RECONSTRUING FUTURE CONDITIONALITY IN ENGLISH JURISPRUDENCE:

Revealing ancient purposes for common law 'lives in being'.

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DEDICATION

To my daughter Tamsin and to my dear wife Fiona, whose patient suffering at the hands of my insatiable need to 'go off with the fairies' has apparently drawn to a close, or so she believes.

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ABSTRACT

This thesis offers a reassessment of conditionality and perpetuity in English jurisprudence. Here, Chapters 1 to 3 lay important conceptual and historical foundations by exploring how external juristic and philosophical traditions influenced the early common law and the fault-lines which let those influences pass largely unnoticed. From this, Chapter 4 focuses on Avicenna's application of ancient Greek, Roman, Neoplatonic and Classical Islamic scholarship to produce a creationist theory of 'thingness' of great relevance to understanding how a coherent benchmark of conditionality is provided by a 'life in being' under England's Rule Against Perpetuities. Here, that new understanding is rooted in more ancient concepts – notions of *causation* and *necessity* – which demonstrate how the Rule pursues objectives of *causal certainty*, rather than socio-economic *policy compromise*. This is important to modern scholarship because it also helps answer still-unresolved questions about the selection of any such life. Furthermore, beginning with the Bracton authors, long-standing principles of *annexation* provide the overarching 'splint' or 'bridge' which connects a necessary cause with its posited final effect. Indeed, the law of determinable fees is applied to show how the *annexation* of a living person supplies the *necessitated* condition which runs with the gift to create a valid common law interest. Chapter 5 assesses this new 'Necessary Life' hypothesis alongside modern 'measuring lives' theories. Ultimately, it is concluded that the selection of a measuring life is better understood and more reliably applied in a revised definitional formula which proposes – 'A non-vested interest is void at inception unless the death of one person then-living *necessarily* causes its *ipso facto* determination within the following twenty-one years'. If so, modern perpetuity reforms have suffered at the hands of misunderstanding the Rule's founding purposes and disregarding the Aristotelian logic which is argued to be implicit in its true *modus operandi*.

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Frequently Used Abbreviations

BLK COMM	Blackstone, *Commentaries on the Laws of England* (1753)
BRACTON	Bracton (Bratton), Henry de, *De Legibus et Consuetudinibus Angliae*, (c 1237) 4 vols., ed. G. E. Woodbine,(transl. S. E. Thorne. Publications of the Selden Society, London, 1968–77).
BUCKLAND A	William W. Buckland, A *Text-Book of Roman Law from Augustus to Justinian* (Cambridge: CUP, 2nd ed, 1932)
BUCKLAND B	William W Buckland, *A Manual of Private Roman Law* (Cambridge: CUP, 1939)
CODE	*Corpus Juris Civilis*, Justinian's Code (c. 529 CE).
CO LITT	Sir Edward Coke, *Coke's Commentaries Upon Littleton; Institutes of the Laws of England*, 1628 to 1644.
DIGEST	*Digest of Justinian*, *trans* Alan Watson, 4 volumes, (Philadelphia: University of Pennsylvania Press, 1985) (530-533 CE).
GAIUS	*The Institutes of Gaius* (c. 161 CE).
GLANVILL	Glanvill R De, *The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvill*, (c. 1187-1189) ed. G.D.G. Hall (Oxford University Press, Oxford, New York, 2002).
INST	*The Institutes of Justinian*, J B Moyle trans, (Oxford, 1911) <http://amesfoundation.law.harvard.edu/digital/CJCiv/JInst.pdf> [online].
LAW COMM	Law Commission, The rules against perpetuities and excessive accumulations, (Law Com, No 251, 1998)
MORRIS & WADE	W H C Morris and W Wade, 'Perpetuities Reform at Last' (1964) 80 LQR 486.
NOVEL	Justinian's *Novellae* (539 CE to 565 CE).
POLLOCK & MAITLAND	Pollock F and Maitland F W, (1898), 2 volumes*, History of English Law*, (Indianapolis: Liberty Fund Inc, 2nd ed, n.d.)
TABLE	The Law of the Twelve Tables (451 to 450 BCE).
SC	*Senatus consultum*. *(*a decree of the senate advising a magistrate*)*
ULPIAN	*The judgments of Ulpian* (fragments) (c. 222 CE).

