* at p 4.
[14] *Ibid* at p 8.

> court order how to administer the trust from then on. The great weakness in the cy-près statute is that there must be discerned in what the donor or testator has written, or more usually has drawn up for him, an intention which can be given effect to cy-près. As the donor or testator will in general never have applied his mind to the question, or the question would not have arisen, there will be many cases in which no such intention can be discerned, however benevolent the approach of the court may be."[15]

7. In light of the deficiencies of the rule against perpetuities, and its rejection of both the 'wait and see' approach and the cy-près scheme as alternatives, the Committee recommended that the rule against perpetuities be abolished. In addition to the problems with the current law, it was argued that the structure of the Australian tax system made it highly unlikely that a disponer would wish to alienate property for the duration of the perpetuity period.[16] Furthermore, direct reference was made to the fact that Scotland does not have, and never has had, a rule against perpetuities, and "the Scots have never suffered the slightest inconvenience by reason of the fact that they have never had such a rule".[17] In accordance with the Committee's recommendations, the Law of Property Act 1936 was amended so as to abolish the rule against perpetuities.[18]

8. The Committee dealt with accumulations only briefly in its Report, stating that "[t]hey cause endless trouble in practice in relation to undisposed of income".[19] The Committee also considered that in the light of its decision to abolish the rule against perpetuities there was no justification for a separate rule restricting accumulation, and so recommended that the rule be abolished. The Committee did, however, make it clear that the reform was not intended to affect either the common law rights of *sui juris* beneficiaries to terminate a trust,[20] "or any statutory power to pay moneys for the maintenance, education, advancement or benefit of the beneficiaries out of accumulations".[21]

9. The primary effect of these reforms is there are now no substantive rules prohibiting either perpetuities or accumulation in South Australian law. As a check against over-long delays in vesting, however, there is a power which enables the court to order the early vesting of property interests.[22] The power was recommended by the Law Reform Committee and, in essence, it provides protection against remote vesting in the absence of a substantive rule prohibiting perpetuities or accumulations.[23] The scope of the power is broad: the first four subsections of section 62 of the Law of Property Act 1936 provide:

> "(1) If, 80 years or more after the date of a disposition of property, there remain interests in the property that have not vested, the court may, on application under this section, vary the terms of the disposition so that the interests vest immediately.
>
> (2) The court may, on application under this section, vary the terms of a disposition of property so that interests that cannot vest, or are unlikely to vest, within 80 years after the date of the disposition, will vest within that period.

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[15] *Ibid* at p 10.
[16] *Ibid* at p 11.
[17] *Ibid*.
[18] The amendment was by way of the Law of Property (Perpetuities and Accumulations) Act 1996.
[19] *Report Relating to the Reform of the Law of Perpetuities*, p 13.
[20] See the Law of Property Act 1936, s 62A, which preserves the rule in *Saunders v Vautier*.
[21] *Report Relating to the Reform of the Law of Perpetuities*, p 14.
[22] Law of Property Act 1936, s 62.
[23] *Report Relating to the Reform of the Law of Perpetuities*, p 17.

(3) If a disposition provides for the accumulation, or partial accumulation, of income from property over a period that will or may terminate 80 years or more after the date of the disposition, the court may, on application under this section, vary the terms of the disposition so that both capital and income will vest within 80 years from the date of the disposition.

(4) In varying the terms of a disposition under this section the court should give effect to the spirit of the original disposition insofar as that is possible given that interests are to vest earlier than contemplated by the person who made the disposition."

10. Applications to the court for the exercise of the power to order premature vesting may be made by a number of different parties, including a trustee of the property and anyone who has an interest in it.[24] Ford and Lee comment:

> "The cases in which the court's power will be exercised will be likely to include, at the least, those in which the disponer had a basic intention of providing for the financial welfare of particular beneficiaries and postponed vesting in terms not inconsistent with that intention but failed to foresee and provide for supervening events which cause the postponement of vesting to operate against the basic intention."[25]

Bermuda

11. The Perpetuities and Accumulations Act 2009, which came into force on 1 August 2009, made broad changes to the previously applicable rules on perpetuities and accumulations.[26] Before the 2009 Act entered into force trusts were limited to a period of 100 years. Under the Act the rule against perpetuities is repealed except where the trust property is land in Bermuda.[27] Also, the restrictions on accumulation of income are repealed.[28] The Act is not retrospective but trusts already in existence on 1 August 2009 can apply to the Bermuda court for an extension of the trust period.[29]

Canada

Manitoba

12. Manitoba received both the English common law rule against perpetuities and the Accumulations Act 1800 on 15 July 1870.[30] Following recommendations made by the Manitoba Law Reform Commission the Manitoban legislature abolished both rules in their entirety in 1983.[31]

13. The Law Reform Commission considered the rule against perpetuities and the accumulations rule on the basis of a reference made by the Attorney-General of Manitoba in

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[24] *Ibid*, s 62(5).
[25] Ford and Lee, para 7560.
[26] It is interesting to note that the rule against perpetuities in s 2 of the Act is defined in such a way as to include any "rule of law which limits the period during which income may be accumulated".
[27] Section 3.
[28] Section 6. See also s 7 for accumulations by charitable and purpose trusts.
[29] Section 4.
[30] Manitoba Law Reform Commission, *Report on the Rules Against Accumulations and Perpetuities* (1983), p 1. See also R Deech, "The Rule Against Perpetuities Abolished" 1984 OJLS 454 which provides a useful and detailed account of the Law Reform Commission's approach.
[31] Perpetuities and Accumulations Act 1983, ss 2 and 3.

1975.[32] The rule against perpetuities formed the principal focus of the Report, while the decision to abandon the rule restricting accumulation received comparatively little attention.[33] The Commission's principal concern was whether the rule against perpetuities remained necessary in Manitoba in the late 20th century. Having taken into account the views of practitioners, academics and other law reform agencies, it decided that the rule no longer served any useful purpose. A number of reasons for this view were put forward, including the Commission's opinion that the conditions of modern Manitoba were not such as to call for a perpetuity rule.[34] The large and often complex family settlements of 17th century England were unknown in contemporary Manitoba: the typical testator is now interested in providing for his or her spouse, children and grandchildren, and not for future and in many cases unborn descendants. Testators might have children by more than one marriage, or financial obligations towards a separated or divorced spouse, which might foreseeably add to his or her concern for the living.[35] Furthermore, while a few eccentric individuals might choose to tie up their property for generations into the future, their number would be too small to justify the retention of an otherwise redundant rule of law such as the rule against perpetuities:

> "The original reasons for the rule [against perpetuities] in England have never applied in this province, and we think that the number of resident or non-resident investors in the wealth of the province who will wish to create dynastic trusts is likely to remain so small, if they in fact exist, that there is not a social or economic problem."[36]

14. Finally, the Commission noted the redundancy of the rule against perpetuities in striking a balance between the interests of trust creators and beneficiaries. The need for the rule against perpetuities to provide this balance had been superseded by the introduction of legislation which provided for trusts to be varied.[37] Above all, the Commission considered that the reasons underpinning the existence of the rule against perpetuities simply no longer pertained in Manitoba and this conclusion provided the Commission with a mandate to recommend that the rule should be abolished.

15. In relation to accumulation the Manitoba Commission expressed little doubt that the rule in the Thellusson legislation was in need of reform. The effect of the rule was to prevent certain schemes which were perfectly reasonable and ought to be allowed, while the permitted periods were considered "both arbitrary and productive of a vast amount of otherwise avoidable litigation".[38] The Commission expressed particular concern that the rule might operate to prevent the use of accumulation and maintenance trusts to provide for mentally impaired children throughout their lifetime. It was considered unacceptable that a truster's intentions could be frustrated in this way. Furthermore, it was thought unlikely that abolishing the rule would lead to a Thellusson-type situation in modern-day Manitoba:

> "We also cannot believe that even an eccentric would choose an accumulation trust in today's conditions for the attempted purpose of building a fortune for an unknown

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[32] *Report on the Rules Against Accumulations and Perpetuities*, p 1.
[33] It was afforded five pages of the Report while most of the remainder of the 105 page document was given over to consideration of the rule against perpetuities. The Commission noted in relation to accumulations that "the issues raised are more localized, and can be dealt with more rapidly": *ibid* at p 4.
[34] *Ibid* at p 51.
[35] *Ibid* at p 29.
[36] *Ibid* at p 51.
[37] *Ibid* at pp 52-53.
[38] *Ibid* at p 5.

heir sometime in the remote future. In an era of corporate enterprise, diversification and take-over acquisitions leading to multi-national corporate activity, the accumulation trust wears more the appearance of the horse and buggy."[39]

16. The Commission also argued that modern day tax conditions would make such an accumulation trust highly unattractive. The tax that would be payable would easily prevent the accumulation attaining the magnitude which had been predicted of Peter Thellusson's fund.[40] Above all, the Commission did not consider that the rule restricting accumulation served any useful purpose in late 20th century Manitoba. Accordingly, it recommended that the Accumulations Act 1800 be repealed.[41]

17. One argument which is sometimes advanced in favour of repealing the accumulations rule is that the continued existence of a rule against perpetuities will prevent income being accumulated excessively.[42] A number of jurisdictions have reasoned that by retaining the rule against perpetuities the influence of the 'dead hand' can be readily controlled. The Manitoba Commission, however, did not adopt this line of argument. In fact, its approach was entirely the opposite. It was argued that, if excessive accumulations were ever to become a problem, reliance on a rule against perpetuities would not be an adequate response:

> "Our final thought is that were the problem of accumulations ever to raise its head again, the legislature would surely wish to have a statutory device attuned to the exact nature of the problem. We cannot bring ourselves to see the perpetuity vesting period of lives in being plus twenty-one years as the control device which a Manitoba Legislature of the future would adopt were it starting afresh in today's sophisticated financial world with its totally different conditions."[43]

Saskatchewan

18. Until recently, Saskatchewan recognised both a rule against perpetuities and one restricting the accumulation of income. In 1987 the Law Reform Commission of Saskatchewan published recommendations for the repeal of both rules.[44] The reasoning of the Manitoba Law Reform Commission, which had made recommendations on perpetuities and accumulations only five years earlier, was heavily relied upon in the Saskatchewan report. The latter considered that variation of trusts legislation was adequate to deal with any of the problems raised by long-term settlements, and that consequently neither the rule against perpetuities nor that restricting accumulation remained a necessary component of Saskatchewan law. Of the rule against perpetuities in particular, the Commission noted the following:

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[39] *Ibid* at p 7.
[40] *Ibid*. Contrast the position in the United States, where the tax regime has made long term trusts fiscally advantageous: see paras 47-59.
[41] *Ibid* at p 8. This proposal was enacted by s 2 of the Perpetuities and Accumulations Act 1983. The abolition of the accumulation and perpetuities rules has caused no significant problems in Manitoba since 1983. (We are grateful to the Manitoba Law Reform Commission for their confirmation of this.)
[42] See the English Law Commission's Report on *Perpetuities and Excessive Accumulations*, discussed at paras 27-34.
[43] *Report on the Rules Against Accumulations and Perpetuities*, p 8.
[44] Law Reform Commission of Saskatchewan, *Proposals Relating to the Rules Against Perpetuities and Accumulations* (1987).

> "The Manitoba Law Reform Commission has drawn the obvious conclusion. It argues that properly formulated variation of trust legislation makes the rule against perpetuities unnecessary. If the rule is abolished, no effort to create a perpetuity will be successful within a trust context if the beneficiaries can demonstrate to the court that the trusts imposed by the settlor have operated for an unreasonably long period of time."[45]

19. The 1987 proposals remained unimplemented until 2008. In the intervening period, the Law Reform Commission of Saskatchewan published two further Reports, one of which recommended, in passing, the abolition of both rules, and the other specifically recommended the repeal of the Accumulations Act 1800.[46] The Saskatchewan legislature implemented the Law Reform Commission's recommendations in the Trustee Act 2008, which covers a number of aspects of the law relating to trustees. Section 58 provides that the rules against perpetuities (which are defined to include both the modern rule against perpetuities, and the rule in *Whitby v Mitchell*) are no longer part of Saskatchewan law. Section 59 provides for the repeal of the Accumulations Act 1800, insofar as it is part of the law of Saskatchewan.[47]

Channel Islands

20. Prior to the introduction of comprehensive legislation in the 1980s, the position of the trust as a legal concept in the Channel Island jurisdictions appears to have been somewhat uncertain. The following quotation deals primarily with Guernsey law, but the position in Jersey is understood to have been very similar:

> "Prior to the introduction of the Trusts (Guernsey) Law 1989 there had been some doubt whether the concept of trust was known to Guernsey law[48] although for many years trusts had been administered in Guernsey, albeit that the law of the trust had been that of another jurisdiction, usually, for obvious reasons, English law. St John Robilliard[49] in a thoughtful and scholarly paper has traced the history of the application of the trust concept in the Island and identified prior to the introduction of the [Trusts (Guernsey) Law 1989] a number of trusts which existed in Guernsey without reference to another law. Whilst these may have existed and been accepted by virtue of the fact that they were not challenged, there was a fear in English Chancery circles that a Guernsey (and also Jersey) trust could be challenged on the basis that it was constituted by a contract as Guernsey had no trust law, or more precisely no equitable jurisprudence. Indeed the author has also heard a similar argument raised in connection with an Isle of Man trust."[50]

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[45] *Ibid* at p 6.
[46] Law Reform Commission of Saskatchewan: *Proposals for the Reform of the Trustees Act* (2002) and *Report on Disposal of English Statute Law in Saskatchewan* (2006), p 26.
[47] The Accumulations Act 1800 was held to apply in Saskatchewan in 1960: *Re Fossum* (1960) 32 WWR 372 (QB). Despite the obiter comments of Porter J in *Re Burns* (1961) DLR 427 (Alberta) at 430-442 it appears to be the case that the Act applied throughout Canada, even in the jurisdictions that did not directly adopt it.
[48] The same comment was made in respect of Jersey, see Cushen, P, *Offshore Trusts*, Kluwer, 1996 at page 197. In discussions with Guernsey lawyers prior to the Trust Law the notion of a Guernsey trust was justified on the basis of the Roman Law concept of fideicommissum. Matthews & Sowden [ie the authors of *The Jersey Law of Trusts* (Key Haven Publications PLC; 1993)] discuss this point and reject the analogy which might be very relevant in any future litigation involving a pre-1989 trust.
[49] A St J Robilliard, "Foundation of Guernsey as a Trust Jurisdiction" Trusts & Trustees, vol 2, Aug 1996, pp 6-16.
[50] R Ashton, *An Analysis of the Guernsey Law of Trusts* (Key Haven Publications PLC; 1998), p 21 (with footnotes reproduced).

