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The rule against perpetual trusts: Part 1 – trusts for non-charitable purposes

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Introduction

This is the first of two articles seeking to explain the rule against perpetual trusts. The rule was introduced to limit the period for which a settlor could direct that an endowment they settled was to be held continuously on trust for a non-charitable purpose, or the period a donor could direct that an endowment they donated was to be held continuously on trust within a non-charitable unincorporated association (a club, society, etc) – it was designed to restrict the duration of these continuous endowment trusts.[1] The continuous endowment trust might typically take the form of providing a fund for a non-charitable purpose trust or non-charitable unincorporated association with a stipulation that the capital be invested continuously and only the income used; or donating a particular asset to an association – such as a building – with a stipulation that it be held continuously for use; or gifting a fund to an association with a stipulation that it be used to purchase an asset and that this asset then be held continuously for use.

This first article examines how the rule applies to non-charitable purpose trusts – in the exceptional situations where the law recognises these. The second will consider how the rule applies to non-charitable unincorporated associations – and indeed whether the rule still applies to them at all.

Terminology

What is being called here 'the rule against perpetual trusts' sometimes goes by other names. But two alternative names involve particular scope for confusion and are perhaps best avoided.

'The rule against perpetuities'

The rule against perpetual trusts is sometimes referred to as 'the rule against perpetuities'. This can be a source of major confusion. The expression 'the rule against perpetuities' in fact encompasses two separate common law rules:[2] a main rule, better called the 'rule against remoteness of vesting', which is the rule *usually* meant by references to 'the rule against perpetuities'; and a subsidiary rule that emerged later, which we are calling the rule against perpetual trusts.[3] The general aim behind each rule is to prevent an owner of property from making arrangements tying it up for too long before someone else is able to deal with it as outright owner. But the two rules are distinct. The rule against remoteness of vesting limits how far into the future one can stipulate that a property interest given shall first arise; in technical language, when it must be set to 'vest' by.[4] So, for example, if I provide in my will

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[1] A helpful account of the origins of rule is William O Hart, 'Some Reflections on the Case of *Re Chardon*' (1937) 53 LQR 24, esp 35-52. Whether the rule might have a wider scope, even outside the law of trusts, is considered by Ian Dawson, 'The Rule Against Inalienability – A Rule Without a Purpose' (2006) 26 LS 414; although he does not consider the content of the rule to be as stated here.

[2] JHC Morris and W Barton Leach, *The Rule Against Perpetuities* (2nd edn, Stevens & Sons 1962), 321-27.

[3] Morris and Leach, n 2 above, did not attach any specific name to it. RH Maudsley, *The Modern Law of Perpetuities* (Butterworths 1979), 171, called it 'the rule against indefinite duration'. But 'the rule against perpetual trusts' is more common and marginally more enlightening: the name was adopted by Philip H Pettit, *Equity and the Law of Trusts* (12th edn, OUP 2012), 226.

[4] The basic rule was clearly stated in *Re Thompson* [1906] 2 Ch 199 (Ch), 202.

that property is to be held on trust for my firstborn child for life, then for their firstborn child for life, and so on down the generations, my attempts to dictate the vesting of new interests – the destination of the property – too far into the future are liable to be invalidated by the rule.[5] This is a complex area, with an extensive history, but as a general rule, in trusts declared today an interest will only be valid if it proves to arise within a statutory perpetuity period of 125 years, under the Perpetuities and Accumulations Act 2009. The distinct rule against perpetual trusts is instead concerned with limiting how long continuous endowment trusts can be stipulated to last for after they commence; their duration.

'The rule against inalienability'

The rule against perpetual trusts is also often called 'the rule against inalienability'. This usage is very common, but should ideally be avoided; both because it causes potential confusion with yet another rule and because it risks misrepresenting the content of the rule against perpetual trusts.[6] The common law 'rule against restraints on alienability' is a distinct rule that, when ownership of an item of property is given, invalidates accompanying stipulations if they impose unreasonable restrictions on its alienation, or transfer.[7] The general aim of this rule is similar to the perpetuities rules. But, again, the rule against perpetual trusts is distinguishable. It regulates the duration of continuous endowment trusts even if the terms of the trust laid down by the settlor allow the specific property within the trust to be freely alienated and replaced with other investments to be held instead as the continuous endowment trust fund.[8] So, for instance, if my will declares a continuous endowment trust over a shareholding, but leaves the trustees free to sell those shares and replace them with other investments for the trust, the rule against perpetual trusts may still invalidate the trust – even though neither the shareholding, nor any other asset, has been rendered inalienable by its terms. In other words, the objection is trust duration, not the inalienability of specific property. (However, we shall see that, given a continuous endowment trust's terms *could* render a specific item inalienable within it, the judges saw the undesirability of this as reinforcing the objection to such trusts lasting too long.)