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Hegel G W F, Philosophy of Right (1820) [trans by T Knox 1942] (Oxford: Clarendon Press 1952) 180
Heidegger M, What is a thing? (Chicago: Henry Regnery Co, 1967) 179
Heisenberg W, Physics and Beyond, (New York: Harper and Row, 1971) 234
Hohfeld W N, "Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1917) 26 Yale LJ 710 192
Hohfeld W N, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 Yale LJ 16 192
Holdsworth W S, History of English Law (London: Methuen, 3rd ed, 1923) 119, 121, 140, 144
Holt J, Colonial England, 1066-1215 (London: Bloomsbury, 1997) 132, 193
Honoré A M, "Ownership"; in A G Guest (ed) Oxford Essays in Jurisprudence (Oxford: OUP, 1961) 107 24, 25, 26, 174, 223
Horowitz S J and Sitkoff R H, "Unconstitutional Perpetual Trusts" (2014) 67 Vand LR 1769 216, 226
Hudson J, Land, Law and Lordship in Anglo-Norman England (Oxford: Clarendon Press, 1994) 123, 125, 128, 129
Hume D, A Treatise of Human Nature [1739] Selby–Bigge and Nidditch (eds.) (Oxford: Clarendon Press, 1978) 191
International Encyclopedia of Comparative Law, ed Drobnig U, et al. (Paris: International Association of Legal Science, 1972) Vol. VI, Chapter 11 112, 113
Jerome, Epistulae 92
Johnston D, The Roman Law of Trusts (Oxford: Clarendon Press, 1988) 3, 89, 91, 92, 93, 94, 97, 98, 104, 106, 108, 175, 181
Jolowicz H F and Nicholas B N, A Historical Introduction to the Study of Roman Law (Cambridge: CUP, 3rd ed, 1972) 198
Jones L M, "Measuring Lives Under the Pennsylvania Statutory Rule Against Perpetuities" (1960) 109 U Pa LR 54 33, 45, 65, 69, 161, 241, 321, 328
Kaye J M, Medieval English Conveyances (Cambridge: CUP, 2009) 130, 133
Krier J E and Dukeminier J, "The Rise of the Perpetual Trust" (2003) 50 UCLA LR 1303 216
Kuhn R L, "Confronting the Multiverse: What 'Infinite Universes' Would Mean" (Space.com, 23rd December 2015) https://www.space.com/31465-is-our-universe-just-one-of-many-in-a-multiverse.html [Online] accessed 4/2/20 234
La Croix R R , "Descartes on Gods Ability to Do the Logically Impossible" (1984) 14 Canadian Journal of Philosophy, 455 268
Leach W B, [1952b] "Perpetuities: Staying the Slaughter of the Innocents" (1952) 67 LQR 35 55
Leach W B, "Perpetuities in a Nutshell" (1938) 51 Harv LR 638 34
Leach W B, "Perpetuities Legislation, Massachusetts Style" (1954) 67 Harv LR 1349 34
Leach W B, "Perpetuities Legislation: Hail, Pennsylvania!: And Three Cheers for Vermont, Washington and Kentucky; Two Cheers for Massachusetts, Maine and Connecticut; One Cheer for Idaho; And Respectful Applause for the New Hampshire Court" (1960) 108 U Pa LR 1124 311
Leach W B, "Perpetuities Reform: London Proposes, Perth Disposes" (1963) 6 UW Austrl LR 11 311
Lee F W, The Elements of Roman Law with a Translation of the Institutes of Justinian (London: Sweet and Maxwell, 4th ed, 1956) 91, 104
Leibniz G W, Die Philosophische Schriften, Gerhardt C G I, ed, (Berlin: Weidmann, 1875-90) 273
Lemos G B and Schaffer K, "Obliterating Thingness: An Introduction to the "What" and the "So What" of Quantum Physics" (2018) retrieved from: <http:Kathrynschaffer.com/documents/obliterating-thingness.pdf> 231
Lieber F, A Manual of Political Ethics 2 vols (Boston: 2nd ed,1838) Vol. 1 186
Lim K, "God's Knowledge of Particulars: Avicenna, Maimonides, and Gersonides", (2009) 5 Journal of Islamic Philosophy, 75. 251
Locke J, Two Treaties of Government (1683) 180, 183
Lundmark T C and Waller H (201) "Using statutes and cases in common and civil law", (2016) 4:4, Transnational Legal Theory, 7:4, 429-469 9
Lynn R J, "Reforming the Common Law Rule Against Perpetuities" (1961) 28 U. Chicago LR 488 311
Lynn R J, "Reforming the Rule Against Perpetuities: Choosing the Measuring Lives" (1965) Duke LJ 720 311
Maitland F W, Why the history of English law is not written; An Inaugural Lecture (Cambridge, CUP, 1888) 147
Marmura M, "Avicenna's Proof from Contingency for God's Existence in the Metaphysics of the Shifa" Medieval Studies 42 (1980) 337. 247, 255
Marmura M, "Some Aspects of Avicenna's Theory of God's Knowledge of Particulars", 82 Journal of the American Oriental Society (1962) 299. 251
Mater et magistra, Encyclical of Pope John xxiii on Christianity and social progress, 1961 183
Maudsley R H, "Measuring Lives Under a System of Wait-and-See" (1970) 86 LQR 357 33, 38, 50, 51, 61