21. Both Jersey and Guernsey introduced comprehensive trust legislation in the 1980s.[51] Both statutes expressly permitted accumulation, subject only to a provision limiting the duration of a trust.[52] In the legislation as originally enacted, in both jurisdictions a trust could not last longer than 100 years from the date of its creation, so in practice accumulations were also limited to 100 years.[53]

Jersey

22. The Trusts (Jersey) Law 1984 has been amended on a number of occasions. Most significant from our point of view are the changes effected by the Trusts (Amendment No 4) (Jersey) Law 2006. The desirability of the amendment was explained, in a report to the minister in 2006, in the following terms:

> "Trusts are one of the key products used by the Island's finance industry. The introduction of the Trusts (Jersey) Law in 1984 was an important moment in the evolution of Jersey as a leading international finance centre, providing an up-to-date legislative framework for this vital sector of the Island's economy.
>
> Since 1984, the world of trusts has evolved at a rapid pace. Increasing numbers of jurisdictions have targeted the trusts market: initially Caribbean jurisdictions such as the Cayman Islands and the British Virgin Islands but more recently key competitors such as New Zealand and Singapore. Legislation itself has developed apace, with jurisdictions keen to develop the concept of a trust and offer flexibility and ease of use wherever possible. Finally, the market for trusts itself has changed, with an increasing demand for 'private trust companies', trust companies created to manage the wealth of an individual family only, often with the head of the family being a director of the trust company. It is important to amend the Trusts Law to keep pace with these changes and so maintain and where possible enhance the Island's attractiveness as a place in which to do funds business.
>
> The Amendment is the most significant updating of the Trusts Law since it was introduced. The Amendment touches many aspects of the Law with a view to clarifying matters which are uncertain, simplifying areas which had previously required delicate drafting and removing barriers to work coming to the Island."[54]

23. As a result of the Trusts (Amendment No 4) (Jersey) Law 2006 the law of Jersey does not now recognise a rule against perpetuities.[55] Consequently, the limitation on the accumulation of income by a trust imposed by the 1984 Act no longer exists. A Jersey trust

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[51] Trusts (Jersey) Law 1984 and Trusts (Guernsey) Law 1989. As explained below, the former has subsequently been significantly amended and the latter has been repealed (by the Trusts (Guernsey) Law 2007).
[52] Trusts (Jersey) Law 1984, art 34(1); Trusts (Guernsey) Law 1989, s 43(1).
[53] Trusts (Jersey) Law 1984, art 11; Trusts (Guernsey) Law 1989, s 12.
[54] From the Report to the Minister for Economic Development when the draft amendment was being considered: http://www.gov.je/StatesGreffe/MinisterialDecision/EconomicDevelopment/2006/Trusts+Amendment+no+4+law.htm?DisplayReport=true (last accessed on 4 December 2009).
[55] Trusts (Jersey) Law 1984, art 15(2), as amended by the Trusts (Amendment No 4) (Jersey) Law 2006. This is to be read with art 11, entitled "Validity of a Jersey trust". A trust is invalid to the extent that it purports to apply directly to immovable property situated in Jersey. (There appears to be no corresponding provision in Guernsey law for immovable property in that jurisdiction.)

may now accumulate income for an indefinite period.[56] Trusts which were in existence before the amendments made by the 2006 Act came into force may take advantage of the new rules: article 15(3) of the amended 1984 Act provides:

> "(3) Except where the terms of a trust provide to the contrary, any advancement, appointment, payment or application of assets from that trust to another trust shall be valid even if that other trust may continue after the date by which the first trust must terminate."

24. Finally, Jersey has very recently enacted legislation allowing the creation of foundations.[57] The foundation is found in a number of civil law jurisdictions and dates back to the canon law of the Middle Ages. It is a combination of a corporation and a trust, with separate legal personality and the possibility of unlimited duration. It is able to hold its own assets, contract with third parties and sue and be sued in its own name and capacity, but it does not have shareholders and holds the assets for the benefit of beneficiaries. The reason for the introduction of the foundation was explained in this way:

> "The Draft Law provides for the creation of a new Jersey legal entity, the foundation. This is intended as an asset management and distribution vehicle. It is believed that foundations will be a valuable addition to the range of products offered by Jersey's financial services industry. Further, foundations exist or are being developed in a number of our competitor jurisdictions, and this Law will help us to remain competitive."[58]

Guernsey

25. Changes to the Guernsey trust regime made by the Trust (Guernsey) Law 2007 have produced a similar regime to that in Jersey.[59] The duration of a Guernsey trust is no longer subject to restriction.[60] Guernsey law also continues to provide that the terms of a trust may authorise the accumulation for any period of all or part of the income of the trust. Section 48(1) of the 2007 Law provides that:

> "For the avoidance of doubt, no rule limiting the period of accumulations or any analogous rule applies to a trust or to any advancement, appointment, payment or application of assets from a trust."

26. A trust which was in existence prior to the commencement of the abolishing legislation will continue to be subject to the original rule restricting trust duration, and so will terminate upon the expiration of 100 years from the date of its creation.[61]

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[56] *Ibid*, art 38, as amended by the Trusts (Amendment No 4) (Jersey) Law 2006.

[57] See fn 9 to para 4.7. Foundations are similar to Jersey's fidéicommis or incorporated associations formed under the Loi (1862) sur les teneures en fidéicommis et l'incorporation d'associations.

[58] http://www.gov.je/StatesGreffe/MinisterialDecision/EconomicDevelopment/2008/mde20080177.htm?DisplayReport=true (last accessed on 4 December 2009).

[59] For a brief comparison between the two regimes see F Noseda, "The Trusts (Guernsey) Law 2007 and other modern trust laws: a civilian perspective" (2008) Trust Law International 22(3), 117, esp at p 125.

[60] Trust (Guernsey) Law 2007, s 16. Guernsey has never recognised a rule against perpetuities: *In Re Tardif* (Plaids de Meubles, 9 May 1953).

[61] *Ibid*, s 16(2). The 2007 law came into force in March 2008. This exception does not apply to trusts which are for charitable purposes, or which terminate before 100 years have passed.

England and Wales

27. English law has, for centuries, recognised a rule against perpetuities and, of course, more recently, a statutory rule restricting accumulation. Prior to the enactment of the Accumulations Act 1800, English law recognised no statutory restriction on the accumulation of income which, at common law, was regulated by the rule against perpetuities. A direction to accumulate would be lawful provided that the length of the resulting accumulation did not exceed the perpetuity period. The Accumulations Act 1800, passed in response to the Thellusson case, constituted the model for many of the statutory rules restricting accumulation around the common law world.[62] The 1800 Act prohibited the accumulation of income by private trusts unless such accumulation was to run for no longer than one of the periods specified by the legislation.[63]

28. Section 164 of the Law of Property Act 1925 replaced the Accumulations Act 1800 in English law, although the provisions are almost identical to those of its predecessor. A person wishing to direct an accumulation of income must select one, and only one, of the four accumulation periods permitted by the statute. Any direction to accumulate in excess of the chosen period will be void.[64] The Perpetuities and Accumulations Act 1964 added a further two accumulation periods to those already in existence under the earlier legislation, and these apply to trust instruments set up after 15 July 1964.[65] For trust instruments created after this date, therefore, the law provides settlors wishing to direct the accumulation of income with a choice of six different accumulation periods.[66] Where, however, trustees are directed to accumulate income for the sole purpose of purchasing land, the settlor has only one choice of period, namely the "duration of the minority or respective minorities of any person or persons who, under the limitations of the instrument directing the accumulation, would for the time being, if of full age, be entitled to the income so directed to be accumulated".[67]

29. The Law Commission consulted on the rules relating to perpetuities and accumulations in October 1993.[68] In its Report, published in 1998, it considered that the law in its present state is "highly technical and, for all except the specialist, difficult to understand and to apply".[69] The consultation invited views on whether the statutory rule restricting accumulation should be abolished.[70] In its Report the Commission noted that the response of consultees to this question had been mixed:

> "There were a number of comments from those who responded to the Consultation Paper on the policy for or against the rule against accumulations. Many considered

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[62] In several countries the 1800 Act was incorporated directly into the law, while in others it simply provided a basis upon which home-made provisions could be modelled.
[63] The Thellusson litigation and the 1800 Act are discussed more fully at paras 2.8-2.18.
[64] Law of Property Act 1925, s 164(1).
[65] Perpetuities and Accumulations Act 1964, s 13. The 1964 Act implemented recommendations made by the Law Reform Committee in 1956. For a discussion of the Committee's recommendations, and s 13 of the 1964 Act, see paras 2.28-2.32.
[66] If the settlor does not specify one of the permitted periods the court must decide, having regard to the language employed and the facts of the case, which period the disponer must have intended: *Re Watt's Will Trusts* [1936] 2 All ER 1555 at 1562.
[67] Law of Property Act 1925, s 166(1).
[68] *The Rules Against Perpetuities and Excessive Accumulations*, Consultation Paper No 133 (1993). Further consultation was carried out, by the Government, prior to the introduction of the Perpetuities and Accumulations Bill (for which see paras 32-34).
[69] Law Commission Report on *Perpetuities and Excessive Accumulations*, para 2.16.
[70] Consultation Paper No 133, *supra*, para 7.11.

that the factors that led Parliament to enact the Thellusson Act in 1800 were as relevant today as they had been then. They were concerned about the possibility of maverick testators who either had no dependents or who made sufficient provision for them to avoid any possible claim under the Inheritance (Provision for Family and Dependants) Act 1975, and who created accumulation provisions on the model of Peter Thellusson. Such conduct would attract public criticism and would be socially undesirable, particularly if the trust created a duty rather than a discretion to accumulate. They also considered that the present levels of taxation would not be a deterrent to the creation of such trusts. Against this, there were others who considered that the only justification for retaining the rule was the need to impose dead hand control and that this objective was better achieved by the retention of some form of perpetuity rule."[71]

30. The Law Commission considered that the rule restricting accumulation no longer served a useful purpose. While its principal function in a modern society as a form of dead hand control remained valid, the Commission took the view that in most circumstances the rule against perpetuities was better suited to curtailing the influence of the dead hand.[72] The Commission also took into account the experience of other jurisdictions in this area. It found that, of the legal systems which had had the rule restricting accumulation in the first place, most had now abolished it.[73] Comparative experience also suggested that there were no readily apparent adverse economic consequences of doing so.[74]

31. The Commission therefore recommended that the statutory rule restricting accumulation should be repealed, subject to an exception for charitable trusts.[75] It is clear, however, that the recommendation is contingent upon the retention of a rule against perpetuities. The Commission also recommended a modified version of the latter rule, to apply only as provided by statute. A single perpetuity period of 125 years was proposed, supplemented by a 'wait and see' provision in place of the current perpetuity period of either a life in being plus 21 years, or a period of up to 80 years.[76] It is intended that the retention of the rule against perpetuities, in modified form, will put an upper limit of 125 years on accumulations which are directed once the accumulations rule has been abolished.

Perpetuities and Accumulations Act 2009

32. A Bill giving effect to the Commission's recommendations was introduced to Parliament on 1 April 2009. It was piloted under a new fast-track legislative procedure designed specifically for Law Commission Bills which are deemed to be uncontroversial. The new procedure is the product of the House of Lords Procedure Committee Report of

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[71] Law Commission Report on *Perpetuities and Excessive Accumulations*, para 10.8.
[72] *Ibid* at para 10.12.
[73] *Ibid*.
[74] *Ibid* at para 10.13.
[75] *Ibid* at para 10.15. Charitable trusts are to be exempted on the basis that the public should benefit from the charity sooner rather than later. It was considered undesirable that settlors should be able to direct long-term accumulations for charitable purposes of a grandiose nature: *ibid* at para 10.19.
[76] *Ibid* at paras 8.13 and 8.25.

February 2008, and will be reviewed following an initial two-bill trial which began with the introduction of the Perpetuities and Accumulations Bill.[77]

33. Despite the uncontroversial nature of its provisions, the Perpetuities and Accumulations Bill generated a significant amount of detailed debate at Committee stage in the House of Lords where evidence on the Bill was taken on three separate occasions. One point which provoked particular debate was the Commission's recommendation that the perpetuity period be a fixed period of 125 years,[78] in place of the present period of a life in being plus 21 years or, for interests created after 15 July 1964, 80 years. The Law Commission justified this on the basis that 125 years corresponds to what might be considered the longest period that could be obtained under the present formulation of the rule, and also that the adoption of such a long period affords a measure of recognition of the views of the consultees who considered that the rule against perpetuities should be abolished altogether.[79] At Committee stage, however, Lord Goodhart questioned the elongation of the period thus:

> "If we had had a 125 year rule in the past, then we would find ourselves dealing with trusts created in 1884, and the question is therefore what is the justification for putting it up beyond 100 years? I can see with the increasing longevity of people there is a justification for putting it up from 80 to 100 years, but what is the justification for saying that my assets could be put into a trust and can still be there in the same trust 125 years later?"[80]

34. The Perpetuities and Accumulations Bill was passed by the Westminster Parliament on 2 November 2009.[81] It will come into force after the Lord Chancellor makes a commencement order.

Isle of Man

35. The rules regulating perpetuities and accumulations for the Isle of Man were originally contained in the Perpetuities and Accumulations Act 1968, which was amended by the Trustee Act 2001. The Act makes provision both for the length of a trust, and also the ability of trustees to accumulate income.

36. As far as perpetuities and accumulation are concerned, the 2001 Act extended the perpetuity period for trusts established under the law of the Isle of Man from 80 years to 150

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[77] The Report is available via http://www.publications.parliament.uk/pa/ld200708/ldselect/ldprohse/63/63.pdf (last accessed on 4 December 2009). Bills which are thought to contain controversial measures will continue to be considered under the normal legislative procedure.

[78] Law Commission Report on *Perpetuities and Excessive Accumulations*, para 8.13.

[79] *Ibid*.

[80] HL Special Public Bill Cttee, *Minutes of Evidence on the Perpetuities and Accumulations Bill*, 20 May 2009, Question 19 (available via http://www.publications.parliament.uk/pa/ld200809/ldpublic/perp/127/9052001.htm; last accessed on 4 December 2009).

[81] Several other provisions of the Bill attracted a significant volume of comment in the House of Lords, including the twin issues of consolidation and retrospectivity. Baroness Deech in particular expressed regret that the Bill was not intended to apply retrospectively, given that prospective amendments will, in some respects, result in a plethora of rules: "we will end up, after this Bill has been passed, with four different sets of rules: pre-1926 common law, which actually had a lot going for it because if you knew it and applied it, you got an immediate answer and you could move on; then you have the provisions of the Law of Property Act 1925; then piled on top of that the Perpetuities and Accumulations Act 1964; and then the new regime to be introduced by this Bill": House of Lords Special Public Bill Cttee, *Minutes of Evidence on the Perpetuities and Accumulations Bill*, 2 June 2009 (available via http://www.publications.parliament.uk/pa/ld200809/ldpublic/perp/127/9060201.htm; last accessed on 4 December 2009).

years.[82] The extended period does not, however, apply to the will of a person dying before, or to trust instruments created before, 1 January 2007.[83] Such cases will continue to be subject to an 80 year perpetuity period. Under the law of the Isle of Man there is no restriction on the accumulation of income by a trust for the length of the perpetuity period.

New Zealand

37. The approach to accumulations and perpetuities in New Zealand mirrors almost exactly the position of the Australian jurisdictions (excepting South Australia).[84] The Perpetuities Act 1964 provides settlors with a power to specify the perpetuity period which must not exceed 80 years.[85] It also contains a 'wait and see' provision.[86] In relation to accumulation of income, section 21(1) of the 1964 Act provides, in similar vein to the Australian statutes:

> "Where property is settled or disposed of in such manner that the income thereof may or shall be accumulated wholly or in part, the power or direction to accumulate that income shall be valid if the disposition of the accumulated income is, or may be, valid, and not otherwise."