Purposes of the rule against perpetual trusts

The basic aim of the rule against perpetual trusts is to prevent settlors determining the use of wealth too long after their deaths. This policy was perhaps best expressed (in the context of Mortmain) by Lord Campbell LC in *Jeffries v Alexander*:[9]

> 'A man has a natural right to enjoy his property during his life, and to leave it to his children at his death, but the liberty to determine how property shall be enjoyed *in saecula saeculorum*[10] when he, who was once the owner of it, is in his grave, and to destine it in perpetuity to any purposes however fantastical, useless, or ludicrous, so

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[5] A gifted interest is not 'vested' so long as the terms of the gift make it 'contingent' upon some future matter being satisfied before the interest arises – in our example, each future gift is contingent upon being born a duly qualified person and so not vested until that happens. The rule against remoteness of vesting is concerned with when 'vesting in interest' takes place, rather than 'vesting in possession' – a distinction we shall refer back to later. In our example, the intended gift to each firstborn child would vest in interest at their birth: even assuming a holder of a prior life interest is still alive then, the child would immediately acquire a subsisting right to the future enjoyment of the trust assets, a right that they could sell, give away, etc, like other property. That the enjoyment of the trust assets is not to vest in possession until later, at the end of a preceding life interest, is immaterial. Importantly, note that the rule against remoteness of vesting is not concerned with how long an interest might last once vested.

[6] Morris and Leach, n 2 above, 325-26.

[7] *Re Brown* [1954] Ch 39 (Ch). Glanville L Williams, 'The Doctrine of Repugnancy - I: Conditions in Gifts' (1943) 59 LQR 343 considers the basis of the rule.

[8] For example, *Re Elliott* [1952] Ch 217 (Ch).

[9] (1860) 8 HL Cas 594, 11 ER 562, 648.

[10] Forever.

> that they cannot be said to be directly contrary to religion and morality, is a right and liberty which, I think, cannot be claimed by any natural or Divine law, and which, I think, ought by human law to be strictly watched and regulated.'

That is, as a matter of inter-generational fairness, we should not allow the 'dead hand' to control wealth indefinitely. The law, of course, generally respects freedom of disposition: we are usually at liberty to do whatever we wish with our own wealth. But the rule against perpetual trusts helps to ensure that freedom of disposition is not abused so as to deny the same freedom to succeeding generations.[11]

The rule against perpetual trusts was also partly aimed at preventing a settlor stipulating that a specific item of property be held continuously as an endowment, and therefore withdrawn from other uses, for too long a period. The law always had a particular concern that land – limited in supply, particularly valuable, socially important, and uniquely located – should not be tied up undesirably. Sir Montague Smith, delivering the judgment in *Yeap Cheah Neo v Ong Cheng Neo*, said about the rule:[12]

> '[T]he rule against [perpetual trusts] … is founded upon considerations of public policy… viz., to prevent the mischief of making property inalienable, unless for objects which are in some way useful or beneficial to the community. It would obviously be injurious … if land convenient for the purposes of trade or for the enlargement of a town or port could be dedicated to a purpose which would for ever prevent such a beneficial use of it.'

The permitted duration when the rule was first introduced: the 'common law perpetuity period' explained

The period for which the rule against perpetual trusts would permit a continuous endowment was set at 'the common law perpetuity period'. This is usually stated as 'lives in being plus 21 years'. That is, basically, a period that starts from the date of the gift (which in the case of a gift by will is of course the date of death); continues through the life or lives of a person or persons who were alive at the date of the gift ('lives in being') and who can be identified from the terms of the gift as relevant for the purposes of this rule; and then terminates 21 years after the death of that person or the last of those persons. This is of course a maximum period: anything within it is permitted.