Maudsley R H, “Perpetuities: Reforming the Common-Law Rule - How to Wait and See” (1975) 60 Cornell LR 355 38, 51, 63
McSweeney T, [2012a] “Property Before Property: Romanizing the English Law of Land” (2012) Buff LR 1139 12
McSweeney T, [2012b] “English Judges and Roman Jurists: The Civilian Learning Behind England’s First Case Law” (2012) 84(4) Temp LR 827 147
Mechem P, "Further Thoughts on the Pennsylvania Perpetuities Legislation" (1959) 107 U Pa LR 965 35
Mechem P, Cases on Future Interests, 19 (1958) 44
Megarry R E and Wade W, The Law of Real Property (London: Stevens and Sons, 4th ed, 1975) 145, 149
Megarry R E, The Statute of Uses and the power to devise (1941) 7 Camb. L. J. 354 121
Merrill T W & Smith H E, The Architecture of Property, Research Handbook On Private Law Theories, Dagan H & Zipursky, Eds., (Edward Elgar Publishing, 2019). 201, 204, 206
Merrill T W and Smith H E, “Optimal Standardization in the Law of Property: The Numerus Clausus Principle” (2000) 110 Yale Law Journal 1 206
Michiea J and Lobaob L, “Ownership, control and economic outcomes” (2012) 5 Cambridge Journal of Regions, Economy and Society, 307 at 314: doi:10.1093/cjres/rss015 217
Milsom S F C, Historical Foundations of the Common Law (London: Butterworths, 2nd ed, 1981) 139, 140, 144, 157, 195
Milsom S F C, The Legal Framework of English Feudalism (Cambridge: CUP, 1976) 120, 121, 124, 130
Morris W H C and Leach W B, The Rule Against Perpetuities (London: Stevens, 2nd ed, 1962) 5
Morris W H C and Wade W, “Perpetuities Reform at Last” (1964) 80 LQR 486 51, 59, 62, 64, 66, 68, 70, 74, 78, 311
Mousourakis G, Roman Law and the Origins of the Civil Law Tradition (Switzerland: Springer, 2015) 147
Munzer S, “A Bundle Theorist Holds on to His Collection of Sticks” (2011) 8 Econ Journal Watch 265 192, 206
Nagel T, Rawls on Justice (1973) 82 Phil Rev 220 182
Nicholas B, An Introduction to Roman Law (Oxford: Clarendon Press, 1975) 89, 90
Nozick R, "Anarchy, State, and Utopia" [reprint 1980] (Oxford: Blackwell, 1974) 180, 183, 185, 188
O’Neal F H, “The Universality of a Curse: ‘Future Interests’ in French Law” (1941) 3 La LR 795. 27
Pareto V, Manual of Political Economy (1906) 184
Pearl D S, A Textbook on Muslim Law (London: Croom Helm, 1979) 114
Plato, Republic 228
Plotinus, Enneades 251
Plucknett T F T, A Concise History of the Common Law (Boston: Little, Brown & Co, 5th ed, 1956) 13, 26, 48, 120, 133, 135, 139, 140, 142, 147, 152, 153
Pollock F and Maitland F W, (1898), 2 volumes, History of English Law (Indianapolis: Liberty Fund Inc, 2nd ed, n.d.) 13, 15, 119, 127, 128, 130, 133, 152, 193, 236
Preston R, An Elementary Treatise on Estates (London: J and W T Clarke, 1827) 155, 299, 300, 302
Quarles J, “The Cy Pres Doctrine: Its Application to Cases Involving the Rule against Perpetuities and Trusts for Accumulation” (1946) 21 NYU LR 384 35, 38
Rawls R, A Theory of Justice (Oxford: OUP, 1973) 182
Re E D, "The Roman Contribution to the Common Law"(1961) 29 Fordham LR, 447. 355
Render M M, “The Concept of Property” (2017) 785 Pitt LR 437 178, 214
Richardson K, “Avicenna and Aquinas on Form and Generation,” in D. Hasse and A. Bertolacci (eds.) The Arabic, Hebrew and Latin Reception of Avicenna’s Metaphysics, (Berlin & Boston: De Gruyter,2012) 251–274. 251, 252
Rostill L D, Fundamentals Of Property Law: Possession, Title And Relativity, Oxford University D.Phil thesis 2016. 137, 187, 199, 231
Savage C W, "The Paradox of the Stone." (1967) 76 The Philosophical Review, 74. 269
Schacht J, An Introduction to Islamic Law, (Oxford: OUP 1964) 109
Seipp D J, “Bracton, the Year Books, and the “Transformation of Elementary Legal Ideas” in the Early Common Law” (1989) 17 Law and History Review 176 12, 147
Seipp D J, “The Concept of Property in the Early Common Law” (1994) 12 Law and History Review 29 194
Simes L M, “Is the Rule Against Perpetuities Doomed? The "Wait and See" Doctrine” (1953) 52 Mich LR 179 35, 106
Simes L M, “Policy Against Perpetuities” (1955) 103 U Pa LR 707 24, 26, 28, 106, 156, 176, 184
Simes L, Handbook Of The Law Of Future Interests 271-73 (2d ed. 1966). 43
Simplicius, In Aristotelis Physicorum 228