Republic of Ireland

38. The Republic of Ireland recognised both a rule against perpetuities and one restricting accumulation. Both rules are derived from the common law, and in contrast to several other jurisdictions, they have been subject to minimal legislative intervention. The Law Reform Commission of Ireland considered the rule against perpetuities and cognate rules, which included the rule restricting accumulation, on the basis of a reference made by the Attorney-General in 1987. The Commission published a Report on these rules in 2000, which recommended their statutory abolition, without replacement.[87]

Rule against perpetuities

39. The Law Reform Commission identified the rule against perpetuities as "the leading member of what could be called a family of rules which have, broadly speaking, the same policy, namely, restricting the extent to which a landowner may control the alienability of his property into the future".[88] The principal question asked by the Commission was whether the rule had any place in the modern legal, fiscal and societal landscape of Ireland. This question was answered in the negative: the Commission took the view that the arguments which have traditionally underpinned the rule against perpetuities bore insufficient strength in a modern context to justify its continued existence. Abolition of the rule, in the Commission's

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[82] Trustee Act 2001 s 38, which inserts a new subsection (1A) into the Perpetuities and Accumulations Act 1968.
[83] *Ibid*.
[84] See paras 2-3. As in NSW and Vic, statutory provisions similar to those in the Accumulations Act 1800 had been enacted: Property Law Act 1952, ss 41-42. These were repealed by the Perpetuities Act 1964. See also Ford and Lee, para 7480.
[85] Perpetuities Act 1964, s 6(1).
[86] *Ibid*, s 8(1).
[87] Law Reform Commission, *The Rule Against Perpetuities and Cognate Rules*, (LRC 62-2000), paras 4.32 and 5.63. These recommendations are enacted by s 16 of the Land and Conveyancing Law Reform Act 2009.
[88] *Ibid* at p 2. The rule against perpetuities is not, however, confined to land. The Commission notes earlier in its Report that "it catches all interests, real or personal, legal or equitable": p 1.

opinion, would not lead to a significant rise in the creation of perpetual interests in Ireland.[89] Besides noting the ability of taxation to act as a disincentive to the creation of long settlements, the Commission considered that Ireland's socio-economic background, which was markedly different from that of England where the rule against perpetuities had first been considered necessary, was such that the abolition of the rule in Ireland would not create any significant difficulties.[90] Finally, the Commission considered that arguments based on what it termed a "fear of the unknown", which were typically born out of respect for the longevity of the rule against perpetuities, and a concern about the consequences of its abolition were unfounded:

> "Of course, we should be wary about sweeping aside a rule which has endured for centuries. The Rule's longevity requires that we proceed with caution. However it does not, without more, justify its continued existence, where there are compelling arguments in favour of its abolition. Restraint, based on a healthy fear of the unknown, must be balanced against a rational examination of what consequences are likely to follow abolition. Such an exercise is speculative, but taxation structures, variation of trust legislation, and the ease with which the Rule can be circumvented already, mean that the situation after abolition is unlikely to hold any, or many, unwelcome surprises."[91]

40. In light of these arguments, and also taking into account its view that contemporaneous recommendations regarding the variation of trusts would adequately deal with any problems which might arise, the Commission recommended that the rule against perpetuities should be abolished without replacement.[92]

Rule restricting accumulation

41. The history of the rule restricting accumulation as it applies in the Republic of Ireland is somewhat anomalous. The Accumulations Act 1800 never extended to Ireland, which retains a common law version of the rule consisting of a single accumulation period of a life in being plus 21 years, but the Accumulations Act 1892 did extend there.[93] The accumulations rule was considered by the Law Reform Commission in its Report of 2000. Three main policy arguments in favour of the rule restricting accumulation were identified:

(i) The argument that the rule prevents large amounts of capital from being 'tied up' for an excessive period of time;

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[89] *Ibid* at paras 4.20-4.22. The Commission considered the arguments in favour of reforming the rule, as opposed to abolishing it outright. It remained unconvinced, however, that even a reformed rule was necessary in a modern context.

[90] The Commission explained the differences thus: "[I]n Ireland, the socio-economic background is different from that of England, the outlook and practices of whose long-established landlord aristocracy and gentry made the rule necessary in the first place. The significant point is that here there are (certainly in the present era) very few of the long-established landed gentry, to whom it might seem appealing to establish the sort of baroque settlement against which the Rule [against perpetuities] guards." *ibid* at para 4.20 (with footnote omitted).

[91] *Ibid* at para 4.31 (with footnote omitted).

[92] *Ibid* at para 4.32. Section 16(d) of the Conveyancing and Land Reform Act 2009 implements this recommendation.

[93] See para 2.22. As the 1892 Act applied only to accumulations for the purchase of land the common law applied in many cases. This limited applicability of the English rule restricting accumulation in Ireland has raised conflict of laws issues in several cases. Morris and Leach, writing in 1962, stated that the same conflict of laws considerations would apply to accumulation as applied to the rule against perpetuities: "Accordingly, an accumulation of the rents of land will be governed by the *lex situs*; an accumulation of the income of moveables will be governed by the law of the testator's domicile at the date of his death if directed by will, and by the proper law of the deed if directed by deed, subject, however, to the influence of the law of the place of administration": Morris and Leach, pp 300-301.

(ii) The so-called 'dead hand' argument, and the consideration that trusters should not be able to dictate financial arrangements from beyond the grave;

(iii) The argument that the rule works to prevent people from disinheriting their immediate family by leaving fortunes to remote descendants.[94]

42. The Commission was unpersuaded by each of the above arguments for retaining a rule restricting accumulation. The first argument was dismissed on the basis that permitting the accumulation of income is not synonymous with the tying up of capital indefinitely. The funds can be invested and put into commercial circulation despite not being distributed among the beneficiaries. Furthermore, investment was viewed in the current commercial climate as something of a virtue. Arguments based on the withdrawal of funds from the economy were therefore redundant in a modern context.[95] In response to the second argument the Commission considered that the 'dead hand' rationale was an insufficient justification for the retention of the rule restricting accumulation. It had already been rejected earlier in the Report in relation to perpetuities and the Commission opined that the same considerations applied to accumulation.[96]

43. Finally, the Commission noted that "as a means of enforcing familial responsibilities, the rule restricting accumulation is ineffective, superfluous and excessive".[97] This had been a dominant issue in the Thellusson litigation where it was argued that Mr Thellusson's will was a contrivance by which to exclude every one of his issue from the enjoyment of his property. However, as the Commission pointed out, the rule restricting accumulation bars only this one method of disinheritance. The rule provided no protection where, for instance, the truster disinherited his or her dependents by making large *inter vivos* dispositions, or by leaving money to charity.[98] Furthermore, the rule applied universally, whether or not adequate provision was actually made for the truster's spouse and issue. In light of these considerations, the Commission considered that an argument for retention of the rule based on protection from disinheritance was unpersuasive.

44. In light of its rejection of the main arguments for its retention, the Commission recommended that the rule restricting accumulation be abolished.[99] It was noted, however, that the traditional response to the problem of reforming the rule in jurisdictions where the Accumulations Act 1800 (or legislation based on it) applied, has been to repeal the Act and retain the 'safety net' of the perpetuity period. The Commission was aware of the fact that its earlier recommendation to abolish the rule against perpetuities would effectively dismantle such a safety net in respect of the abolition of the accumulations rule. It concurred, however, with the view of the Manitoba Law Reform Commission that the rule against perpetuities was not the appropriate response to problems arising out of accumulation of income.[100] Moreover, the existing rule in *Saunders v Vautier,*[101] which determined when an accumulation might be validly terminated, and the Commission's own recommendations on

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[94] *Report on Perpetuities and Cognate Rules*, *supra* at paras 5.47-5.51.
[95] *Ibid* at para 5.48.
[96] *Ibid* at para 5.49.
[97] *Ibid* at para 5.50.
[98] *Ibid* at para 5.51.
[99] Section 16(e) of the Land and Conveyancing Law Reform Act 2009 abolishes the accumulations rule.
[100] *Report on Perpetuities and Cognate Rules*, paras 5.52-5.53.
[101] (1841) 4 Beav. 115.

variation of trusts legislation could be employed where a direction to accumulate proved problematic.[102]

45. A Bill incorporating the Law Reform Commission's recommendations on the rule against perpetuities and that restricting accumulation was introduced into the Irish Parliament in 2006.[103] It was passed in July 2009. In contrast to the Perpetuities and Accumulations Act 2009, recently passed by the UK Parliament, the Irish reforms are included as part of a much broader property and conveyancing law reform package, rather than a stand-alone set of reforms. Part 3 of the Bill deals with future interests, and section 16 abolishes both the rule against perpetuities and that restricting accumulation.[104] Section 17 provides the scope of application of section 16:

> "17 Section 16 applies to any interest in property whenever created but does not apply if, before the commencement of this Part, in reliance on such an interest being invalid by virtue of the application of any of the rules abolished by that section-
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> the property has been distributed or otherwise dealt with, or
>
> any person has done or omitted to do any thing which renders the position of that or any other person materially altered to that person's detriment after the commencement of this Part."

South Africa

46. We discuss South African law in detail in Appendix B, at paragraphs 43 to 56, but at this point it is worth noting that South Africa has never recognised a rule against perpetuities or one restricting the accumulation of income.

United States of America

Rule against perpetuities

47. The common law rule against perpetuities was received by the states whose legal systems stemmed from English law.[105] The classic formulation of the common law rule was that of John Chipman Gray: "No interest is good unless it must vest, if at all, no later than twenty-one years after some life in being at the creation of the interest."[106] The common law rule had not been substantially altered by the time the American Law Institute published its Restatement of the Law of Property.[107] Nevertheless, just as with the English rule, it was recognised that the rule would sometimes produce harsh results. Consequently it was proposed that an interest under a trust that might vest after the perpetuity period should not be automatically invalid from the outset; instead the interests should be treated as valid unless, on the expiry of the perpetuity period, it was found that it had not already vested. This proposal came to be known as 'wait and see'. Pennsylvania was the first state to adopt

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[102] *Report on Perpetuities and Cognate Rules*, paras 5.54-5.55.
[103] Land and Conveyancing Law Reform Bill 2006.
[104] Section 16 also abolishes the rules known as the contingent remainder rules: the rule in *Purefoy v Rogers* and the rule in *Whitby v Mitchell* (also known as the old rule against perpetuities and the rule against double possibilities).
[105] Louisiana is the exception. For a relatively recent survey of the US reforms relating to perpetuities see Part I of Dukeminier and Krier.
[106] Gray, p 191.
[107] Restatement, Sections 370 and 371 as read with Section 374.

a 'wait and see' rule, in 1947. There was, however, no consensus over whether this approach was correct and supporters and opponents of the principle became engaged in what were dubbed the 'Perpetuities Wars'.[108] The debate continued during the drafting of the Second Restatement of the Law of Property, whose first volume was published in 1983.[109] It opened with the rule against perpetuities, which included a 'wait and see' provision and, also controversially, a list of measuring lives.[110] However, this did not put an end to the debate and it was not long before there were further developments.

48. In 1986 the National Conference of Commissioners on Uniform State Laws developed the Uniform Statutory Rule Against Perpetuities ("USRAP").[111] The USRAP followed on from the Restatement Second and included the 'wait and see' principle.[112] Instead of using measuring lives plus 21 years (plus, perhaps, one or two periods of gestation) it created a flat waiting period of 90 years, which it viewed as a considerably preferable policy.[113] Many states subsequently adopted the USRAP.[114]

49. Also in 1986 there was another, quite separate impetus for reform, this time towards abolition of the rule. Professor Sitkoff describes it in this way:

> "Since 1986, a host of states have abolished the Rule Against Perpetuities as applied to interests in trust.[115] The driving force for this abrupt turnabout was not a careful reconsideration of the ancient policy against perpetuities, but rather a 1986 reform to the federal tax code. Under the 1986 code (as amended through 2005), a transferor can pass $1 million during life or $1.5 million at death free from federal estate, gift, and generation-skipping transfer ("GST") taxation (collectively the federal wealth transfer taxes). By passing this $1 million or $1.5 million in trust, a transferor can ensure that successive generations benefit from the trust fund, free from federal transfer taxes, for as long as state perpetuities law will allow the trust to endure. In a

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[108] See Dukeminier and Krier at pp 1305-1307. The personal nature of some of the attacks is illustrated by WB Leach, "Perpetuities Legislation: Hail, Pennsylvania!" (1960) 108 U Pa L Rev 1124.

[109] In the original Restatement the rule against perpetuities was set out in the last volume to be published. The fact that it was in the first volume of the Second Restatement may well have been due in part to its controversial nature: Dukeminier and Krier at 1307.

[110] Restatement (Second), Section 1.4. Dukeminier and Krier write: "He [Professor Casner, the Reporter for the Second Restatement] was set on writing wait-and-see into the Second Restatement and wasted no time about it. Professor Richard R. Powell, the reporter for the First Restatement of Property, came out of retirement at age eighty-eight to speak in opposition. For two annual meetings of the American Law Institute, Casner and Powell were locked in robust debate. At the second meeting, in 1979, Casner, the Reporter, prevailed. The 'wait and see' doctrine was adopted by the Second Restatement. Instead of using the lives relevant to vesting as the measuring lives, the Restatement drafters fashioned a list of specific measuring lives, and wrote them into the Restatement. Mandating an artificial list of lives for wait-and-see was a highly unusual practice for a Restatement, which is ordinarily concerned with articulating principles to be adopted by courts. In any event, it turned out that the Restatement list was unprincipled, full of holes, and unworkable. The idea went no further than Iowa, which by statute adopted 'wait and see' with an expanded version of the Restatement list of measuring lives": Dukeminier and Krier, p 1307 (with footnotes omitted).

[111] http://www.law.upenn.edu/bll/archives/ulc/fnact99/1990s/usrap90.pdf; last accessed on 4 December 2009.

[112] Section 1(a)(2).

[113] The prefatory note begins: "The Uniform Statutory Rule Against Perpetuities … alters the Common-law Rule Against Perpetuities by installing a *workable* wait-and-see element" (with emphasis added).

[114] In around 2004 it was in force in 23 states plus the District of Columbia: see JC Tate, "Perpetual Trusts and the Settlor's Intent" 53 U Kan L Rev 595 at 601, fn 31.

[115] There is a useful footnote in the original. "Abolition" took a number of different forms, but this topic lies beyond the scope of the present Paper.

state that has abolished the Rule, successive generations can benefit from the trust fund, free from federal wealth transfer taxation, *forever*."[116]

50. The tax reforms therefore prompted many states to consider whether to abolish the rule against perpetuities (or to enact such a long perpetuity period as to render the rule in practice redundant).[117] Some states had already abolished the rule: Idaho, Wisconsin and South Dakota did so in 1957, 1969 and 1983 respectively.[118] In South Dakota's case the abolition was a bid to attract trust business.[119] This motivation also lay behind other states' decisions. For instance, Delaware abolished its rule in 1995, and the official synopsis of the abolishing legislation makes clear the reasoning behind the decision:

> "Several states, including Idaho, Wisconsin and South Dakota, have abolished altogether their rules against perpetuities, which has given those jurisdictions a competitive advantage over Delaware in attracting assets held in trusts created for estate planning purposes. [ ]
>
> The multi-million dollar capital commitments to these irrevocable trusts, and the ensuing compound growth over decades, will result in the formation of a substantial capital base in the innovative jurisdictions that have abolished the rule against perpetuities. Several financial institutions have now organised, or acquired trust companies, particularly in South Dakota, at least in part to take advantage of their favourable trust law.
>
> Delaware's repeal of the rule against perpetuities for personal property held in trust will demonstrate Delaware's continued vigilance in maintaining its role as a leading jurisdiction for the formation of capital and the conduct of trust business."[120]

51. Delaware's repeal of its rule against perpetuities was closely followed in a considerable number of other states.[121] Sitkoff sums up the position in 2006 in this way:

> "The Rule Against Perpetuities is dying an ignoble death. To attract trust business and the lawyers' fees and trustees' commissions that come with it, twenty-one states have abolished the Rule as applied to interests in trust. … Not surprisingly, perpetual trust legislation is under consideration in several of the states that have not yet abolished the Rule."[122]

52. It has been calculated that, by 2003, approximately $100 billion in trust assets had been invested in those states which had abolished the rule against perpetuities.[123] It is widely recognised that a very significant factor behind any future direction which the market might take is the tax decisions made by Congress. Dukeminier and Krier end their article on perpetual trusts with these words:

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[116] Sitkoff, pp 507-508 (omitting footnotes; the final word is italicised in the original). These generous exemptions from the GST tax (which is otherwise charged at the highest rate of the federal estate tax) are increased periodically. In 2009 the lifetime exemption becomes $3.5m (or $7m for a married couple).
[117] Several states have created 1,000 year perpetuity periods and others have periods of several centuries.
[118] Schanzenbach and Sitkoff, p 2473 (where, refreshingly, the authors express some doubt as to whether Wisconsin abolished the rule before 1969, or even had a rule at all).
[119] Sterk, pp 2101-2102.
[120] Quoted by Schanzenbach and Sitkoff, p 2474.
[121] *Ibid*. A number of other states are considering proposals to abolish the rule: see Tate, *op cit*, pp 603-604 for data as at about 2004.
[122] Sitkoff, p 501 (with footnotes omitted).
[123] *Ibid*.