This period was not purposely designed as a reasoned limitation on continuous endowment trusts for non-charitable purposes or unincorporated associations. It was designed within the rule against remoteness of vesting, as a time limit for how far into the future a property interest could be stipulated to first arise. In that context the period had a rationale. It allowed the giving of gifts to all those personally known to the giver (lives in being); and to the next generation, permitting delay in the gift until they had attained majority (the age of 21 at the time). When the rule against perpetual trusts emerged later, the same period was copied into it without express discussion of its suitability there. There was, however, a certain logic to adopting the period. The basic policy of the rule against remoteness of vesting was to ensure that property vested in a beneficial owner, free to deal with it as they chose, by the end of the common law perpetuity period. When the courts first laid down the rule against perpetual trusts, in cases involving non-charitable purpose trusts, it probably appeared self-evident that the trust for a *purpose* must last no longer than that same period, so that the property would then vest in

[11] LM Simes, 'The Policy Against Perpetuities' (1955) 103 U Pa L Rev 707.

[12] (1875) LR 6 PC 381 (PC), 394. Testamentary trusts, in perpetuity, for (inter alia) land to be maintained as a family burial ground and for a house to be built for private religious rituals for the souls of the dead were held void.

a *person* by the end of it.[13] At all events, plainly the judges would not have adopted the common law perpetuity period into the rule against perpetual trusts unless satisfied that it at least provided for a reasonable duration.

The rule against perpetual trusts appears to have inherited the same position as applied under the rule against remoteness of vesting: a settlor could stipulate any number of lives in being and they need not have any connection at all with the benefits of the trust.[14] However, ascertaining when the last life would end had to be possible, otherwise the trust would fail for uncertainty.[15] Therefore, by selecting a clearly identified batch of healthy, robust newborns with genes for longevity, a settlor could secure the probable continuance of their trust for well over a century – given current life expectancies.

Consideration of whether the common law perpetuity period continues to apply for the purposes of the rule against perpetual trusts will be postponed. The general view is that it does still apply; and we shall proceed on that assumption in the meantime.

The categories of valid non-charitable purpose trusts

The rule against perpetual trusts was first laid down in the context of trusts for non-charitable purposes. Of course, as a general rule a trust for a non-charitable purpose is invalid because there would be no one to call for enforcement of the trust; but by way of exception, an established line of cases shows trusts can validly be created for a limited range of non-charitable purposes.[16]

Trusts of imperfect obligation

These exceptional situations are usually called 'trusts of imperfect obligation':[17] there is recognised to be a trust obligation, but with no one to enforce it. There appear to be up to three surviving categories: (1) to pay for building funeral/memorial monuments and caring for graves

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[13] In truth, the position was more complex. Limiting continuous endowment trusts to the common law perpetuity period, under the rule against perpetual trusts, only *tended towards* the validity of following interests. The limitation was neither necessary nor sufficient to ensure the validity, under the rule against remoteness of vesting, of all gifts following on from continuous endowment trusts. It was not necessary to ensure the validity of all follow-on gifts, because the rule against remoteness of vesting only required certainty about a gift's vesting *in interest* within the common law perpetuity period – it would be immaterial if a continuous endowment trust delayed vesting *in possession* beyond the common law perpetuity period. And it was not sufficient to ensure the validity of all follow-on gifts, because even if a continuous endowment trust terminated within the common law perpetuity period, a follow-on gift would still fail under the rule against remoteness of vesting if the gift's terms subjected it to a contingency such that it might not vest in interest until later. Furthermore, if no follow-on gift was provided for, any interest under an automatic resulting trust for the settlor or their estate, arising through a failure to exhaust the beneficial interest in the trust property, would not have been subject to the rule against remoteness of vesting.

[14] *Re Villar* [1929] 1 Ch 243 (CA), upholding in a family trust, for the purposes of the rule against remoteness of vesting, a 'royal lives clause' involving well over 100 lives: 'the period ending at the expiration of 20 years from the day of the death of the last survivor of all the lineal descendants of Her Late Majesty Queen Victoria who shall be living at the time of my death'.