Simpson A W B, A History of the Land Law (Oxford: Clarendon Press, 2nd ed, 1986) 13, 119, 122, 127, 128, 129, 130, 133, 135, 139, 140, 193
Sitkoff R H and Schanzenbach M, "Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes" (2005) 115 Yale LJ 356 216
Sparks B, "A Decade of Transition in Future Interests" (1959) 45 Va LR 493 35
St John Green N, "Proximate and remote cause", (1936) 4 American Law Review, 201 284
Stake J E, "Darwin, Donations, and the Illusion of Dead Hand Control" (1990). Articles by Maurer Faculty. Paper 628. <http://www.repository.law.indiana.edu/facpub/628> 293
Stein P, The influence of Roman Law on the common law, (1994) BW-krant Jaarboek, 165 <https://openaccess.leidenuniv.nl/bitstream/handle/1887/36630/240.pdf?sequence=1> [online] 16
Stenton F, Anglo-Saxon England (Oxford, Clarendon Press, 3rd ed, 1971) 119
Stenton F, The First Century of English Feudalism, 1066-1166 (Oxford: Clarendon Press, 1932) 125, 127
Sterk S E, "Jurisdictional Competition to Abolish the Rule Against Perpetuities: R.I.P. for the R.A.P.", (2003) 24 Cardozo L R, 2097 226
Stone L, The Crisis of The Aristocracy, 1558-1641 215
Tate J, "Ownership and Possession in the Early Common Law" (2006) 48 The American Journal of Legal History 280 118
Tawney R H, "The Rise of the Gentry, 1558-1640" (1941) 11 Econ Hist Rev 1 215
The Gospel According to Mark (2: 2-12). 269
Thorne S E, "English Feudalism and Estates in Land" (1959) 17 Cambridge LJ 193 127, 128, 133
Thornely J W A, "Property Law - The Rule against Perpetuities- Reform" (1957) Cambridge LJ 30 35
Tudor O, "Absolute Certainty of Vesting Under the Rule Against Perpetuities-A Self-Discredited Relic", (1954) 34 Boston ULR, 129 57
Turner R, "Roman Law in Britain Before the Time of Bracton" (1975) 15 The Journal of British Studies 1 147
Turner, R 'Roman Law in Britain Before the Time of Bracton' (1975) 15 The Journal of British Studies 1 14
Twetten D, " Aristotelian Cosmology and Causality in Classical Arabic Philosophy and its Greek Background" in Ideas in Motion in Baghdad and Beyond: Philosophical and Theological Exchanges between Christians and Muslims in the Third/Ninth and Fourth/Tenth Centuries, Janos D (ed) (Leiden: Brill, 2016). 247
Twetten D, "Averroes on the Prime Mover Proved in the Physics." (1995) 26 Viator: Medieval and Renaissance Studies, 107 257
Vallario A M, "Death by a Thousand Cuts: The Rule against Perpetuities" (2015) 25 Journal of Legislation, Issue 2, Article 3 38, 216, 226
Vinogradoff P, "The Roman Elements in Bracton's Treatise" (1923) 32 Yale LJ 751 147
Waggoner L W, "Congress Promotes Perpetual Trusts: Why?" (2014) Law & Economics Working Papers, University of Michigan, Paper 80 216, 226
Waggoner L W, "Perpetuity Reform" (1983) 81 Mich LR, 1718 38, 72, 311
Waggoner L W, 'Perpetuities: Perspective on Wait-and-See' (1985) 85 Columbia LR, 1714 72
Waggoner L W, 'Rejoinder By Professor Waggoner' (1985) 85 Columbia LR, 1739. 72
Waggoner L W, "Prefatory Notes and Comments", Draft Uniform Statutory Rule Against Perpetuities, April 30th 1986 72
Waterbury T, "Some Further Thoughts on Perpetuities Reform" (1957) 42 Minn LR 41 35
Watson A, Rome of the XII Tables. Persons and Property (Princeton: Princeton University Press, 1975) 90, 93
Weatherall J O, Void: The Strange Physics of Nothing (New Haven: Yale University Press, 2016) 269
Whitman J, The Legacy of Roman Law in the German Romanic Era (New Jersey: Princeton University Press, 1990) 127
Wiseman H, "Explainer: Heisenberg's Uncertainty Principle" The Conversation (13th June 2012) https://theconversation.com/explainer-heisenbergs-uncertainty-principle512?gclid=EAIaIQobChMIgs2zvIm45wIVSrDtCh32zguYEAMYAyAAEgLK. 232
Wisnovsky R J, "Avicenna and the Avicennian Tradition" in Adamson P and Taylor R C (eds), The Cambridge Guide to Arabic Philosophy (Cambridge: CUP, 2005) 92. 250, 275
Yaldir H, "Ibn Sina's Formulation Of Divine Knowledge: "The Necessary Existent Apprehends Intellectually All Things In A Universal Way"" in The Science And Education At The Beginning of The 21st Century In Turkey, Volume 2 (Sofia: St Kliment Ohridski University Press, 2013) 459. 252
Zulueta F de, The Institutes of Gaius (Oxford, Clarendon Press, 1946) 93
Zulueta F de and Stein P, The Teaching Of Roman Law In England Around 1200. (London: Selden Society, 1990) 13

PREFACE - WHAT IS A PERPETUITY?