"The short of it is that Congress has come to be in charge of trust duration. The future of perpetual trusts is in its hands, to be dealt with through the tax system. The role of the states is to develop affordable means for modifying and terminating trusts when that is in the best interests of the beneficiaries. We have reached a great turning point in the law of trusts."[124]

Rule restricting accumulation

53. As the rule against perpetuities is being substantially eroded or abolished in many states there has been a correspondingly increased need to consider the position of the rule restricting accumulation. Like the perpetuities rule, the common law accumulations rule – under which income may be accumulated for a period which does not exceed the period allowed by the common law rule against perpetuities – was received by almost all of the US states.[125] Nevertheless, its application and extent is not necessarily the same as that of the English common law rule, nor is it applied uniformly across all of the US jurisdictions. For example, in some states an accumulation for a period in excess of the permitted period is entirely void whereas in others it is only void as to the excess.[126]

54. The Accumulations Act 1800 was enacted after American independence and consequently it never applied in the United States. A minority of states have enacted statutory rules on accumulations, the earliest dating back to 1830.[127] These restrictions are loosely based on the 1800 Act,[128] though there are notable modifications in various states. There are three broad statutory approaches which emerged during the 19th century: some statutes were based very closely on the 1800 Act; others, such as the New York statute of 1830, permitted accumulations only during the minority of the beneficiary;[129] and a third strand is typified by the California statute of 1872, which limited accumulation to the period during which restrictions may be imposed to prevent alienation.[130]

55. By 1944, when the first Restatement of the Law of Property was completed, 14 states had statutory rules on accumulations in force.[131] Unsurprisingly, there was considerable variation in the approaches that were adopted. For example, 7 of the 14 states followed the example of New York, whereby (as mentioned in the previous paragraph) accumulations were not only limited as to their duration but also as to their purpose: they had to be destined for the benefit of the minor whose minority constituted the accumulation period. In only 3 of

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[124] Dukeminier and Krier at 1343. There is a discussion of the tax aspects of perpetual trusts in Sitkoff, pp 507-510.
[125] This was settled in 1941 by the decision in *Gertman v Burdick* 123 F.2d 924 (DC Cir 1941): see Sitkoff, pp 506-507.
[126] Sitkoff, p 507.
[127] We have not considered in detail the reasons for the early American legislation on accumulation but it is interesting to note that not only did many states decide to pass their own legislation during the 19th century but also that some of the concerns motivating the Accumulations Act in England were felt across the Atlantic. For instance, a Pennsylvania decision from 1849 expressed fear that an accumulation trust might "draw into its vortex all the property in the state": *Hillyard v Miller*, 10 Pa 326 at 336. This echoes similar sentiments in response to the Thellusson trust described in Part 2. It should not be forgotten that, shortly before Mr Thellusson's death, Benjamin Franklin had died, in 1790, leaving two accumulation trusts (both for charitable purposes), each endowed with £1,000 and directions that income was to be accumulated for 200 years, with a payout after a century. When the trusts were wound up in 1990 one had amassed just less than $5m and the other had achieved less than half of that sum.
[128] See paras 2.15-18.
[129] This thereby limited both the *purpose* of the accumulation (which had to be for the minor's benefit) and the period.
[130] See Restatement (Second), p 126.
[131] See, generally, *ibid* at pp 2596ff. In those states without a statute the common law applied.

these 7 states, however, did the rule apply to income from real and personal (heritable and moveable) property, with the remaining 4 states restricting it to income from real property only. Also, in 3 of the 14 states the permitted accumulation period was identical to that permitted under the local statutory rule against perpetuities (though that was shorter than the common law perpetuity period).

56. Nowadays, the typical situation in states which have a statutory rule restricting accumulation is that the accumulation period matches the perpetuity period.[132] In these states it is generally not necessary to consider whether a settlement complies with the accumulations rule: if it is not void under the rule against perpetuities then it will typically comply with the rule restricting accumulation. Nevertheless, we have seen that many states have now abolished the rule against perpetuities, and others are considering following suit, which means that the position of the rule restricting accumulation has come out of the shadows.

57. In light of these developments, there is a new impetus for evaluation of the US rule restricting accumulation. The dominance which the rule against perpetuities has historically exerted leaves the position of the rule unclear in many states now that the older and more distinguished rule (as Sitkoff has referred to it) is being consigned to history. Where states have not addressed this situation directly by statute, questions arise as to the relationship between the perpetual trust and the rule restricting accumulation. Sitkoff summarises the main issue thus:

> "With the erosion of the rule against perpetuities, however, the rule against accumulations of income may have newfound relevance. Perpetual trusts are more likely than ordinary trusts to prescribe accumulations of income and such trusts are designed to endure beyond the traditional perpetuities period of lives in being plus twenty-one years."[133]

58. In some states, the accumulations rule has been abolished by statute. Delaware, Illinois and South Dakota, all of which actively promote themselves as attractive jurisdictions in which to establish a perpetual trust, have taken legislative steps to modify or abolish it.[134] Other states have not done so, however, and the overall position is consequently less clear. In particular, if the state has a common law rule restricting accumulation (which, it will be recalled, permits income to be accumulated for the common law perpetuity period) but has modified the perpetuity rule by statute, then it may no longer be apparent for how long income may be accumulated.[135]

59. This issue arose in 1999 for decision by the Supreme Judicial Court of Maine. The court held that the state accumulation period was *not* concurrent with the perpetuity period (which at the time incorporated the 'wait and see' principle). This resulted in the testator's

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[132] Sitkoff cites statutes from California, New York and Pennsylvania: Sitkoff, p 506, fn 35.
[133] Sitkoff, p 502.
[134] Sitkoff, pp 510-511.
[135] Section 2.2(1) of the Restatement (Second) provides: "(1) An accumulation of trust income under a non-charitable trust created in a donative transfer is valid until the period of the rule against perpetuities expires with respect to such trust and any accumulation thereafter is invalid." The Comment states that the period of the rule against perpetuities is defined in Section 1.1, ie 21 years after lives in being. This does not, therefore, answer the question of what accumulation period applies where the applicable perpetuity period is other than 21 years after lives in being.

accumulation direction being held invalid, though the rest of the will was valid.[136] Commentators have, however, suggested that the effect of this decision is likely to be restricted. In particular, it is not thought likely that it will be followed in states which have acted to abolish the rule against perpetuities; the argument here is that the creation of an infinite or very long-term perpetuity period will result in the accumulations period being of equal length. And, at a practical level, "[l]ocal bankers and lawyers who were able to secure abolition of the Rule Against Perpetuities are likely also to be able to get the rule against accumulations revised in the legislatures".[137]

[136] *White v Fleet Bank*, 739 A.2d 373 (Me 1999), affirmed on appeal: 875 A.2d 680 (2005). See Sitkoff, pp 511-512.

[137] Sitkoff, p 512. The author sets out the arguments about the likely impact of the decision. It is also worth noting that he argues, in Part VI of his article, that the policy justifications for having a restrictive accumulations rule – which boil down to the twin desires to avoid the creation of vast fortunes and to prevent distortion of the investment markets – are not sufficient to support the continued existence of the rule.

Appendix B

Comparative material on rules restricting successive liferents

Introduction

1. The rule in Scots law restricting successive liferents and that in *Frog's Creditors* are each discussed in Part 2 at paragraphs 2.36-2.58. Both have the effect of limiting 'dead hand' control by restricting the power of a truster to create future interests in his or her property. In common law systems 'dead hand' control tends to be regulated by the rule against perpetuities (and also, where it applies, the rule restricting accumulation) and we have commented on those rules, in a comparative context, in Appendix A. Such rules do not apply in civil law systems but there are other devices which aim at limiting the ability to create perpetuities. In this Appendix we offer a brief comparative analysis of the position in various civilian jurisdictions,[1] and we also consider the mixed system of South Africa.

2. At the outset, a fundamental question about the validity of this exercise needs to be addressed. Civil law systems generally do not provide for trusts to be established. Does that not mean that a comparative exercise will be futile, as like cannot be compared with like? It is certainly true that, of the civilian jurisdictions we examine, only Malta provides for trusts under domestic law.[2] Despite this, we believe that the exercise is not a futile one but is beneficial, for two reasons. First, the Scots law rules under examination do not necessarily depend on the existence of a trust. For example, the restrictions on the creation of successive liferents apply equally to proper liferents as they do to trust liferents. The second reason is a broader one: the civil law contains, or has created, a number of institutions which can often do what can be done by a trust in a common law system. In response to Maitland's complaint that the lack of a trust in the German Civil Code "is a big hole"[3] it has been said:

> "In all humbleness, a civil lawyer will submit that, instead of a big hole, civil law offers a *bouquet* of institutions which either alone or in combination fulfil most if not all of the functions of a trust."[4]

3. There are various civil law institutions by which a person may transmit property to an unborn generation, thereby achieving something similar to what is permitted in common law systems which contain a rule against perpetuities. The particular form of those institutions varies somewhat in detail from jurisdiction to jurisdiction but they all share a common root in Roman law. The main one is the *fideicommissum*, which we discuss shortly, but there were

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[1] France, Spain (including its regions which have succession laws), Germany, Austria, Malta and Greece.
[2] South African law also provides for trusts. In addition, other civil law jurisdictions have recently made provision for trusts or similar institutions such as *la fiducie* in France (see the laws of 19 February 2007 and 4 August 2008). The question of whether and how to follow this route is a live one in various civilian countries.
[3] FW Maitland, *Equity: a course of lectures*, p 23.
[4] Dyer and Van Loon Report, para 57. Furthermore: "When something achievable with the trust is not achievable under the civil law, it is usually because the result is forbidden for reasons of social policy": KD Kerameus and PJ Kozyris (eds), *Introduction to Greek Law* (2nd, 1993), p 128.

others too. All of the civilian systems we examine permit the creation of a usufruct,[5] which allows a person to exercise some control over the future use of his or her property. Unlike many of the institutions described later in this Appendix, which are restricted to testamentary use, a usufruct can be created during life or by will. (The equivalent in Scots law to the usufructuary institutions in civilian systems is the proper liferent.[6]) Again, simple substitution is commonly found, that is the ability of a testator to nominate an heir or legatee and then to nominate a different person who is to be the heir or legatee if the first-named person is unable or unwilling to take. However, neither usufruct nor simple substitution reaches very far into the future.

4. As mentioned above, the *fideicommissum* lies at the heart of the perpetuities which are permitted under the civil law. The fluctuating fortunes of the *fideicommissum* from the early part of the Empire – it was not enforceable during the Republic – are beyond the scope of this Paper but by the time of Justinian, in the 6th century, it was competent to make *fideicommissa* of unlimited duration. The testator would direct the heir to hand over the property on death to his son, with a direction that the son do the same, and so on. The heir may be allowed to keep a quarter for himself, though there were methods by which this would not affect the passing of substantially the whole estate.[7] However, in response to the settlement of one Hierius which purported to create a never-ending perpetuity, this practice was restricted by Justinian to four generations.[8] Thereafter, the *fideicommissum* had a wide influence on the modern civil law systems based on Roman law. Most of the ones we examine in this Appendix have a form of it, though it has often become melded with the separate institution of substitution.[9]

5. Before turning to the individual legal systems we have two further preliminary comments. First, civilian systems generally restrict the extent to which a person can dispose of his or her property more than common law systems do. Family members typically have the right to a significant percentage of the estate. One effect of this is that there is less opportunity to create substantial perpetuities, as the entitlement of the living to their shares will deplete the estate. As has been written in respect of France:

> "The subject of perpetuities has, for various reasons, acquired less importance in France than it has in common-law countries. The principal explanation of this difference appears to lie in the rules relating to *réserve* and to *légitime*, which protect an owner's natural heirs against the alienation by gift or will of more than a fraction, fixed by law, of his estate. These restrictive principles not only make settlements more difficult to establish in practice, but, being derived from pre-revolutionary law,

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[5] See, eg, German Civil Code, arts 1030ff; Austrian Civil Code, arts 509ff; French Civil Code, arts 578ff; Spanish Civil Code, arts 467ff; Italian Civil Code, arts 477ff. For simplicity we bracket these various civilian institutions together, though they are not exactly identical to each other.

[6] For a discussion of liferents see Stair, vol 13, paras 1608-1609 and vol 18, para 74, and also GL Gretton and AJM Steven, *Property, Trusts and Succession* (2009), ch 21. The relevance of understanding the nature of a usufruct is illustrated, in the tax field, by T Lyons QC and R Frimston, "The Contemporary Usufruct" 2009 Private Client Business, issue 1, pp 32-44.

[7] The heir's quarter could be met by reservation, and Justinian allowed the testator to forbid the retention of a quarter: *Arg Nov* 1.2.2 *in f*.

[8] *Novella* 159. See D Johnston, *The Roman Law of Trusts* (1988), pp 112-116 for an analysis. The novel was discussed by the Privy Council in *Strickland v Strickland* [1908] AC 551, on appeal from Malta. In relation to the precise limit of the permitted perpetuity the court said: "The novel itself is so verbose, and the reasoning upon which it is founded is so loose, that it is not surprising that the commentators thereon arrived at conflicting conclusions as to its true meaning and import" (at 569). See paras 33-40 for a discussion of Maltese law.

[9] See Gretton, esp pp 158-159.

have doubtless contributed to the formation of social habits unfavourable to the spirit of entail."[10]

6. Secondly, as hinted at in the final sentence of the quotation above, there appears to be a cultural difference between continental testators and those in Britain and the United States in respect of the desire to create perpetuities. This is hard to measure and, even if measurable, the underlying reasons may be obscure. Nonetheless, a legal academic said in the mid-1930s:

> "Although the present law of Germany affords quite a variety of means for 'settling' property, I think that it can safely be said that the only extensive use made of them is for providing for a surviving spouse, who will usually be appointed the other spouse's primary heir, with the children or other relatives as secondary heirs. Provisions as to more distant events and eventualities seem to be rare."[11]

7. There are more recent comments of this nature, about Spain, in paragraph 12. They suggest that the difference between continental civilian habits in relation to testamentary dispositions and the corresponding habits of testators in Western common law countries still exists but is narrowing. There are no doubt many reasons for the cultural differences: one is the rules on forced heirship which have already been mentioned and another is the historical context against which individual civil codes were developed. This topic lies beyond the scope of this Paper but it will be recalled that in many cases the introduction of a country's civil code followed a great political upheaval in which the landed classes lost influence and, with it, the ability to create perpetual estates in their land. By and large, therefore, the civilian systems view perpetuities with great mistrust and seek to suppress them.[12] The extent to which such suppression is viewed, by modern eyes, as desirable or necessary is highly relevant for contemporary development of the law in this area.

8. We now outline the relevant provisions of the laws of Spain, France, Germany, Austria, Malta, Greece and South Africa.

Spain

9. We begin with Spain because it is a rich and varied source, due to the ability of its autonomous regions to legislate in the area of succession; there have also been some very recent changes to the legislation.

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[10] MS Amos, "Perpetuities in French Law", (1934) 16 J Comp Legis & Int Law, 3rd series, 18-24 at p 18.

[11] M Rheinstein, "Some fundamental differences in real property ideas of the 'Civil law' and the common law systems", 3 U Chicago L Rev (1935-1936) 624-635 at pp 632-633. He continues: "Nothing more than guessing is possible as to the causes of this difference from the customs of Anglo-American countries. One reason may be the greater rareness of large fortunes; it may also be that impulses associated with economic individualism and limits on feudal power have affected common practices; another reason may be the great consciousness of the continental nations of the instability of expectations, or the futility of provisions for the future. Nations which have gone through the experiences of succeeding wars, revolutions, and inflations, are less convinced of the permanency of present conditions than nations which for centuries have not seen an invading enemy and whose chief experiences in instability are the periodic crises of the capitalist system."