[15] *Re Moore* [1901] 1 Ch 936 (Ch). A testatrix left property on trust for the maintenance of her brother's tomb in Africa 'for the longest period allowed by law, that is to say, until the period of twenty-one years from the death of the last survivor of all persons who shall be living at my death'. Her attempt to use every life on the planet doomed to the trust to failure for uncertainty. The prospect of mere difficulty – even great difficulty – in identifying the final death would not cause a provision to fail, according to *Re Villar* (n 14). In a case of difficulty, it may now be possible to convert the perpetuity period into 100 years under Perpetuities and Accumulations Act 2009, s 12 – even for the purposes of the rule against perpetual trusts; depending on one's reading of s 12, in conjunction with s 18.

[16] *Re Endacott* [1960] Ch 232 (CA). The Court of Appeal decided there is a closed list of non-charitable purposes for which trusts may be created: only the same kinds of purpose upheld in past cases will be allowed in future trusts; the past cases were 'anomalous' and the anomaly should not grow.

[17] Walter G Hart, 'What is a Trust?' (1899) LQR 294, 302.

or associated monuments;[18] (2) to pay for the care of specific animals**;**[19] and, probably, (3) to pay for performance of private religious ceremonies for souls.[20]

Re Denley purpose trusts?

The suggestion is regularly made that a wider range of non-charitable purpose trusts is validated by the case of *Re Denley's Trust Deed*.[21] However, this claim is controversial; and ultimately it seems unfounded.[22] We shall proceed on the conservative view that the only non-charitable purpose trusts recognised by the law are the trusts of imperfect obligation listed above; however, the possibility of *Re Denley* purpose trusts should be kept in mind.

The emergence of the rule against perpetual trusts

There is no question of a perpetual trust if the capital within a trust of imperfect obligation can be freely spent: for example, the trust for is for building a monument, or paying for ceremonies, immediately. Such a trust is valid without the need to state any time limit for its completion.[23] Potential problems only arise if there is a direction the capital is to be retained as a continuous endowment; for example, the trust is to use only the income of a fund for maintenance, or ceremonies, into the future. The first case to establish the rule against perpetual trusts was *Lloyd v Lloyd*.[24] The rule is not found conveniently formulated in Kindersley V-C's judgment: it has to be deduced from the rulings in the case. Two trusts of imperfect obligation were in issue. First, recipients of a life interest were directed to maintain a tomb out of the income: this trust was found to be valid. Note that the conferring of a life interest meant it was limited to the lives of the trustees – lives in being. Second, it was also directed that trustees use rents to maintain the tomb without limit as to time: this was said to have been found void in an earlier hearing, with the judge supposing it was for perpetuity. It can be concluded that a trust to hold property invested as a continuous endowment, to use the income to perform a trust of imperfect obligation for a period beyond the common law perpetuity period, was viewed as void.

The practical operation of 'lives in being plus 21 years'

When applying the rule against remoteness of vesting, usually in the context of beneficiary trusts, relevant lives in being would often have been inherent within the terms of a settlor's gift – without the need for the settlor to nominate any other lives in being.[25] But in trusts of imperfect obligation, there are no beneficial interests to provide inherently relevant lives in being. So, unless a settlor nominated other lives in being, the common law perpetuity period

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[18] Trusts are permitted for the purposes of paying for a memorial monument for oneself, *Trimmer v Danby* (1856) 25 LJ Ch 424; paying for a memorial monument for another, *Musset v Bingle* [1876] WN 170 (Ch); and paying for tending graves and associated monuments, *Re Hooper* [1932] 1 Ch 38 (Ch).

[19] Trusts are permitted for the purposes of paying for maintenance of one's pets or other particular animals, *Re Dean* (1889) 41 Ch D 552 (Ch).

[20] Trusts appear to be permitted for the purposes of paying for religious ceremonies for souls to be performed in private, and it has been judicially assumed these are non-charitable, *Re Hetherington* [1990] Ch 1 (Ch) 9 (obiter, explaining *Bourne v Keane* [1919] AC 815 (HL)).

[21] [1969] 1 Ch 373 (Ch).

[22] A view the author hopes to substantiate at length elsewhere shortly.

[23] Before the rule against perpetual trusts emerged to deal with continuous endowments, trusts simply for building monuments were repeatedly treated as valid without any reference to perpetuity issues: *Masters v Masters* (1718) 1 P Wms 421, 24 ER 454; *Makeham v Hooper* (1792) 4 Bro CC 153, 29 ER 826; *Limbrey v Gurr* (1821) 6 Madd 151, 56 ER 1049; *Mellick v President and Guardians of the Asylum* (1821) Jac 180, 37 ER 818; *Adnam v Cole* (1843) 6 Beav 353, 49 ER 862. (In the *Mellick* case there had, in fact, been a delay of 37 years in building the monument, because necessary consent had been refused. The decision was that, although the trust was valid, building years later when consent was available would be inconsistent with the terms of the will.)