(A) INITIAL DISTINCTIONS

If asked, many citizens would probably describe the concept of owning an object of property in terms of absolutes. Indeed, the notions of total *dominium* expressed in the black and white terms of 'mine' and 'thine' would most likely predominate. Few would contemplate the *greyness* of limited ownership, and fewer still are likely to recognise the complication of owning something subject to conditions or even just a possibility of future ownership. Nevertheless, relatively clear legal distinctions exist between; *(a)* the dominium which affords an owner absolute control over the use and disposition of his or her property,[1] *(b)* lesser interests carved from the 'whole' for a limited time or purpose, such as leases or easements, and *(c)* interests in property held upon conditional suspension for a period which might endure beyond the life of its owner. This thesis is concerned largely with the problems resulting from the *latter* of these three categories.

(B) THE PROBLEM OF PERPETUITIES

The lessons of history reveal that wealthy property owners have often attempted to exercise prolonged control over their lifetime accumulations, even to the point of ruling those assets from beyond the grave. Typically, any such 'dynastic' ambitions were achieved by gifting[2] property upon terms made contingently dependent upon the occurrence (or non-

1 Here, it should be noted that different rules developed for real property in England which, since the Conquest, have denied citizens any claim to *allodial* land ownership.

2 They are usually donative transactions since it is most unlikely that anyone would pay for the possibility of acquiring an interest in land which might never materialise in fact.

occurrence) of a *future* possibility. The more distant those possibilities were, the longer the donor's control might even last into actual *perpetuity*. The stick might be lengthy, but the carrot was often intended to ensure the obedience of those who followed. For these reasons, conditional future gifts (or non-vested interests) are usually called 'perpetuities' and have attracted much criticism over several millennia. This historical background is explored in Chapter 2 below.

A useful beginning can be made by considering the following hypothetical disposition of *Hill Farm* to:

(1) Mary's first legitimate daughter to attain twenty-one

Here, assuming Mary is alive, unmarried and with no daughters who have already attained twenty-one, Hill Farm will remain in conditional suspension until; *(a)* Mary marries and produces a daughter who, in turn, survives to attain twenty-one, or *(b)* Mary dies without having produced a legitimate daughter, or *(c)* Mary's legitimate daughter(s) all die before reaching twenty-one. Here, the outcomes in *(b)* and *(c)* mean the terms of gift have failed completely and the corpus must revert to the donor's estate.

In gift (1) above, the element of 'perpetuity' is provided by the uncertainty as to which of those possibilities will occur in fact. In the interim, the only certainty is that this gift cannot endure for any longer than either Mary's life plus twenty-one years thereafter.[3] If Mary was a new-born baby, that could well be for more than one hundred years, which whilst not in

[3] Who would also be treated as a living person at Mary's death since, by definition, she could be *en ventre sa mere* when Mary died. Clearly that daughter is then bound to reach twenty-one within the following 21 years, and accordingly, the disposition creates a *valid* postponement at common law.

actual perpetuity, still represents a lengthy valid postponement of beneficial enjoyment. Moreover, there would undoubtedly be heavy pressure imposed upon Mary to marry and procreate as the price she must pay for financial security.

Some donors might have perfectly sound reasons for creating perpetuities, such as to prevent a wayward or insane son from inheriting[4] or, like Andrew Carnegie, to establish public libraries across Britain. However, there are likely to be many others with much less altruistic ambitions such as the pursuit of civil immortality,[5] self-aggrandisement, or even plain spite. Moreover, perpetuities in Italy were often paraded publicly as a symbol of elevated social rank.[6] Accordingly, one feature of perpetuities is that they might also become valued as an object of 'property' in their own right; that is, as a badge of economic power.

Nevertheless, the possibility of donors achieving their individual objectives seems to depend upon, *(a)* the private and public purposes which property served in those societies, and *(b)* what opportunities existed to impose long-lasting ownership controls over privately held assets. Plainly, the chance to impose dynastic control over assets cannot exist where society either prohibits private ownership of objects or prevents the exercise of post-dispositional control over them. At this point, therefore, it appears that mankind's relationship with 'property', and the extent to which something can be 'owned' into the

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4 This is exactly the problem considered in the landmark decision of *Howard v Duke of Norfolk* (1681) 3 Chan Cas 14.

5 David Johnston, *The Roman Law of Trusts* (Oxford: Clarendon Press, 1988) 2-3.

6 Indeed, Carlo Calisse*, A History of Italian Law* (Boston: Little, Brown & Co, 1928) at 632 notes that owning a *fideicommissum* was the ambition of all those who aspired to nobility in Italy.

distant future, now reveals itself as an important factor in understanding perpetuities and will be considered at length in Chapter 3 below.

It must be noted how, throughout history, lawmakers have often tolerated contingent future gifts where the donors' designated period of postponement was restricted to acceptable limits. Thus, it becomes possible to identify two distinct categories of perpetuities – *valid* perpetuities which obeyed any such permissive laws and *invalid* perpetuities that did not. This distinction will be used throughout the following thesis.