[12] Of course this is not to say that all or most common law countries took the opposite view. While the major civilian codes were being promulgated, during the 19th century, many New World states and provinces which adopted English common law were developing rapidly but without the background of European landed classes. This meant that land law reform and the destruction of perpetual estates was largely irrelevant for them, even though they inherited the English rule against perpetuities.

10. The law of succession is regulated by the Spanish Civil Code, or *Código Civil*. In addition, the local laws of six of Spain's autonomous communities determine the rules of succession within their own territory.[13] This applies to much of the northern and eastern parts of the peninsula: Aragon, the Balearic Islands,[14] the Basque Country,[15] Catalonia, Galicia and Navarra.[16] The result, in the words of a contemporary commentator, is that "Spanish Law as a whole is a wonderful breeding ground for internal comparative law".[17]

11. It is worth noticing three general points before examining the detail of the laws applicable in Spain. The first is that, although there is a pronounced restriction on the freedom of testation,[18] in common with the general tendency of civil law systems, the rules vary across the country and the variations can be relatively extreme in places.[19] There is also a debate at the moment on possible reforms to the '*legítima*'.[20] The second point is a practical one: Spaniards are much more likely than their European neighbours to make a will. Recent figures suggest that about half of all estates are testate, compared with around 10% in France and 20% in Germany.[21]

12. The third point concerns a specific institution, the fideicommissary substitution, by which something akin to successive interests in property can be created. The details are examined below, both in the Civil Code and also in the Catalan Code, but it should be noted that at a general level this is a relatively undeveloped area of the law. In a recent decision the Supreme Court said:

> "[T]he fideicommissary substitution, though regulated only in outline in the Civil Code (articles 781ff), has had a long historical tradition, a significant but limited academic treatment and has been the subject of very few recent decisions of this Court."[22]

The contention that the fideicommissary substitution has been neglected of late is echoed, with a twist, by a commentary on Spanish succession law from two years ago:

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[13] Thus the Civil Code ("CC") applies in the rest of Spain. Internal conflict of law questions are determined, for Spanish citizens, by 'legal residence' (*vencidad civil*): see arts 9.8 and 14 CC. Residence and location of assets are relevant for foreigners. See D Hayton (ed), *European Succession Laws* (2nd ed, 2002), paras 17.114-17.120.

[14] One set of rules applies in Mallorca and (with very minor differences) in Menorca; a separate set of rules applies in Ibiza and Formentera.

[15] At least three different regional laws (*fueros*, or charters), apply in different parts of the Basque Country: *fuero de Ayala* (see fn 19), *fuero de Bizkaia* (applicable to (largely agricultural) parts of the province of Bizkaia and to two towns in the province of Álava) and *fuero de Gipuzkoa* (applicable throughout the province of Gipuzkoa). Where no *fuero* applies, the common law of Spain as set out in the Civil Code is to be used.

[16] The question of how to deal with the regional laws, many with a very long history, was an important one in the development of a national code. This task lasted for much of the 19th century, and the *Real Orden* of 29 July 1889, commenting on the recent publication of the current Civil Code, says: "Una de las cuestiones más viva y extensamente discutidas en ambas Cámaras fue la de la subsistencia del derecho foral [ie the law of the *fueros*], en las relaciones entre los habitantes de las provincias y territorios que lo conservan y los de los territorios y provincias en que rige el derecho común [ie the national common law, derived mainly from the law of Castile]."

[17] Cámara, p 5. This article formed the basis of the Spanish National Report for the XVIIth Congress of the International Academy of Comparative Law held in Utrecht in July 2006. We have found it a useful source for this part of the Appendix.

[18] The details are summarised in a helpful table in Cámara, annex 2.

[19] The *fuero de Ayala* (see fn 15) allows complete freedom of testation. This applies to a small collection of towns and villages in the province of Álava, in the hinterland of Bilbao, with a current population of about 15,000. By contrast, the neighbouring area, in which the *fuero de Bizkaia* applies, has the highest forced share: 80% of the estate must be left to descendants

[20] See Cámara, pp 31ff.

[21] See Cámara, p 6 for more data and reasons for the phenomenon.

[22] Decision of the *Tribunal Supremo, Sala de lo Civil* (Judge O'Callaghan Muñoz), 29 December 1997 (accessible, in Spanish, by using the data base at http://www.poderjudicial.es/search/index.jsp; last accessed on 4 December 2009).

"Estate planning, which has no strong tradition in Spain, unlike the situation in other legal systems, particularly in Common Law systems, is being used more and more in recent times, particularly for the transmission of large fortunes."[23]

Civil Code

13. The provisions of the Civil Code on succession[24] permit certain testamentary settlements which extend beyond a simple transfer of property from the deceased to a living heir or beneficiary. The main device which is relevant for present purposes is that of substitution but two others merit mention. First, a legacy may be made subject to a condition. However, this cannot be used to require the legatee to pass the legacy on to a member of a future generation so as to create a perpetuity: any condition which requires the legatee to make a testamentary provision in favour of either the original testator or a third party is null.[25] Secondly, there are liferents (*los usufructos*).[26] The Code requires that all of the parties, ie liferenter(s) and bare owner(s), must be alive at the date of the testator's death.[27] The effect of this is that successive liferents are permissible but only where all of the potential liferenters – whose rights are successive rather than consecutive – are alive at the testator's death.

14. There is another device which may be used: substitutions and in particular the fideicommissary substitution (*la sustitución fideicomisaria*).[28] Regional codes – and we examine the Catalan one in particular[29] – make provision for fideicommissary substitution, and we have seen that they have long been a feature of Spanish law.[30] The essence of such a substitution is that it permits a testator to leave some or all of the estate, on death, to a nominated person who is then entrusted to maintain it and pass it on, usually on his or her death, to a specified person.[31] There are numerous variations on this basic structure, but the limits prescribed by the Civil Code are the following:

(i) the substitution must be express;[32]

(ii) the testator may only leave the property to a person (*fiduciario*) who is alive at the date of his or her death and the property which is subject to the substitution cannot pass to someone beyond the 'second degree' (*secundo grado*);[33]

(iii) the *fiduciario* must pass the whole property to the specified destinee subject only to certain permitted deductions, although provision is made for the testator to make other provision in this regard;[34] and

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[23] Cámara, p 27. The author also notes, on pp 5-6, that the Civil Code largely reflects 19th century society whereas many of the regions have updated their laws recently, adapting them to more contemporary attitudes.
[24] Book III, Title III (arts 657-1087) CC.
[25] Art 794 CC.
[26] Art 787 CC.
[27] *Ibid*, read with art 781 CC.
[28] Chapter II, 3rd Section (arts 774-789) CC, where provision is also made for three other types of substitution: *la vulgar* (or *simple*), *la pupilar* and *la cuasi-pupilar* (or *ejemplar*). The history of the fideicommissary substitution (which may not even be correctly classified as a substitution) in the civilian tradition is explored in Gretton, pp 158-159.
[29] See paras 17-19.
[30] See para 12.
[31] The person who is entrusted termed the '*fiduciario*', which suggests a fiduciary relationship.
[32] Art 783 CC, para 1.
[33] Art 781 CC.
[34] Art 783 CC. para 2. See Cámara, p 24 for a brief discussion of 'residual fideicommissary substitution'.

(iv) the fideicommissary substitution cannot be used as a means to avoid payments to 'forced heirs' (*la legítima*).[35]

15. The right of the ultimate destinee (*el fideicomisario*) is not dependent on whether he or she survives the *fiduciario* since the right to the property arises on the death of the testator.[36] This means that if the destinee (Z) dies before the *fiduciario* dies then the latter is obliged to pass the property on to Z's heirs.

16. The efficacy of the fiduciary substitution for passing property to future generations is, therefore, limited. The main restriction is that the ultimate destinee can be no more distant than the 'second degree'.[37] In addition, the need to satisfy the requirements of the forced heirs will limit the amount of property which can be passed by way of substitution.

Catalan Civil Code

17. As it is not practicable to treat each of the autonomous regions' succession laws in detail we concentrate only on those applicable in Catalonia. The first point to note is that the current law is very recent, from 2008,[38] and is also comparatively detailed: in relation to substitutions it contains a total of 73 articles as opposed to the 16 in the Spanish Civil Code.[39] Allied to this, in comparison with the Civil Code there is a greater range of prescribed devices by which a testator may pass property.[40] For instance, there is provision for creating a power of appointment by which a testator may leave property to a spouse / partner / cohabitant or parent with that person having power to choose which descendant of the testator will take the property (*la designación de heredero por fiduciario*).[41] It is also competent to designate an heir or legatee confidentially (*los herederos y legatarios de confianza*).[42] However, neither of these devices will permit the creation of a perpetuity.

18. Fideicommissary substitutions (*los fideicomisos*) are regulated by articles 426-1 to 426-59.[43] Broadly speaking, the provisions mirror those outlined above in relation to substitutions regulated by the Civil Code.[44] The Catalan provision is in article 426-10, which provides for three situations:

(i) It is competent to nominate as many ultimate beneficiaries as the testator desires, provided that they are all alive at the time of his or her death. (Those who are conceived but not born are not eligible for these purposes.) In this

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[35] Art 782 CC.
[36] Art 784 CC.
[37] As previously mentioned, there is a general scarcity of material on substitutions. In particular we have not been able to ascertain precisely what limits the 'second degree' requirement imposes. See para 34 for a discussion of how a comparable question was decided under Maltese law.
[38] Law 10/2008, of 10 July 2008, which came into force on 1 January 2009. It inserts a number of new Titles into the Catalan Civil Code (*Codi civil de Catalunya*, or "CCC").
[39] Substitutions are in fact in a separate chapter from that dealing with *fideicomisos*. This division is not observed in the Civil Code, but reflects that in Justinian's *Institutes*, where substitutions occupy different (and non-adjacent) titles from those devoted to the *fideicommissum*.
[40] However, the Civil Code is not the only source of 'national' succession law. For example, Cámara notes (at, p 23) that the Supreme Court has been active and creative in filling gaps in the codified rules.
[41] Arts 424-1 to 424-10 CCC.
[42] Arts 424-11 to 424-15 CCC.
[43] These articles are divided into 6 sections: (i) general issues, (ii) interpretation, (iii) effects of fideicommissary substitutions whilst they are pending, (iv) disposition of the relevant property, (v) effects of fideicommissary substitutions at the point of creation, and (vi) *fideicomiso de residuo* and *sustitución preventiva de residuo*.
[44] See paras 14-15. However, there are differences: eg the fideicommissary substitution can be created implicitly (art 426-13 CCC) and there is express provision for *fideicomisos de residuo* (art 426-51 CCC).

scenario the beneficiaries will be set up so that their rights run successively to each other.

(ii) It is competent to nominate as ultimate beneficiary a person who is not alive at the testator's death, but in this case only one beneficiary can be specified.

(iii) Where the ultimate beneficiaries are family members (defined as the testator's issue, siblings, nephews or nieces) it is competent, in addition to the two options above, to nominate an unlimited number of successive beneficiaries provided that each is of the first or second generation. The first generation is to be understood as being the testator's children, nephews or nieces. It is thus lawful to pass property beneficially to grandchildren or great nephews or nieces.

In addition, if the *fiduciario*, ie the person to whom the property is entrusted, is a legal person the property must pass to the beneficiary within 30 years.

19. The effect of this, in relation to the ability to create perpetuities, is comparatively similar to what can be achieved under the Civil Code, as outlined above. However, although we do not have any statistics as to the frequency with which fiduciary substitutions are made in Catalonia, it is likely that they are used often enough to justify the very recent and equally comprehensive legislation.

France

20. By the 16th century 95% of the land in France was inalienable as a result of being subject to fideicommissary substitutions.[45] There had been attempts to limit this: for example, an Ordonnance of 1560 limited, for the future, perpetual settlements by way of successive life interests to two lives. A further Ordonnance of a few years later (1566) imposed a limit of four lives, with retrospective effect.[46] Nonetheless it is "[n]o wonder the French Revolution vigorously reacted against this system. The French Civil Code of 1804 instituted general prohibitions on fideicommissary substitutions and on testamentary dispositions and donations to persons not yet conceived."[47]

21. Despite the disinclination of the law to allow perpetuities there are methods in French law which may be used to achieve certain long-term settlements.[48] One is the usufruct, though this cannot be granted in favour of a legal person for longer than a life or lives in being at the time of its creation.[49] (If granted to a corporation, it is limited to 30 years.[50]) It is, therefore, incompetent to create successive usufructuary interests in favour of a party who is not conceived at the time when the succession opens. A second method by which a property owner may control future use is by imposing a restraint on alienation. The sanction for breach of the restraint determines whether or not this is lawful. If the sanction is that the property is forfeited, the restraint is lawful. If, on the other hand, the sanction is that the

[45] Dyer and van Loon Report, para 54.
[46] MS Amos, "Perpetuities in French Law", (1934) 16 J Comp Legis & Int Law, 3rd series, 18-24 at p 18.
[47] Dyer and van Loon Report, para 54.
[48] We do not deal with leases, some of which were regulated not by the Code but by revolutionary laws, eg that of 18-29 December 1790 limiting leasehold interests to 99 years or three lives.
[49] Arts 617 and 906 Civil Code ("CC").
[50] Art 619 CC.

purported alienation is void, the restriction will be unlawful unless it lasts for a relatively short period and is justified by reference to an *intérêt sérieux*.[51] The maximum allowable period appears to be the lifetime of a living person, but in certain cases even this period may be unacceptably long.

22. A third option is to use a substitution, though this is a relatively recent development. The Civil Code originally provided: "Substitutions are prohibited. Any disposition whereby the donee, the instituted heir, or the legatee is charged to preserve the *res* and to transmit it to a third party is void, even as regards the grant to the donee, the instituted heir, or the legatee."[52] Nowadays, substitutions under which a person is obliged to preserve and pass on an inheritance or a legacy are only permitted if "authorised by law".[53] This, combined with the rule that the recipient of the property must be alive at the relevant time,[54] means that, unless there is an exception allowed by law, property may only be passed to an identified living person and without a condition that the recipient hand it on to a third person.

23. One substitution which is permitted by law is the *liberalité graduelle*.[55] This places the donee or legatee (*le grevé*) under an obligation to pass the property, on death, to a specified third party (*le second gratifié*). It is unlawful to impose a further and similar obligation on the third party.[56] In effect, this means that X can pass property to Y, who must be alive (or at least conceived) at X's death, with an obligation on Y to pass the property, on his or her death, to Z. There is no requirement that Z must have been alive at the time of X's death.

Germany

24. The German Civil Code (Bürgerliches Gesetzbuch, or BGB) dates from 1896 and has been highly influential, to a degree matched only by the French Civil Code (1804), in many different jurisdictions whose own codes draw on it. The fifth and final book of the BGB deals with succession, and section III is dedicated to wills.

25. There are two main ways in which a testator may create a perpetuity. These are in addition to usufruct[57] and simple substitution (*Ersatzerbe*).[58] The first is by means of a fideicommissary substitution (*Nacherbfolge*) and the second is through a fiduciary legacy

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[51] Examples include a restriction on the alienation of property for so long as its income was to fund an annuity, or for so long as a right to repurchase the property subsisted (and, by art 1660 CC, this right cannot endure for longer than 5 years).
[52] Art 896 CC (in original form but now superseded).
[53] Art 896 CC, as substituted by law no 2006-728 of 23 June 2006 (in force from 1 January 2007).
[54] Art 906 CC: in order to receive an *inter vivos* or testamentary gift or legacy or inheritance one must have been conceived at the time of the donation or, as appropriate, testator's death.
[55] Arts 1048-1056 CC (as substituted by law no 2006-728 of 23 June 2006). Note that the language is not that of fideicommissary substitution. There are other permitted substitutions, eg those under which the first recipient is charged with passing on the residue of what he or she received (*liberalité résiduelle*: arts 1057-1061 CC), contracts of marriage and testamentary legacies to certain legal people. In addition, former arts 1048-1049 CC contained further exceptions: see Amos, *op cit*, p 21.
[56] There are further constraints, eg that the property (which can be of any type) must be identifiable at the time of the transfer from the donor or testator's patrimony and must still subsist at the donee or legatee's death. If the property consists of shares which the donee or legatee alienates in exchange of other shares the rule applies to the latter: art 1049, al 2 CC; if the property is heritable the charge must be registered: *ibid*, al 3.
[57] Arts 1030-1089 BGB.
[58] Art 2096 BGB. In addition, it is possible to make a contractual 'pact of inheritance' (*Erbvertrag*): arts 2279-2302 BGB. It creates future interests in favour of those named in the deed and applies to the entire estate. The document is treated as a will.