[24] (1852) 2 Sim NS 255, 61 ER 338.

[25] For example, if a will gave a life interest to A, with the property then to be divided equally between A's children living at her death, then assuming A was alive at the testator's death, she was inherently a life in being to use when testing the validity of the gift to her children.

would generally be simply a 21-year perpetuity period by default. However, *Lloyd v Lloyd*, above, showed that, even without a nomination of specified lives in being, *occasionally* the trustees could provide relevant lives in being – if the terms of the trust effectively limited its duration to their lives. Another example is *Re Howard*,[26] where an annuity for the lives of two servants, or the survivor, on trust to look after a parrot was held valid.

'So long as the law allows…'

In *Re Hooper*,[27] a trust of imperfect obligation declared for (in effect) 'so long as the law allows' was held valid for 21 years. Sheridan[28] argued for the words 'for so long as the law allows' to be implied into all trusts of imperfect obligation declared without a stated time period so as to validate them for 21 years. He said:[29]

> '[E]quity apparently draws a distinction between a testator who wants to do what the law allows and one who says so in his will … If the testator does not make [an express stipulation beyond the perpetuity period], why not assume he wanted things done only so far as they could legally be done?'

This was eminently reasonable. Unfortunately, it looks inconsistent with a substantial number of decisions.[30] It seems unlikely that a court would decline to follow the precedents: all that could be said to encourage them to do this is that Sheridan's argument was not considered by the courts in those past cases.

Does the common law perpetuity period still apply to trusts of imperfect obligation?

The general view is that, for the purposes of the rule against perpetual trusts, the common law perpetuity period still applies to trusts of imperfect obligation. During statutory reform to the rule against remoteness of vesting, both the Perpetuities and Accumulations Act 1964[31] and the Perpetuities and Accumulations Act 2009[32] expressly purported to leave untouched the rule against perpetual trusts. There was an argument that the wording of the former Act may have inadvertently changed the perpetuity period for the rule against perpetual trusts;[33] but this is extremely difficult to maintain as a matter of Parliamentary intent on the wording of the legislation.

However, an argument could be made that the perpetuity period has now changed, on different grounds – an argument not based on the wording of the legislation but based on the content of the rule against perpetual trusts itself. So far we have understood the content of the rule to be that 'a trust of imperfect obligation is void if it is liable to last beyond *the common law perpetuity period*'. But the rule could be understood as saying instead that 'a trust of imperfect obligation is void if it is liable to last beyond *the perpetuity period for the purposes of the rule against remoteness of vesting – whatever that happens to be at any given time*'. The fact that the old cases all talk about 'lives in being plus 21 years' is explicable simply by the fact that this was the perpetuity period at the time they were decided. The rule against perpetual

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[26] *The Times* 30 October 1908 (Ch).
[27] [1932] 1 Ch 38 (Ch).
[28] LA Sheridan, 'Trusts for Non-Charitable Purposes' (1955) 17 Conv 46.
[29] LA Sheridan, 'Trusts for Non-Charitable Purposes' (1955) 17 Conv 46, 54-55.
[30] *Lloyd v Lloyd* (1852) 2 Sim NS 255, 61 ER 338; *Rickard v Robson* (1862) 31 Beav 244, 54 ER 1132; *Fowler v Fowler* (1864) 33 Beav 616, 55 ER 507; *Hoare v Osborne* (1866) LR 1 Eq 585 (Ct Ch); *Re Rigley's Trusts* (1866) 36 LJ Ch 147 (Ct Ch); *Fisk v Attorney-General* (1867) LR 4 Eq 52 (Ct Ch); *Musset v Bingle* [1876] WN 170 (Ch); *Re Williams* (1877) 5 Ch D 735 (Ch); *Re Birkett* (1878) 9 Ch D 576 (Ch); *Re Vaughan* (1886) 33 Ch D 187 (Ch); *Re Jones* (1898) 79 LT 154 (Ch); *Re Rogerson* [1901] 1 Ch 715 (Ch); *Re Barker* (1909) 25 TLR 753 (Ch); *Re Dalziel* [1943] Ch 277 (Ch); *Re Elliott* [1952] Ch 217 (Ch).
[31] Perpetuities and Accumulations Act 1964, s 15(4).
[32] Perpetuities and Accumulations Act 2009, s 18.
[33] RH Maudsley, *The Modern Law of Perpetuities* (Butterworths 1979), 177-78.