Finally, no introduction to perpetuities would be complete without referring to Professor Gray's seminal statement on the English common law Rule against Perpetuities. There:

> 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.[7]

Thus, only those perpetuities which are certain to vest, if they ever do so, within twenty-one years of the death of someone alive at the date of gift are valid interests under English common law. Although Gray's definition does not expressly say so, the Rule tests future gifts *prospectively*, and any interests not certain to vest beneficially, if they ever do so, within a 'life in-being plus twenty-one years thereafter' are voided *ab initio*. For this reason, the Rule is also known as the '*initial certainty*' Rule. Unfortunately, the seemingly straightforward use of that so-called 'measuring life in being' exposed deep rifts in academic opinion. These are considered in Chapter 1 and large portions of Chapter 2 below.

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7 John Chipman Gray, *The Rule Against Perpetuities* (Boston: Little, Brown & Co, 4th ed, 1942) § 201.

(C) THE QUESTION OF VESTING

One further prefatory explanation is necessary as it strikes at the very heart of the hypothesis developed herein. It is crucial to recognise three separate dimensions to the concept of vesting. These are:

Firstly, the Rule requires only that gifts must vest beneficially *in interest*, not necessarily in possession, within its permissible period.[8] Thus, the Rule is not concerned with the formalities of who possesses legal title to the estate, rather, it looks only to see when a final *claim* could be made against that estate.

Secondly, the possibility of vesting should not be viewed entirely from the contingent beneficiary's perspective. A gift may propose an alternative vesting scenario by specifying a contingent interest in remainder. Thus, final vesting may fall to be measured by the validity of the contingent *remainderman's* claim. Indeed, the perpetuitous consequences of contingent remainders led to the development of separate principles[9] whose eventual overturning[10] created the very need for a new rule that restricted perpetuities.[11]

Finally, the danger that a gift will fail for perpetuity raises the possibility of an alternative vesting claim by the *grantor's estate*. Therefore, the interests of a testator's heirs or residuary legatees are implied by the Rule's initial certainty requirement. Yet, for all intents and purposes, these reversionary claims fall into the same *general* category as those of the

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8 *Evans v Walker* (1876) 3 Ch. D. 211.

9 See, for example, the destructibility of contingent remainders in *Chudleigh's Case* (1595) 1 Co. 120a, 76 Eng. Rep. 270.

10 *Pells v Brown*, (1620) 79 Eng. Rep. 504.

11 Gray (n 7) § 121.7 and § 159; William H. C. Morris and W. Barton Leach, *The Rule Against Perpetuities* (London: Stevens, 2nd ed, 1962) 7.

contingent remaindermen. They arise equally on either the initial or subsequent failure of the principal beneficiary's claim. From this, it is evident how there are *two* sides to the vesting coin - the beneficiary's and those arising upon its failure. Indeed, the fact that those claims persist simultaneously means they can properly be regarded as '*concurrent*' interests in the gift.

The foregoing points re-surface in Chapter 4 below when other varieties of potential perpetuity, especially determinable fees, are applied to help explain to the Rule's operation. This is particularly so where the rules governing contingent reversions introduce the concept of annexation to how understand how the Rule validates *some* perpetuities instead of simply annulling them all.

CHAPTER 1 – FOUNDATIONAL CONCEPTS

(A) THE CURIOSITIES WHICH INSPIRED THIS PROJECT

Nutshell

English common law has a particularly fascinating history whose conceptual origins are not always clearly signposted. Indeed, we find suggestions of influence from ancient Greek and Roman times, through Neoplatonism and Classical Islamic scholarship, leading to their partial and unexplained reception by the Bracton authors. From this, the lack of any acknowledged connection has created hidden fault lines in English jurisprudence, and no more so than in its treatment of conditionality in the common law of property.

This is a thesis founded in history, logic, metaphysics, and theology - all applied to help understand how mankind came to deal with the issues of causation and conditionality raised from creating *perpetuities* in law. Unfortunately, there are few opportunities to take a more direct route since supporting English legal precedent is either scant or non-existent on the topic. The reasons for this follow immediately below. Yet, that by no means undermines this project's worth since a rigorous effort to cast light on the darkness of conditionality and English perpetuity law should be welcomed. This is not least because the *tsunami* of modern legislative reforms to the poorly understood 'Rule Against Perpetuities' has left a flood-tide of unconstrained dynasticism in its wake.

(1) The Peculiarities of English Jurisprudence

Jurists on both sides of the English Channel would probably agree that, in contrast to civilian law, the common law system has no *institutional* centrality in the form of codified laws. Instead, several aspects of England's legal system might be argued to offer only an

assemblage of customary rules taken from different sources.[12] In this regard, we need look no further than Justice Blackstone to see how English jurists have acknowledged the common law's somewhat quirky foundations:

> The law of real property in this country is formed into a fine artificial system, full of unseen connections and nice dependencies, and he that breaks one link of the chain endangers dissolution of the whole. [13]

Yet, there are more sinister undertones to Blackstone's admonition, which may be likened to the challenge of playing 'pick-up-sticks'. Removing one stick risks disturbing some (or all) of the others. This 'floodgates' logic seems perfectly sound. However, Blackstone's proposition appears to be predicated upon a belief that if a plan existed during the fashioning of English property law, the overall scheme was not fully known or understood. Plainly, that would be a remarkable situation which deserves serious consideration.[14]

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12 See further n 38 below.