(*Nachvermächtnis*).[59] They both permit the testator to pass property to a person who is under an obligation to transmit it, either on death or on the occurrence of a specified event, to a third person (and it is possible that this person is in turn under a similar obligation). The main difference between them lies in the type of property to which they apply: the first applies to the whole estate and the second to specific items within the estate.

26. A fideicommissary substitution operates in respect of the whole estate (and so is sometimes called a *fideicommissum universale*).[60] It is, however, time-limited: "The appointment of a reversionary heir [ie an ultimate beneficiary] becomes inoperative after the lapse of thirty years since the accrual of the inheritance, unless an occasion for reversionary succession has arisen before then."[61] By way of illustration, suppose A provides, by will, that her estate is to go to B and then, on the occurrence of event X, to C. (This is the simplest situation: in practice, multiple Bs and Cs can be appointed.) The general rule just outlined is that, unless C takes within 30 years of A's death, the appointment of C as A's ultimate beneficiary becomes inoperative. The two exceptions are:[62]

(i) where event X is to occur either with reference to B (eg on B's death) and B was alive at A's death, or the event is to occur with reference to C (eg when C marries) and C was alive at A's death; and

(ii) if a sibling of B or C has been appointed as an ultimate beneficiary (along with C).

In addition, where event X is to occur with reference to either person B or C and that person is a legal person, the 30 year period applies without exception.[63]

27. Between A's death and the occurrence of event X, B enjoys free and unrestricted ownership of the entire estate. With some exceptions, B may dispose of any part of the estate,[64] though subrogation applies and so the payment or other benefit received in consequence of the disposal becomes part of the estate.[65] As a result B may not gift any part of the estate and any attempt to do so will be "ineffective in so far as it would frustrate or impair the right of the reversionary heir".[66] One exception to B's right of disposal concerns land. As Rheinstein explained in the mid-1930s: "On principle, [B] should be allowed to sell freely any piece of land belonging to the estate. However, land is regarded as such an important asset that modern German law provides for an exception. Any sale of land made

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[59] A third option, the *fideicommissum familiarum*, does not fall within the scope of the BGB but was retained as part of the law of each of the *Länder* until the revolution of 1919: see M Rheinstein, "Some fundamental differences in real property ideas of the 'Civil law' and the common law systems", 3 U Chicago L Rev (1935-1936) 624-635 at p 631. Rheinstein describes it as an "aristocratic institution" which suffered numerous attacks on political and economic grounds before being abolished.
[60] Arts 2100-2146 BGB provide for fideicommissary substitutions.
[61] Art 2109(1) BGB. The translations in this section are taken from the translation of the BGB by IS Forrester, SL Goren and H-M Ilgen (North-Holland Publishing Company, 1975).
[62] Art 2109(1) BGB, paras 1 and 2.
[63] Art 2109(2) BGB.
[64] Art 2112 BGB.
[65] Art 2111 BGB.
[66] Art 2113 BGB.

by [B] out of the estate without the consent of [C] is invalid in so far as it impairs the rights of the latter."[67]

28. If, instead of wanting to pass the whole estate from B to C, a testator wants to pass only a part of the estate in this way, this can be achieved by means of a fiduciary legacy. Article 2191(1) reads:

> "Where a testator has bequeathed an already bequeathed object to a third party on the arrival of a particular time or the occurrence of a certain event after the devolution of the legacy, the original legatee is deemed to have been charged with such legacy."

This therefore appears to operate as a double legacy on the part of the testator. As with a fiduciary substitution, there are similar time limits which apply to this type of legacy: the general rule is that the third party must take within 30 years of the testator's death, subject to exceptions identical to those outlined in paragraph 26 above.[68]

Austria

29. Austria's Civil Code (Allgemeines bürgerliches Gesetzbuch, or ABGB) deals, in its second part, with the law of property. The tenth chapter of its first subdivision (on the laws concerning property rights) provides for substitutions, including fideicommissary substitutions.[69] Certain provisions have been repealed. As explained in an annotated translation of the ABGB:

> "The ancient entailments of foeffment and fideicommiss, medieval institutions which preserved the estate for generations, have been abolished. One small remainder, as indicated by its name, is the 'fideicommissary substitution' which may extend over more than one generation but, in contrast to the abolished fideicommiss, is limited in duration."[70]

30. The current law permits the testator to "require the heir to surrender the inheritance which passed to him upon the death of the testator or in other definite cases to a second designated heir".[71] This is called a *fideikommissarische Substitution*. It may arise either expressly or by implication:

> "If the testator has forbidden the heir to make a will in regard to the succession, a fideicommissary substitution is established thereby and the heir must preserve this estate for his intestate heirs. A prohibition upon the alienation of the succession however, does not eliminate the right to dispose thereof by a last will."[72]

31. There are restrictions on the fideicommissary substitution which are aimed at limiting the time for which it may last. Successive heirs may be named, without limit, provided that

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[67] Rheinstein, *op cit*, p 627. See art 2113(1) BGB, which also applies the same restriction to dispositions of registered ships and ships under construction. In addition, special provision is made for cases where a forest forms part of the inheritance: art 2123 BGB.
[68] Arts 2162 and 2163 BGB.
[69] Arts 604-646, ABGB. Arts 618-645 have been repealed.
[70] PL Baeck, *The General Civil Code of Austria* (2nd ed, 1972), p 115.
[71] Art 608 ABGB. This translation, along with the others in the section on Austrian law, is from Baeck, *op cit*.
[72] Art 610 ABGB.

they are all "contemporaries of the testator".[73] If, however, they include an ultimate beneficiary (*Nacherbe*) who is unborn at the time of the execution of the testament then the fideicommissary substitution is only valid in either the first or second degree.[74] Where the legacy is of immoveable property the substitution is only valid in the first degree, but where it is of sums of money and other moveable property it is valid to the second degree.

32. Three further points may be noted: first, the fiduciary to whom the property is left by the testator "obtains a restricted right of ownership, with the rights and duties of an usufructary, until the fideicommissary substitution devolves upon the reversionary heir";[75] secondly, there is a presumption, in cases of doubt, that "the liberty of the heir to dispose of the property is limited as little as possible";[76] and lastly the rules outlined above do not apply to foundations (*die Vorschriften*) dedicated to the promotion of the public welfare.[77]

Malta

33. Until the publication in 1784 of the *Diritto Municiaple di Malta*, also known as the Code of Rohan, it was lawful to establish perpetual settlements by way of *primogenitura* and *fideicommissa*. An example was considered in the late 1940s by the Privy Council, on appeal from the Maltese Court of Appeal, in *Cassar Desain v Cassar Desain Viani*.[78]

34. The Code of Rohan introduced a rule limiting such settlements, which amounted to entails, to four degrees (*gradi*). The relevant provisions are:

> "Majorats, *primogeniturae* and *fideicommissa* shall hold good up to the fourth degree inclusively, after which every tie and burden shall cease, and the property shall pass unburdened to the heir of the fourth and last substitute.
>
> The four degrees shall be counted *in capita* and not *in stirpes* without including therein the instituted heir.
>
> It is not forbidden to found *fideicommissa* so that they shall last less than four degrees, likewise the last possessor shall be allowed to renew them for a further period of four degrees or less."[79]

The issue of whether a "degree" was to be interpreted as a generation, or whether the limitation was to four transmissions of the property – which might involve fewer generations, for example if successive siblings inherited, or more, for example if a grandchild took from a grandparent – fell to be decided in *Strickland v Strickland*.[80] The Privy Council held that, in that particular case, the limitation was to four generations, even though one of the generations had been bypassed. The judges were asked to consider a wide variety of authorities including Justinian's 159th Novel, as mentioned in paragraph 4 above.

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[73] Art 611 ABGB.
[74] Art 612 ABGB. "In determining the degrees, only a reversionary heir who has obtained the possession of the inheritance is taken into consideration": *ibid*.
[75] Art 613 ABGB.
[76] Art 614 ABGB.
[77] Art 646 ABGB.
[78] [1948] AC 18.
[79] Quoted in *Strickland v Strickland* [1908] AC 551 at 566.
[80] *Ibid*.

35. Modern Maltese law relating to perpetuities is governed by the Civil Code, which was enacted in Napoleonic times, and most recently by the Trusts and Trustees Act of 2004.[81] The former makes perpetuities all but impossible to create and this was the position until the late 20th century. The 2004 Act, on the other hand, allows assets to be placed in trust for up to 100 years. Its effect is akin to the creation of a perpetuity rule in a jurisdiction where, after centuries of relative freedom, perpetuities had all but been prohibited.

36. In a little more detail, the Civil Code permits simple substitution (*substitutio vulgaris*) to deal with the situation in which an heir or legatee is unable or unwilling to take;[82] however, a single provision of the Code prohibits entails and makes it incompetent to set up a fideicommissary substitution:

> "757. (1) Entails are prohibited:
>
> Provided that entails created before the date of the commencement of Ordinance No. IV of 1864, hereby repealed, shall continue to be regulated by the provisions of the law in force before that date including the provisions contained in Chapter II of Book IV of the Municipal Code of Malta, commonly called 'Code De Rohan', saving the provisions of Title I of Part II of Book Second of the Code of Organization and Civil Procedure.
>
> (2) Any provision by which the heir or legatee is required to preserve and return the inheritance or legacy to a third person shall be considered as if it had not been written."

37. One form of limited perpetuity which is permitted involves settlements between spouses: it is lawful for one spouse to leave estate to the other and to specify a beneficiary who will take the residue of the relevant property on the death of the surviving spouse.[83] The surviving spouse may not dispose of the property by donation or by will. This rule is an exception to the general prohibition on making inheritances or legacies inalienable.[84]

38. In addition to the restriction in article 757(2), quoted above, successive usufructs are expressly prohibited.[85] This does not apply, however, "to dispositions in favour of persons called to benefit under a trust or a foundation".[86] The effect is to create a mechanism by which successive interests can be created in favour of future generations.

39. The permitted duration of a trust or a foundation is 100 years.[87] There appears to be no limit within that period during which the vesting of property or its income must take place. As a result settlements may be created which benefit future generations, and the precise way in which this takes place will be a matter for the truster or founder. It would, for

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[81] Chapter 331 (accessible at http://docs.justice.gov.mt/lom/legislation/english/leg/vol_7/chapt331.pdf; last accessed on 4 December 2009). This Act amends earlier trust law and also the Civil Code ("CC"), by adding arts 958A-958J, "Of trusts and their effects".

[82] Substitutions and entail are provided for in Book Second, Part II, Title III, Subtitle I, para VI (arts 751-761 CC). *Substitutio vulgaris* is provided for in art 751 CC.

[83] Art 758(3) CC. Paras (5) and (6) of that article are also relevant.

[84] Art 758(1) CC. There is a further exception to the rule, in that usufructs and pensions may be made inalienable: art 736 CC.

[85] Art 761(1) CC.

[86] Art 761(3) CC.

[87] Trusts and Trustees Act, s 12(1) (trusts); art 29(7) of Sch 2 to the Civil Code (foundations). In certain cases (eg charitable trusts, purpose foundations or unit trusts) the duration is unlimited.

instance, be possible to settle property in such a way that income is payable to a particular person or succession of people, in the manner of successive liferents, with the capital being destined for a third party. Alternatively capital and income may be retained for up to 100 years before being paid out.

40. By way of summary, Maltese law has provided for the following:

(i) up to 1784: complete freedom to create perpetuities;[88]

(ii) 1784-1797: perpetuities limited to "four degrees";[89]

(iii) 1797-2004: almost complete prohibition of perpetuities;

(iv) 2004 onwards: perpetuities may be created by way of trust for up to 100 years.

Greece

41. Greek succession law is regulated by the fifth book of the Civil Code.[90] It permits 'common substitution'[91] and also, in a separate run of articles, fideicommissary substitution (*katapísteuma*).[92] The latter are subject to certain conditions:

(i) the testator "is allowed to set up only one *fideicommissum* but there is no time restriction for the estate to be transferred to the post-heir;"[93] and

(ii) the disposition is null "unless it is for the public benefit or in favour of close relatives of the testator".[94]

42. A fideicommissary substitution need not be express but can arise by implication. This applies in the following circumstances:[95]

(i) the testator established as heir a natural person who had not been conceived, or a legal person which had not been incorporated, at the time of his or her death;[96] or

(ii) the heir is designated by reference to a condition or an event which had not been fulfilled, or taken place, at the time of the testator's death.[97] For example, the testator might stipulate that the first of his three nephews to marry will become his heir but at the time of his death none had married.

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[88] Eg *Cassar Desain v Cassar Desain Viani* [1948] AC 18.
[89] Eg *Strickland v Strickland* [1908] AC 551.
[90] The Civil Code ("CC") dates from 1946. Certain basic concepts of modern Greek succession law derive from Athenian inheritance law and the French, German and Swiss Civil Codes have also been influential. For a brief summary see D Hayton (ed), *European Succession Laws* (2nd ed, 2002), para 10.2.
[91] Arts 1809-1812 CC.
[92] Arts 1923-1941 CC.
[93] Hayton, *op cit*, para 10.85.
[94] KD Kerameus and PJ Kozyris (eds), *Introduction to Greek Law* (2nd ed, 1993), p 170.
[95] The examples are from Hayton, *op cit*, para 10.86.
[96] Art 1924 CC.
[97] Art 1925 CC.

South Africa

43. South African law has long recognised the trust. It has never, however, recognised a rule against perpetuities or one restricting the accumulation of income. In the first edition of his book, *South African Law of Trusts*, Professor Honoré expressed his unease with this:

> "The claim of a founder to control the management of property by future generations of his descendants or relatives is surely neither logically deducible from the nature of ownership nor justifiable by an appeal to the supposed economic incentive which the prospect of post-mortem autocracy provides. … When Hitler claimed to have founded a Reich to last a thousand years he was regarded as unbalanced, but when a South African testator purports to create a settlement to last forever the law takes him seriously.
>
> It seems to me therefore that the basic principle on which the permissible duration of trusts should be based is that no restriction on the disposition of capital should be valid beyond the lifetime of the beneficiaries born at the time when the trust instrument takes effect, ie during the testator's lifetime or before he executes the trust instrument *inter vivos*."[98]

44. This means that there is *prima facie* nothing to prevent a trust operating for long periods of time without the beneficial interest in the capital of the fund vesting, nor to prevent lengthy accumulation. As an example, when a testator directed that the income from his estate be accumulated for 50 years before the proceeds were paid over to a charity, the court held that it had no power to authorise payment at an earlier stage (which would have been to the charity's benefit).[99] This illustrates the fact that the court has limited power to vary trusts:

> "The basic principle, to which there are significant exceptions, is that just as the court has no general power to alter wills or contracts so it has no general power at common law to alter trusts set up by will or contract. This is true apart from statute even if the proposed variation would clearly be to the advantage of all the beneficiaries under a trust created by the will or contract. The reason given is the public interest in giving effect to wills and contracts and respecting the expressed intention of the parties to them."[100]

As will be seen, there are now two statutory powers which permit the court to vary a trust purpose, each of which allows variation on, amongst other grounds, that of the public interest. These are in Acts of 1965 and 1988.