trusts might in fact always cross-refer to the *current* perpetuity period under the rule against remoteness of vesting; if that period changed at common law, the rule against perpetual trusts would change with it; and when it was changed by statute, the rule against perpetual trusts changed with it. In other words, the rule against perpetual trusts could be understood as a function of the rule against remoteness of vesting; tending to ensure that property dedicated to a trust of imperfect obligation is validly vested elsewhere by the end of the perpetuity period set by the rule against remoteness of vesting. Accordingly, for a trust declared today, the perpetuity period for the rule against perpetual trusts would be 125 years.[34]

It could be objected that this would be contrary to Parliament's intention when passing the Acts. But this does not seem to be true. All we have to go on regarding Parliament's intention is that, at the time of the 2009 Act, the Law Commission advised that they *assumed* that the common law perpetuity period applied for the purposes of the rule against perpetual trusts, but they were not sure; and that they had not evaluated the merits of this period because it was outside the scope of their review.[35] That hardly amounts to proof of a positive Parliamentary intention that the common law perpetuity period should continue to apply for the purposes of the rule against perpetual trusts. The wording of both Acts, where they say the rule against perpetual trusts is being left untouched, is quite consistent with the possibility suggested here that the period for the rule against perpetual trusts always corresponds to, and changes with, the period for the rule against remoteness of vesting.

Would a 125-year period be a desirable view of the law? It would mean a consistent perpetuity period throughout the law for the future. And a 125-year period is the sort of span a well-advised settlor could achieve under the common law perpetuity period anyway – but the uncertainty and practical inconvenience of using lives in being would be removed by a set time. In the case of maintaining graves, 125 years is close to a period the law allows when other means are employed.[36] In the case of maintaining animals, 125 years would invariably be shortened by the lifespan of the creature. And in the case of paying for religious ceremonies, 125 years could be defended on the basis that such ceremonies are borderline charitable – and indeed may be legally charitable as an endowment of clerics – and, if charitable, perpetual duration would be allowed.[37]

Is the test 'certainty' or 'probability' that the trust will end within the perpetuity period?

It appears to be generally assumed that a trust will only be valid under the rule against perpetual trusts if it is *certain* the trust will end within the perpetuity period – if there is no possibility at

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[34] Perpetuities and Accumulations Act 2009, s 5.

[35] Law Commission, *Rules Against Perpetuities and Excessive Accumulations* (Law Com No 251, 1998) para 1.14 (note omitted): 'any consideration of the rule against inalienability belongs more properly in a review of the law governing non-charitable purpose trusts … It was therefore expressly excluded from the Consultation Paper'. Para 8.35 added: 'Although the point is not wholly free from doubt, it is generally thought that only the common law periods of a life or lives in being, a life or lives in being plus 21 years, or 21 years alone, may be employed as the relevant perpetuity period …' The Explanatory Notes confirm the 2009 Act was intended to follow closely the Law Commission's recommendations (para 4), and state that the perpetuity period for the rule against perpetual trusts was understood to be the common law perpetuity period (paras 77-78). On use of external aids to statutory construction, see Diggory Bailey and Luke Norbury (eds), *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edn, LexisNexis Butterworths 2020), ch 24.

[36] Parish Councils and Burial Authorities (Miscellaneous Provisions) Act 1970, s 1, authorises contracts for 99 years.