13 *Perrin v Blake* (1796) 1 W.Bl., 672, Hargrave's Law Tracts at 498.

14 Alternative explanations also exist: *(a)* It could be a justification for conservatism and maintaining the status quo. Thus, the opaqueness of English common law served political purposes in which a jurisprudential 'boogie man' waits threateningly in the wings to wreak havoc from any changes made to the law. *(b)* There is also a 'Pandora's box' explanation where dangerous secrets might be revealed once opened. Here, the influence of Romanic jurisprudence on English law has always been the subject of legal and political tension, clearly evidenced by the conflict between Lord Mansfield's pleas for flexibility [*Wyndham v Chetwynd* (1757) 1 Burr 414] and Lord Camden's dissenting, but fervent, criticism of judicial discretion and the dangers absorbing of Roman law.[*Doe d. Hindson v Kersey* (1765) - reprinted at n (j) *Cornwell v Isham,* 1 Day 35 Jan. 1, 1802 (Connecticut Supreme Court, 1802). <https://cite.case.law/day/1/35/#footnote_0_10> [online]]. (c) The argument of 'letting sleeping dogs lie' seems equally plausible. English common law was formed during murky and

Although Blackstone singled property law out as the target for his remark, the eccentricity[15] of English common law is by no means unknown to jurists. Indeed, Professor Dicey, perhaps jokingly, remarked that custom and history crossed in English constitutional law such that it did "not properly deserve the name of law at all".[16] From this, he suggested the lawyer's domain might then be divided equally between professors of history and of jurisprudence, with the latter pursuing their function "… to deal with the oddities or outlying portions of legal science".[17] However, the common law's eccentricities and distant methodology from the institutional context of civilian law may have been exaggerated, and scarcely exists in modern times. Indeed, Lundmark and Waller contend the reasoning practice in civilian and common law courts is now identical. [18]

An even richer source of peculiarity can be found in the *separate* systems of common law and equity extant in early modern England - which some might even regard as taking a step *beyond* eccentricity. Indeed, equity attracted particularly low regard amongst legal purists in terms which Bentham described as:

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turbulent times where the connections and compromises made were often hidden from view; yet, they have somehow managed to work themselves out. This seems to be part and parcel of Blackstone's admonition against interfering in what is not understood, or of tinkering with the unknown.

15 Which the Oxford English Dictionary defines as irregular, anomalous or capricious behaviour: <https://www-oed-com.libezproxy.open.ac.uk/view/Entry/59245?redirectedFrom=eccentric#eid> [online].

16 Albert V Dicey, *Can English Law be Taught at the Universities?* Inaugural Lecture, University of Oxford, 21st April 1883 at 21.

17 ibid 22.

18 Thomas C. Lundmark and Helen Waller, 'Using statutes and cases in common and civil law', (2016) 4:4, *Transnational Legal Theory*, 7:4, 429-469.

> … that capricious and incomprehensible mistress of our fortunes, whose features neither our Author, nor perhaps any one is well able to delineate; of Equity, who having in the beginning been a rib of Law, but since in some dark age plucked from her side, when sleeping, by the hands not so much of God as of enterprizing Judges, now lords it over her parent sister.[19]

Blackstone, who was by no means immune to personal criticism for his eccentric views,[20] side-lined equity to a 'supplemental' role outside the mainstream of English law. Moreover, he seems to have had a similar strategy in mind when tackling eccentricities *within* the common law. There, Blackstone's express plan for his *Commentaries* was to produce a 'map' of the *general* features of English law; ostensibly to prevent overburdening students with excessive detail.[21] However, Blackstone may have had other plans afoot when sweeping legal peculiarities under the jurisprudential carpet – probably to facilitate the development of a seemingly cohesive and coherent treatise to rival the *Corpus Juris Civilis*. By doing so, Blackstone's strategy probably represented the continuing effort of jurists, from the time of the Bracton authors[22] onwards, to demonstrate the *legitimacy* of English common law in a way never previously seen.

Finally, the Neoplatonic notion that *all* 'things' exist only *conditionally* – creates a separate challenge for English common law and its attempted management of future

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19 Jeremy Bentham, *A Fragment on Government*, (Oxford: Clarendon, 1891) 96.

20 *Re Goodman's Trusts* (1881) 17 Ch D 266, 296 per Lord Justice James who described Blackstone as "the somewhat indiscriminate eulogist of every peculiarity and anomaly in our system of laws".

21 1 BLK COMM 35.

22 BRACTON: Bracton's (Bratton's) co-authors are widely regarded to have been Martin of Pattishall and William of Raleigh.

contingencies. However, as considered in sub-sections (2) and (3) beginning on pages 246 and 281 respectively below, these ideas have cast significant influence over legal thinking.

(2) The Confluence of Fault-Lines in the Bracton Treatise

We need not journey far to discover evidence to support Blackstone's assertion. Indeed, the Bracton treatise of the early thirteenth century contains many instances of unexplained solutions based upon unseen connections. However, for the reasons which follow, the author argues those peculiarities have a significance which stretches well beyond simple eccentricity. Instead, they are argued to represent fault-lines in the fabric of English common law, of which several persist into modern times.