45. The Immovable Property (Removal or Modification of Restrictions) Act 1965 replaced an earlier Act of 1916,[101] whose utility was limited as its powers were barely more extensive

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[98] AM Honoré, *South African Law of Trusts* (1st ed, 1966), p 474. This view is reiterated in the latest edition (5th ed, 2002) at p 601. (The 5th edition is the first to appear without the leading participation of Professor Honoré.)

[99] *Ex parte Jewish Colonial Trust: Re Estate Nathan* 1967 (4) SA 397 (N). Interestingly, this case is also said to demonstrate that the court has no power to strike down trusts which are unreasonable from the start. "As regards the initial scheme the testator or donor may apparently be as unreasonable as he or she pleases. Certainly if any disposition is to be described as 'utterly unreasonable', the provisions in the will of Solomon Nathan [ ] fit": Honoré, p 528. This is in contrast to the Scots common law rule: see paras 2.59-2.76.

[100] See Honoré, p 515 (with footnotes omitted).

[101] Removal of Restrictions on Immovable Property Act 1916.

than the common law ones. One of the main innovations of the 1965 Act was the court's power to act not only if this was in the interests of the beneficiaries but also if there were public interest considerations which justified action.[102] Two further points should be noted about this statute: first, it applies to trusts as well as to fideicommissa (which we discuss later),[103] and secondly, although the Act is limited to immoveable property, this limitation is not as narrow as it may at first appear: for instance, the statute applies where a person receives a benefit from a fund of which immoveable property forms a part.[104]

46. Section 2(1) contains the discretionary power of the court:

> "2. Application to the court for the removal of modification of restrictions on immovable property
>
> (1) If any beneficiary interested in immovable property which is subject to any restriction imposed by will or other instrument before or after the commencement of this Act, desires to have such restrictions removed or modified on the ground that such removal or modification will be to the advantage of the persons, born or unborn, certain or uncertain, who are or will be entitled to such property or the income thereof under such will or instrument, such beneficiary may apply to the court for the removal or modification of such restriction."

Section 3(1) sets out the four grounds on which a court may remove or modify a restriction:

> "3. Powers of court as to removal or modification of restrictions on immovable property and as to disposal of proceeds of such property
>
> (1) If the court to which application is made under this Act, is satisfied -
>
> > (a) that the shares which any of the beneficiaries in being at the time of the making of such application individually hold in the immovable property concerned are so small that they cannot be beneficially occupied or enjoyed; or
> >
> > (b) that no beneficial use can be made of the immovable property concerned by the beneficiaries in being owing to there being a prohibition in the will or other instrument against the sub-division of the property; or
> >
> > (c) that since the taking effect of the will or other instrument imposing any restriction upon the immovable property concerned circumstances materially affecting the value of the property have arisen which in the opinion of the court were not contemplated or foreseen by the person who made and executed the will or instrument; or
> >
> > (d) that it will be in the public interest or in the interests of the persons referred to in sub-section (1) of section two, to do so,

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[102] The 'public interest' criterion has generated some case law. See, eg, *Ex Parte Wallace* 1970 (1) SA 103 (NC) where a fiduciary who was not inclined to work a farm applied to have a restriction on the sale of the farm removed. The court lifted the restriction, on public interest grounds, given that the farm should be sold to someone who would make the land productive. See Honoré, p 521.

[103] See paras 52-54.

[104] See also para 51.

it may remove or modify any restriction such as is referred to in sub-section (1) of section two and order the property to be sold in whole or in part or may make such further or other order as to it may seem just."

47. Section 3(2) permits the court to make an order regarding the proceeds of any sale of property which results from the lifting of restrictions. Without prejudice to any other order which the court thinks fit, it can order that the money be invested in securities or immovable property which will then become subject to the same conditions which applied to the property which was the subject of the court application, or alternatively that it be distributed to the beneficiaries. In this way the court may, in effect, determine whether the original settlement should continued in a form close to the one in which it was first set up (rather in the manner of a cy-près scheme) or whether it should be terminated.

48. The other statutory power of the court to vary a trust purpose is in the Trust Property Control Act 1988. This owes its origins to a Report of the South African Law Commission on the law of trusts, published in 1987.[105] The Commission found, on consultation, that the ability of trusters to set up long-term or perpetual trusts, which was noted in paragraph 44 above, did "not appear to evoke much criticism".[106] It considered, however, that in the exceptional situation where such a trust either contravened the public interest or caused prejudice to the interests of beneficiaries a power to vary trust provisions may be useful:

> "A power for the court to vary trust provisions will not solve all problems but it will give relief in some cases. The longer a trust lasts the greater the possibility that circumstances will arise which were not contemplated by the founder and will therefore give the court power to vary the trust if it is in conflict with the public interest or prejudices the interests of beneficiaries. Provisions which limit the duration of trusts will sometimes solve problems but will also make the law of trusts more complicated and will impair the flexibility of the trust institution."[107]

49. This recommendation has been enacted in section 13 of the Trust Property Control Act 1988 (which applies to both public and private trusts):

> "13. Power of court to vary trust provisions
>
> If a trust instrument contains any provision which brings about consequences which in the opinion of the court the founder did not contemplate or foresee and which-
>
> a) hampers the achievement of the objects of the founder; or
>
> b) prejudices the interests of beneficiaries; or
>
> c) is in conflict with the public interest,
>
> the court may, on application of the trustee or any person who in the opinion of the court has a sufficient interest in the trust property, delete or vary any such provision or make in respect thereof any order which such court deems just, including an order whereby particular trust property is substituted for particular other property, or an order terminating the trust."

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[105] South African Law Commission, *Report on the Review of the Law of Trusts* (1987; Project 9).
[106] *Ibid* at para 23.11.
[107] *Ibid* at para 23.19 (with footnote omitted).

50. One example of the application of this provision is in *Ex parte President of the Conference of the Methodist Church of Southern Africa NO: In re William Marsh Will Trust*.[108] A trustee of a trust established for the purpose of "founding and maintaining a home for destitute white children" applied to have "white" removed from the trust deed. This was in order that the home might accommodate children of other ethnicities, of which there was a growing number (in comparison with a decline in the numbers of destitute white children). The court considered that, under section 13, it had to be satisfied that the testator neither contemplated nor foresaw a lack of persons eligible to benefit from his charitable act, and also that the provision was in conflict with the public interest. The court considered that both elements were satisfied in this case and accordingly it varied the trust.

51. Comparing this provision with that in the 1965 Act (which, as we have seen, is confined to immoveable property) Honoré notes that the former is, in some respects, narrower in scope, despite the fact that the latter is limited to certain types of property:

> "The court's jurisdiction [under the 1965 Act], though confined to immovables, is within this limited area greater than under the 1988 Act in that it is not essential that circumstances not contemplated or foreseen by the person who imposed the restriction should have arisen."[109]

Limitation of successive interests

52. In addition to the trust South African law recognises the fideicommissum,[110] which can also be used to create perpetuities. At common law it is competent to set up a perpetual fideicommissum.[111] Courts will only uphold such a settlement, however, if the language shows an unambiguous intention to create a perpetuity. In cases of doubt the settlement will be construed as being valid only to the fourth generation.[112]

53. This rule is now subject to statutory limitations in the Immovable Property (Removal or Modification of Restrictions) Act 1965 which limit the duration of settlements made by way of trust or fideicommissum.[113] These limits are stricter than the common law ones, even if the 'four generation' rule mentioned in the paragraph above applies.

54. Fideicommissa are dealt with in sections 6 and 7 of the 1965 Act which provide, respectively, for fideicommissa created after or before the commencement of the Act. The basic rule in both cases is that fideicommissa "in respect of immovable property" are to be limited, at most, to two successive fideicommissaries. When property vests in the second such person it vests free of the fideicommissum.

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[108] 1993 (2) SA 697.
[109] *Ibid* at p 521. In addition, the 1965 Act applies to restrictions on immoveable property in a trust or a fideicommissum (which is explained in the footnote below), whereas the 1988 Act applies only to trusts.
[110] "A testamentary fideicommissum is a disposition of property by will to a beneficiary (known as the 'fiduciary') subject to a provision requiring the fiduciary, either absolutely or upon the fulfilment of a condition, to pass on the property, either wholly or in part, to another beneficiary (known as the 'fideicommissary'). A fideicommissary may also be created by act *inter vivos*, for example by gift, contract or antenuptial contract": MM Corbett, G Hofmeyr and E Kahn, *The Law of Succession in South Africa* (2nd ed, 2001), p 260.
[111] See Corbett et al, *op cit*, pp 289-294. An example of a perpetual settlement is *Ex parte Barnard* 1929 TPD 276 which prohibited alienation for 99 generations!
[112] Corbett et al notes that the "rule dates from the time of Justinian": *op cit*, p 291, fn 282. See para 4 above for Justinian's Novel.
[113] See Honoré, pp 549-550 for a discussion of the effects of this statute on trusts, and see Corbett et al, *op cit*, pp 292-294 for the effect on fideicommissa.

55. In relation to trusts section 8 limits the duration for which alienation of immovable property may be restricted. It provides:

> "8. Limit on duration of restrictions on alienation of immovable property imposed by will or other instrument otherwise than by way of a fideicommissum
>
> (1) No restriction against the alienation of any immovable property imposed before or after the commencement of this Act, otherwise than by way of a fideicommissum,[114] by any will or other instrument which provides for benefits for successive beneficiaries named, described or designated therein, shall be effectual to prohibit or restrict the alienation of such immovable property after a right to enjoy any benefit in connection with or derived from such immovable property or any fund of which such immovable property forms a part, has in terms of the will or other instrument vested in the third successive beneficiary.
>
> (2) After any restriction against alienation has ceased to be effectual in respect of any immovable property in terms of sub-section (1), such immovable property shall thereafter in all other respects continue to be, or if it is sold, the proceeds or any investment of the proceeds thereof, shall thereafter in all other respects mutatis mutandis be, subject to the terms, conditions and trusts contained in the will or other instrument relating to such immovable property."

56. The effect of this is that restrictions against alienation of immovable property are only valid until the third successive beneficiary's right opens.[115] He or she is free to alienate the property. However, the proceeds of sale, or any investment of the proceeds, become subject, by real subrogation, to the same conditions and trusts as applied to the property which was formerly inalienable.

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[114] Section 1 defines fideicommissum as not including a trust.

[115] Section 8 does not apply to immovable property held on trust for public or charitable purposes: *Van Wyk v Mogoba NO* 1993 (4) SA 144 (C) 149D.

Appendix C

Philosophical analysis of the basis for a rule restricting accumulation

1. Soon after the Law Commission's Report on the Rules against Perpetuities and Excessive Accumulations was published in 1998, Professor Gallanis wrote an analysis of it in an article entitled "The Rule against Perpetuities and the Law Commission's flawed philosophy".[1] A number of the arguments which he adduces can be applied equally well to the Scots law rule restricting accumulation and are relevant to the present Paper. What follows is a summary of the main arguments made by Professor Gallanis together with a discussion of some relevant issues to which they give rise.

2. Gallanis begins by recalling that the Law Commission's recommendations for reform of the rule against perpetuities aim at balancing the freedom of the current generation to deal with their property as they wish with the freedom of future generations to control that property. This he terms a normative argument – in other words, an argument about how things ought to be, as opposed to how they actually are – and he notes that the recommended balance is needed for two types of reason: economic reasons and reasons of justice.

3. The Law Commission found that an economic argument was very hard to make, as relevant empirical evidence was elusive.[2] Despite this, there was another reason ("the desirability of placing some restrictions on how far settlors could tie up property for the future") which was, on its own, persuasive.[3]

4. Gallanis' article seeks to explore the philosophical basis on which this reasoning rests. He notes the influence of Professor Simes' views, as expressed in his article "The Policy Against Perpetuities",[4] on the Commission's thinking; indeed, the Commission makes approving reference to this work (as we do too).[5] Simes advocated the view that the rule against perpetuities was a fair way of restraining 'dead hand control': it "strikes a fair balance between the desires of members of the present generation, and similar desires of succeeding generations, to do what they wish with the property which they enjoy".[6] This can be characterised as a form of 'intergenerational justice'. Gallanis seeks to understand what theory of justice lies behind this conclusion. In his words, "it is high time to revisit the argument that the Rule's balancing of interests is just".[7]

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[1] (2000) CLJ 284.
[2] See para 3.65 above.
[3] See Law Commission Report on *Perpetuities and Excessive Accumulations*, para 2.32; and Gallanis, p 285.
[4] (1955) 103 U Pa L R 707.
[5] See paras 3.69 and 5.16.
[6] Simes, p 723.
[7] Gallanis, p 286.

5. The starting point is to recognise that the recommended reform of the rules restricting perpetuities and accumulation constitutes a restriction on dead hand control. The debate over whether there should be any such restriction can been seen as a contest between the traditional philosophical schools of liberalism and egalitarianism. Or, more concretely, between those who would favour freedom of disposal of property, including the power to impose restraints on succeeding generations (the liberals), and those for whom the goal is to allow each generation to have the same degree of control over their property as their ancestors did, thereby not permitting the imposition of restrictions on the next generation (the egalitarians).

6. This contest would hardly arise if, as a matter of fact, the population were broadly in favour of just one of these two competing positions. If we were all liberals, it would be unlikely that any rule restricting accumulation or successive liferents would find support as a part of Scots law; and if we were all egalitarians then the accumulations rule would perhaps be rather stricter than it currently is and we might also have made changes to the rule restricting successive liferents. That, however, is not the case. Instead, the population is made up of a mixture of liberals and egalitarians,[8] which means that a policy which is purely liberal or purely egalitarian is very unlikely to command popular support. It is possible, though, to devise an intermediate position which might be attractive.

7. Gallanis characterises the intermediate position which is advocated by Simes, and which is also, at its heart, exemplified by the Law Commission's recommendations, as utilitarianism.[9] Its claim to embody justice (or fairness) lies in its aim of providing the greatest overall satisfaction of the desires of the living *and* of future generations in relation to the control of property.

8. Gallanis attacks this position from two angles. First, he says that it is not clear, as a matter of fact, that the recommended dead hand restraints will indeed create a world in which there is maximum overall satisfaction both of the living and of the yet-to-be-born. "Until some supporting data are introduced, the descriptive claim in favour of the Rule rests solely on the *ipse dixit* of its advocates."[10] Secondly, he attacks the contention that, by aiming at a utilitarian solution, justice will be achieved. These criticisms are ones which can be (and have been) levelled at utilitarianism itself.[11]

9. Finding that a utilitarian approach is unsatisfactory (and we return to this topic below), Gallanis proceeds to investigate another possible philosophical justification for the Law Commission's recommended reforms to the perpetuities rule.[12] It centres on the type of

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[8] It is likely that part of the population is broadly supportive of the liberal position and part broadly supportive of egalitarianism (and, of course, that some people support neither). However, it is also plausible that a single individual may support each position at different times: we may tend, being motivated by personal interest, to be more liberal when it is a question of whether *we ourselves* may impose property restrictions on future generation, but when we are to be subject to such restrictions we may tend to be more egalitarian. To that extent, the division between egalitarianism and liberalism is overly simplistic.

[9] Gallanis, p 287.

[10] Gallanis, p 288.

[11] Eg Gallanis uses a variation of Bernard Williams' example of Jim and the Indians: if Jim comes across a group of 20 Indians who are about to be killed in order to deter their compatriots from further insurrection (even though none of the 20 is guilty of insurrection) and is offered a way of saving all 20 innocent men but only by killing himself, what advice would utilitarianism offer to Jim in his hour of need? Naturally, the example is intended to suggest that, if Jim is advised to take his own life, thereby maximising the overall satisfaction of all participants, then utilitarianism is condemned. In particular, in its quest for maximum global satisfaction it fails to have any concern for individual satisfaction levels, however extreme the dissatisfaction may be.