[37] Jamie Glister and James Lee (eds), *Hanbury and Martin Modern Equity* (22nd edn, Sweet & Maxwell 2021), para 16-012: 'Even where the masses are said in private, the trust is arguably charitable on the basis that public benefit can be found in the endowment of the priesthood.' (And see CEF Rickett, 'An Anti-Roman Catholic Bias in the Law of Charity?' [1990] Conv 34, esp 40-43.)

all it might last beyond that time.[38] This is by analogy with the common law rule against remoteness of vesting, where it was necessary to the validity of a gift that it could *only* vest within the period – even the remotest *possibility* it might vest outside would invalidate the gift; for example, the fanciful possibility of a 100-year-old woman giving birth.[39] But this was a pitiful rule, subsequently overridden by statute.[40] In *Ward v Van der Loeff*,[41] Lord Blanesburgh, after concurring in a unanimous decision of the House of Lords that a gift was void under the common law rule against remoteness of vesting, when only a truly 'remarkable conjunction of events'[42] in the future might have infringed the rule, and even that fantastical sequence of events was no longer possible by the date of the judgment, lamented:[43]

> 'So far as the Courts are concerned, the existence of the rule in these days is usually made manifest only in cases where nothing of the kind having been desired or suspected, and where by nothing short of a miracle could a perpetuity at any time have supervened, even that possibility has, by the time of the contest, ceased to be existent. All the same in these cases the rule is fatal even to gifts so innocuous, and I cannot doubt that such a result is both mischievous and unfortunate, in many directions – in this notably, that it brings a sound principle into entirely gratuitous discredit.'

There is no reason to wish on a child the most unattractive feature of its parent. Whatever may have been the position under the common law rule against remoteness of vesting, no judge appears to have said that a trust will only be valid under the rule against perpetual trusts if it is *absolutely certain* the trust will end within the perpetuity period. Instead the spirit of the cases may be that the trust is invalidated only if it is proven that it would *probably last beyond the perpetuity period* – applying the usual civil standard of a balance of probabilities.

In *Re Dean*,[44] North J held valid a testator's trust for the maintenance of his horses and hounds, for 50 years if any of the horses and hounds should so long live. The judge recognised the need to comply with the rule against perpetual trusts,[45] but gave no explanation of how this trust complied with it. The decision has been widely condemned as wrong on the perpetuity point.[46] But the criticism is only justified if we *assume* the rule against perpetual trusts requires certainty that the trust will end within the perpetuity period. We can instead take this case as indicating that the rule only invalidates a trust if it is proven that it will probably last beyond the perpetuity period – and there was no such proof before the court.

Similarly, in *Re Haines*,[47] Danckwerts J upheld a testator's unlimited trust for the maintenance of pet cats. The following exchange is reported:

> '[Danckwerts J] Is there any trouble with the rule against perpetuities? How old are the cats?
>
> Counsel did not know.
>
> [Danckwerts J] Can I take judicial notice of the fact that 16 years is a long life for any cat?

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[38] For example, AJ Oakley (ed), *Parker and Mellows: The Modern Law of Trusts* (9th edn, Sweet & Maxwell 2008), para 3.096: 'If, at the time when the trust comes into effect, there is any possibility, no matter how remote, that it is capable of continuing for longer than the appropriate perpetuity period, then the trust will be void.'

[39] *Re Dawson* (1888) 39 Ch D 155 (Ch), esp 164.

[40] In particular by the 'wait and see' regime in Perpetuities and Accumulations Act 1964, s 3 and Perpetuities and Accumulations Act 2009, s 7.

[41] [1924] AC 653 (HL).

[42] [1924] AC 653 (HL), 677.

[43] [1924] AC 653 (HL), 679.

[44] (1889) 41 Ch D 552 (Ch).

[45] (1889) 41 Ch D 552 (Ch), 557.

[46] JHC Morris and W Barton Leach, *The Rule Against Perpetuities* (2nd edn, Stevens & Sons 1962), 322, commented: 'North J. seems to have assumed that an animal could be a life in being for the purposes of the Rule against Perpetuities … But on this point the decision has been disapproved and would hardly be followed today.'

[47] *The Times* 7 November 1952 (Ch).

Counsel – Yes, I think that you can…'

Again, there has been criticism.[48] But once again this is misplaced, if we understand the case to be demonstrating that the rule against perpetual trusts only invalidates a trust where there is proof of a probability it will last beyond the perpetuity period.

A rule based on probability rather than certainty has never been expressly formulated. But a relaxed approach may have seemed entirely reasonable to the judges here. The common law perpetuity period was a rather arbitrary one to begin with, with no particular rationale in this context. And courts were usually dealing with the default period of 21 years – whereas the law in fact permitted a *well-advised* settlor to employ lives in being to create such a trust for a century and more. So, it would hardly have seemed the end of the world if one of these trusts did end up briefly exceeding the permitted period.

Accordingly, a possible view of the law is that – even if the settlor stipulates a trust to potentially last beyond the perpetuity period (as with the 50 years in *Re Dean*) – the rule against perpetual trusts only invalidates a trust if it will *probably* last beyond the perpetuity period.

Would this be a desirable view of the law? On first impression, arguably yes. But there are complications. First, if as suggested above the perpetuity period applicable to trusts of imperfect obligation under the rule against perpetual trusts is now 125 years, a relaxed approach to applying it is perhaps less justifiable – especially because less necessary to the validity of gifts, particularly for the maintenance of animals, the only situation where the issue under discussion has been of apparent significance in the reported cases. Secondly, whatever formulation of the rule against perpetual trusts we adopt on this point – certainty or balance of probabilities – may also have to be applied in the quite different context of continuous endowment trusts for non-charitable unincorporated associations. We shall see in the next of these articles that it is not clear that the rule against perpetual trusts continues to apply in that context at all: the courts seem to believe it does, but this is questioned by some commentators. While, if it does, there is a stronger case in that context for saying that the rule's perpetuity period is 125 years – that period may have been mandated by statute in the association context. If the rule against perpetual trusts does indeed still apply to non-charitable unincorporated associations, and with a 125-year perpetuity period, the choice of certainty or balance of probabilities is likely to have much greater practical import there than in the case of trusts of imperfect obligation. There must be countless such associations that will *probably* terminate within the next 125 years, but are not *certain* to do so. So, considerations relevant to that context would need to be weighed.

There are, therefore, a number of preliminary issues that need to be resolved before we could sensibly judge whether a test of certainty or balance of probabilities is the better view of the law.

Conclusions

The rule against perpetual trusts limits the duration of the small category of permitted non-charitable purpose trusts – trust of imperfect obligation – where they contain an element of continuous endowment. The general view is that, to be valid, they must be limited to the common law perpetuity period of 'lives in being plus 21 years'. It has been suggested here that the rule against perpetual trusts may instead be a rule that operates by cross-reference to whatever the perpetuity period currently is for the purposes of the rule against remoteness of vesting – so that a trust of imperfect obligation declared today could be created for 125 years, giving a consistent and more practically convenient perpetuity period throughout the law for the future. The rule is generally understood to invalidate a trust if it might possibly exceed the

[48] JHC Morris and W Barton Leach, *The Rule Against Perpetuities* (2nd edn, Stevens & Sons 1962), 323, commented (notes omitted): 'It seems questionable whether courts should indulge in guesses of this sort; nor is there any justification for assuming that cats cannot live for more than twenty-one years.'

perpetuity period (by analogy with the common law position under the rule against remoteness of vesting). But it has been suggested here that the cases may possibly instead support the view that a trust is only invalidated if it will probably exceed the perpetuity period. And Sheridan's old suggestion has been revisited[49] – commending his proposal that, to validate such trusts for the perpetuity period, where necessary 'so long as the law allows' should be implied into any continuous endowment trusts that do not stipulate a longer period. This runs counter to a considerable number of decisions – but Sheridan's argument was not considered in those cases.

Adopting these three revised interpretations of the law is the most the courts could do towards facilitating the wishes of settlors – and we usually regard the law of trusts as a 'facilitative project' for settlors.[50] But it must be a matter of individual judgement whether we wish instead to constrain their wishes, in the special context of trusts of imperfect obligation for monuments, animals, and religious ceremonies, by retaining the more conventional view of the rule against perpetual trusts – given that the very purpose of the rule is to limit how far the 'dead hand' may dictate the use of wealth at the expense of the living.

But in making that judgement about how to formulate the rule against perpetual trusts, it should be kept in mind that some, at least, believe there may be a significantly wider range of valid non-charitable purpose trusts to which the rule would apply – purposes which proponents of this view suggest would often be more socially useful than the trusts of imperfect obligation – validated by the case of *Re Denley*.[51] And the operation the rule in the rather different context of continuous endowment trusts for non-charitable unincorporated associations must also be kept in mind – if the rule still applies to these – which will be the subject of the second article.

[49] Above n 29.
[50] Simon Gardner, *An Introduction to the Law of Trusts* (3rd edn, OUP 2011), ch 2.
[51] [1969] 1 Ch 373 (Ch).