[12] Gallanis, pp 290-292.

rule which those operating behind the 'Rawlsian veil' would support. In brief, this approach asks what rule would be supported by people who had to choose between a number of options without knowledge of how any given one would affect their particular situation. Instead, their decision would have to be based on general considerations about the likely effect of each option on the population as a whole. Gallanis concludes, however, that this approach is unlikely to yield a version of the perpetuity rule which matches that recommended by the Commission, but he thinks that if economic data were available then this might possibly allow the Rawlsian approach to work. The title of the last substantive part of the article, "The Economic Arguments hold the Key", leaves no doubt that, for Gallanis, support for whatever form of the perpetuity rule is adopted is most likely to be found in economic data. Other, abstract sources of support are ruled out: "The Rule cannot be supported by abstract concepts, such as liberty, equality, or property rights, because the Rule embodies a compromise among these abstractions."[13]

10. How does this analysis of a possible justification for dead hand control help us? It does so in a number of ways.

11. First, we agree with Professor Gallanis' conclusion that a utilitarian approach will not do. There are three reasons, which mirror (but with examples specifically relevant to accumulations of income) those used by Gallanis. The first reason is a general one, concerning the difficulties inherent in trying to measure satisfaction. How can we begin to quantify this, especially as it involves calculating the satisfaction levels of those not yet born? If we assume, though, for present purposes that adequate measurements can be obtained, our second objection is that the goal of maximising overall satisfaction ignores, at great cost, the way in which that satisfaction is distributed. To take an example, suppose a particular policy gives a satisfaction level of about 4 out of 5 (ie 80%) for the whole population (of, say, 10). However, suppose that an adjustment to the policy leads to 100% satisfaction for 9 of the 10 people but the tenth person's satisfaction is reduced to zero. The *overall* satisfaction of the adjusted policy is greater than that of the version which satisfies everyone at 80%.[14] But, because the adjusted policy leaves most people only slightly better off but one person very much worse off, it is hard to see how it is fairer or more just. So, the way in which satisfaction is distributed under a particular rule should, in our view, be a factor in deciding whether the rule is a good one.

12. The third reason for rejecting a pure utilitarian basis for a rule restricting accumulation is that it promotes overall satisfaction at the expense of ignoring other goals which should be met by a rule which is fair and just. If, for example, the rule were to say that the treasury would, each year, match all accumulations by paying an equivalent amount to the trustees this would lead to sky-high satisfaction amongst those who chose, and could afford, to set up accumulation trusts. Yet the satisfaction levels of the rest of the population might not be affected, as the increase in treasury expenditure may be almost negligible; indeed these people might even be marginally more satisfied by the rule, as they might hold out hope of being able to take advantage of it themselves one day. So, overall satisfaction under this version of the rule could very well be higher than if the rule did not provide for an annual bonus. On a purely utilitarian approach it would therefore be preferable. Yet such a

[13] Gallanis, p 292.
[14] This is because, marking satisfaction out of 5, the first policy scores an aggregate of 40 out of a possible 50, whereas the second scores 45 out of 50.

rule would be hard to justify *simply* on the basis that it increased overall satisfaction. There would need to be some other basis for justifying the treasury's benevolence.

13. Secondly, we find Gallanis' conclusion that economic data hold the key to be instructive but not in an immediately obvious way. We have already made clear that we are not in a position, almost a decade after Gallanis wrote his article, to offer solid economic data which might support any proposal we may make: we have discussed this in our Paper.[15] In that particular respect, therefore, we are no better off. Notwithstanding this, we consider that locating the key to support for a rule on dead hand control in an appeal for economic data from real economies in the real world (an appeal which has been unfruitful so far) has implicit within it a more general point. Suitable economic data, even if they become available, are subject to change. They are not constant. This is in contrast to concepts such as liberty and equality, which have been found to be an unsuitable basis for determining what a rule on dead hand control should contain. This insight is, in our view, a useful one. It lends support for the proposition that a desirable rule is one which produces satisfactory results *in a particular society at a particular time*. Economic conditions are subject to change as much as other aspects of society. A rule which works now will not necessarily work at some point in the future (nor may it work now across different countries), nor can a rule which may have worked in 1800 be assumed to work nowadays.[16]

[15] See paras 3.60-3.61 and 3.65.
[16] This does not, of course, determine in any way what a suitable rule will be in any given circumstances. That issue is the subject of our Paper.

Appendix D

Relevant Legislation

This Appendix contains the main legislative provisions referred to in Part 2. It follows the layout of that Part and accordingly it is divided into three sections which deal, respectively, with: accumulation of income, successive liferents, and the legislation relevant to the rules in *Frog's Creditors* and *Newlands*. The provisions are listed in chronological order within each of these parts. Where a provision has been quoted in the main body of the Paper we give the relevant paragraph number.

A: Accumulations of Income

(i) Accumulations Act 1800 (39 & 40 Geo. III c. 98),'The Thellusson Act'[1]

An Act to restrain all Trusts and Directions in Deeds or Wills whereby the Profits or Produce of Real or Personal Estate shall be accumulated, and the beneficial enjoyment thereof postponed, beyond the time therein limited.

WHEREAS it is expedient that all dispositions of real or personal estates, whereby the profits and produce thereof are directed to be accumulated and the beneficial enjoyment thereof is postponed, should be made subject to the restrictions hereinafter contained: May it therefore please your Majesty that it may be enacted, and be it enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in parliament assembled, and by the authority of the same, that no person or persons shall after the passing of this Act, by any deed or deeds, surrender or surrenders, will, codicil or otherwise howsoever, settle or dispose or any real or personal property so and in such manner that the rents, issues, profits or produce thereof shall be wholly or partially accumulated for any longer term than the life or lives of any such grantor or grantors, settler or settlers, or the term of twenty-one years from the death of any such grantor, settler, devisor or testator, or during the minority or respective minorities of any person or persons who shall be living or in ventre sa mere at the time of the death of such grantor, devisor or testator, or during the minority or respective minorities only of any person or persons who under the uses or trusts of the deed, surrender, will or other assurances directing such accumulations would for the time being, if of full age, be entitled unto the rents, issues and profits, or the interest, dividends or annual produce so directed to be accumulated, and in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits and produce of such property so directed to be accumulated shall, so long as the same shall be directed to be accumulated contrary to the provisions of this Act, go to and be received by such person or persons as would have been entitled thereto, if such accumulation had not been directed.

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[1] This Act was repealed, for Scotland, by the Trusts (Scotland) Act 1961, s 5(1).

2 Provided always, and be it enacted, that nothing in this Act contained shall extend to any provision for payment of debts of any grantor, settler or devisor, or other person or persons, or to any provision for raising portions for any child or children of any grantor, settler or devisor, or any child or children of any person taking any interest under any such conveyance, settlement or devise, or to any direction touching the produce of timber or wood upon any lands or tenements, but that all such provisions and directions shall and may be made and given as if this Act had not passed.

3 Provided also, and be it enacted, that nothing in the Act contained shall extend to any disposition respecting heritable property within that part of Great Britain called Scotland.

4 Provided also, and be it enacted, that the restrictions in this Act contained shall take effect and be in force with respect to wills and testaments made and executed before the passing of this Act in such cases only where the devisor or testator shall be living and of sound and disposing mind after the expiration of twelve calendar months from the passing of this Act.

(ii) Accumulations Act 1892 (55 & 56 Vict c. 58), section 1

1 No person shall, after the passing of this Act, settle or dispose of any property in such manner that the rents, issues, profits, or income thereof shall be wholly or partially accumulated for the purchase of land only, for any longer period than during the minority or respective minorities of any person or persons who under the uses or trusts of the instrument directing such accumulation would for the time being, if of full age, be entitled to receive the rents, issues, profits, or income so directed to be accumulated.

(iii) Trusts (Scotland) Act 1961 (c. 57), section 5: see paragraph 2.26

(iv) Law Reform (Miscellaneous Provisions) (Scotland) Act 1966 (c. 19), section 6: see paragraph 2.28

B: Successive Liferents

(i) Entail Amendment Act 1848 (11 & 12 Vict c. 36), 'The Rutherfurd Act', sections 47 – 49[2]

47. Act not to be defeated by trusts;

Where any land in Scotland shall, by virtue of any trust disposition or settlement or other deed of trust whatsoever, be in the lawful possession, either directly or through any trustees for his behoof, of a party of full age born after the date of such trust disposition or settlement or other deed of trust, such party shall not be in any way

[2] As originally enacted, ss 47-49 only applied to deeds dated on or after 1 August 1848 but s 8 of the Entail (Scotland) Act 1914 amended them so that they apply to deeds prior to that date. Section 48 is restricted to deeds dated on or before 25 November 1968: see s 18(4) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 (set out in para 2.44). In addition, certain words in ss 47-49 have been repealed by the Abolition of Feudal Tenure etc. (Scotland) Act 2000 asp 5, sch 13, para 1 and certain words have been substituted by sch 12, para 5(5) and (6) of that Act.

affected by any prohibitions, conditions, restrictions, or limitations which may be contained in such trust disposition or settlement or other deed of trust, or by which the same or the interest of such party therein may bear to be qualified, such prohibitions, conditions, restrictions, or limitations being of the nature of prohibitions, conditions, restrictions, or limitations of entail, or intended to regulate the succession of such party, or to limit, restrict, or abridge his possession or enjoyment of such land in favour of any future heir, and such party shall be deemed and taken to be the proprietor of such land, and it shall be lawful to such party to make application by way of summary petition to the Court of Session, setting forth the facts, and referring to this Act, and craving the court to pronounce an act and decree declaring him proprietor of such land, and unaffected by any such conditions, provisions, restrictions, or limitations; and the court shall proceed in such petition as may be just, and shall have power to pronounce an act and decree declaring such party to be proprietor of such land, and unaffected as aforesaid; and such act and decree may be recorded in the register of sasines, and being so recorded shall have all the operation and effect of the most formal and valid disposition to such party, and his heirs and assignees whomsoever, of such land duly recorded:

Provided always, that the rights of all parties holding securities over such land, and all rights which are held independently of such trust disposition or settlement or other deed of trust, shall be as they are hereby reserved entire.

48. or by life-rents;[3]

Where any land in Scotland shall, by virtue of any deed, be held in liferent by a party of full age born after the date of such deed, such party shall not be in any way affected by any prohibitions, conditions, restrictions, or limitations which may be contained in such deed, or by which the same or the interest of such party therein may bear to be qualified, and such party shall be deemed and taken to be the proprietor of such land, and it shall be lawful to such party to obtain and record an act and decree of the Court of Session in the like form and manner and in the like terms and with the like operation and effect as is herein-before provided with reference to an act and decree of the said court in the case of deeds of trust:

Provided always, that the rights of all parties holding securities over such land, and all rights which shall be held independently of the deed by which such liferent is constituted, shall be as they are hereby reserved entire.

49. or by leases.

Where any land in Scotland shall, by virtue of any tack, assignation of tack, or other deed or writing, be held in lease, either directly or through trustees for his behoof, by a party of full age born after the date of such tack, assignation of tack, or other deed or writing, such party shall not be in any way affected by any prohibitions, conditions, restrictions, or limitations which may be contained in such tack, assignation of tack, or other deed or writing, or by which the same or the interest of such party therein may be qualified, such prohibitions, conditions, restrictions, or limitations being of the

[3] Section 48 is restricted to deeds executed on or before 25 November 1968: see s 18(4) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 (set out in para 2.44).

nature of prohibitions, conditions, restrictions, or limitations of entail, or intended to regulate the succession of such party, or to limit, restrict, or abridge his possession or enjoyment of such land in favour of any future heir:

Provided always, that it shall be lawful to the proprietor of whom such lease is held to enforce any prohibitions, conditions, restrictions, or limitations contained in such tack, assignation of tack, or other deed or writing which shall have been inserted therein for the bona fide purpose of protecting the just rights and interests of such proprietor, in so far as such enforcement may be necessary in order to such protection.

(ii) Entail Amendment (Scotland) Act 1868 (31 & 32 Vict c. 84), section 17[4]

17 From and after the passing of this Act, it shall be competent to constitute or reserve, by means of a trust or otherwise, a liferent interest in moveable and personal estate in Scotland in favour only of a party in life at the date of the deed constituting or reserving such liferent, and where any moveable or personal estate in Scotland shall, by virtue of any deed dated after the passing of this Act (and the date of any testamentary or *mortis causa* deed shall be taken to be date of the death of the grantor, and the date of any contract of marriage shall be taken to be the date of the dissolution of the marriage), be held in liferent by or for behoof of a party of full age born after the date of such deed, such moveable or personal estate shall belong absolutely to such party, and where such estate stands invested in the name of any trustees such trustees shall be bound to deliver, make over, or convey such estate to such party: provided always, that where more persons than one are interested in the moveable or personal estate held by trustees as herein-before mentioned, all the expenses connected with the transference of a portion of such estate to any of the beneficiaries in terms of this Act shall be borne by the beneficiary in whose favour the transference is made.

(iii) Trusts (Scotland) Act 1921 (c. 58), section 9: see paragraph 2.42

(iv) Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 (c. 70), section 18: see paragraph 2.44

C: Statutory provisions relating to the rule in *Frog's Creditors* and *Newlands*

(i) Trusts (Scotland) Act 1921 (c. 58), section 8

8 (1) Where in any deed, whether *inter vivos* or *mortis causa*, heritable or moveable property is conveyed to any person in liferent, and in fee to persons who, when such conveyance comes into operation, are unborn or incapable of ascertainment, the person to whom the property is conveyed in liferent shall not be deemed to be beneficially entitled to the property in fee by reason only that the liferent is not expressed in the deed to be a liferent allenarly; and all such conveyances as aforesaid shall, unless a contrary intention appears in deed, take effect in the same manner and in all respects as if the liferent were declared to be a liferent allenarly;

[4] Section 17 was repealed by the Trusts (Scotland) Act 1921.

provided always that this subsection shall not apply to any conveyance which has come into operation before the passing of this Act.

For the purposes of this subsection, the date at which any conveyance in liferent and fee as aforesaid comes into operation shall be deemed to be the date at which the person to whom the liferent is conveyed first becomes entitled to receive the rents or income of the property.

(2) Where under any conveyance, whether coming into operation before or after the passing of this Act, any property is conveyed to one person in liferent and in fee to persons who, when such conveyance comes into operation, are unborn or incapable of ascertainment, it shall be competent to the court, on the application of the liferenter, whether or not he would, according to the existing law, be deemed to be fiduciary fiar, or of any person to whom the fee or any part thereof bears to be presumptively destined, or who may have an interest under such conveyance notwithstanding that such interest is prospective or contingent, or of the Accountant of Court:—

(a) to grant authority to the fiduciary fiar to exercise all or such of the powers, or to do all or such of the acts, competent to a trustee at Common Law or under this Act, as to the court may seem fit:

(b) to appoint a trustee or trustees (of whom the liferenter or fiduciary fiar may be one) with all the powers of trustees at Common Law and under this Act, or a judicial factor, to hold the said property in trust in place of the liferenter or fiduciary fiar; and to authorise and ordain the fiduciary fiar to execute and deliver all such deeds as may be necessary for the completion of title to the said property by such trustee or trustees or judicial factor; or otherwise, to grant warrant to such trustee or trustees or judicial factor to complete a title to the said property in the same manner and to the same effect as under a warrant in favour of a trustee or trustees granted in terms of the section of this Act relating to the appointment of new trustees by the court, or a warrant if favour of a judicial factor granted in terms of section twenty-four of the Titles to Land Consolidation (Scotland) Act, 1868, or section forty-four of the Conveyancing (Scotland) Act, 1874, as the case may be. The expense of completing the title as aforesaid shall, unless the court otherwise directs, be a charge against the capital of the estate.

(3) For the purposes of this section, all references to a trust deed in this Act contained shall be read and construed as a reference to the conveyance of the property in liferent and fee as aforesaid.

Appendix E

Advisory group

Mr Alan Barr	University of Edinburgh; Solicitor, Edinburgh
Mr Andrew Dalgleish	Solicitor, Edinburgh
Mr Frank Fletcher	Solicitor, Edinburgh
Mr Derek Francis	Advocate, Edinburgh, TrustBar
Mr Nicholas Holroyd	Advocate, Edinburgh
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