It is submitted that three fault-lines in common law jurisprudence affect what it means to 'own' property in England – and these are deduced from the discussion in sub-section (1) above:

(a) The suggested absence of an overall scheme by which the English common law of property was fashioned into a cohesive whole. Here, sub-section (i) below will consider how this resulted from the Bracton authors' surreptitious and inaccurate reception of Roman law and principles of causality into England which created a wholly unconvincing exposition of the so-called English common law.

(b) The existence of competing and contradictory influences in establishing England's legal principles on real property. Here, the probable culprit lies in the Bracton authors' attempts to 'shoehorn' principles of Roman land law into the entirely incompatible feudal structure of landholdings then prevailing in England.

(c) The failure to tackle problems exposed by Islamic scholarship regarding how existence is so suffused with conditionality that no 'absolutes' are possible in materiality.

Each will now be considered in turn:

(i) The Surreptitious Reception of Roman law into England

The *first* suggested fault-line is provided by the Bracton authors' surreptitious reception of some aspects of Romanic jurisprudence into England,[23] presumably with the intention of creating the false *outward* appearance of coherence and cohesion needed to make English common law rank alongside the ancient precedent. However, it is submitted those forces of cohesion and rationalisation were borrowed from *Roman* jurisprudence, not the customary law in force during the Confessor's time. Indeed, it will be demonstrated in sub-section *(ii) Certainty and Living Persons: The Bractonian Model* beginning on page 141 below how the Bracton treatise does not withstand close scrutiny, and was largely side-lined over the following fifty years because their description of English law seemed too un-English.[24] Nevertheless, the net result *was* to receive some elements of Roman law - and to the extent that this *was* noticed, Seipp drew upon the words of both Pollock and Maitland and Brunner to describe how the influence of Romanic jurisprudence was dismissed as simply ' … a 'youthful flirtation' that 'operated as a sort of prophylactic inoculation, and ... rendered the national law immune against destructive infection.' [25]

Unfortunately, it was their failure to do so in conceptually rigorous terms which created a remarkable new reality: The Bractonian era probably marked the *height* of Romanic

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23 One of the most convincing contributions can be found in Thomas J. McSweeney, 'Property Before Property: Romanizing the English Law of Land' (2012) 60 Buff LR 1139.

24 David J. Seipp, 'Bracton, the Year Books, and the "Transformation of Elementary Legal Ideas" in the Early Common Law' (1989) 17 *Law and History Review* 176, 180.

25 Seipp (n 24) 177 and note 11.

influence over English law,[26] albeit only clandestinely,[27] at a time when anti-Roman feelings were probably at their greatest. Thus, an era of potential *light* quickly became one in which the success of the Bracton treatise depended almost entirely upon working in *darkness*.

Due mention should, however, be given to an alternative argument regarding the poor quality of legal scholarship in England.[28] The Bracton treatise was no *Corpus Juris Civilis*, and there were no better skilled jurists available to legitimise their endeavours. Indeed, that situation remained little changed for centuries to follow, leading Professor Dicey to lament that we have "… not twenty treatises worthy to stand side by side with the productions of great jurists in other countries …".[29]

When viewed in those broad contexts, it is unsurprising how the Bracton authors fell victim to virtually insurmountable problems; but that does not mean their work shied away from Romanic influence. Although Pollock and Maitland advocated the Bracton treatise had no pretentions to introduce *substantive* Roman law into England,[30] there is convincing

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26 Theodore F. T. Plucknett, *A Concise History of the Common Law* (Boston: Little, Brown & Co, 5th ed, 1956) at 282.

27 Bracton's reliance upon Roman law, particularly Azo, *Summa Instituionium (1210)*, is well documented: Francis de Zulueta and Peter Stein, *The Teaching Of Roman Law In England Around 1200.* (London: Selden Society, 1990); Plucknett (n 26) 549-551; A. W. Brian Simpson, *A History of the Land Law* (Oxford: Clarendon Press, 2nd ed, 1986) 65. Indeed, Bracton provides a virtual recitation of the DIGEST; BRACTON f. 19. That said, however, Coke argued most strenuously that English law was unique to England and did not depend upon any foreign law including Canon or Roman law; CO LITT ii 98.

28 Alan Watson, *Studies In Roman Private Law* (The Hambleton Press, 1991) 259.

29 Dicey (n 16) para 13.

30 Pollock & Maitland, Vol I, 221.

evidence to the contrary.[31] Accordingly, Pollock and Maitland's claim: 'But we have only to look at manuscripts of Bracton's text to see that the influence of Roman law is on the wane, is already very slight.'[32] suggests they may have failed to discriminate between what was *absent* from that which needed to be *hidden*. Indeed, the author suggests that was precisely the game at play; and the earlier parts of this thesis seek to explore this puzzle through Vinogradoff's challenge:

> It seems necessary to go again through the papers with care and to discover, if possible, why so many passages of the Institutes or of Azo have been twisted by Bracton into shapes that do not correspond to their plain and direct meaning.[33]

(ii) Incompatible Notions of Land Ownership

Although still related to Romanic jurisprudence, a *second* fault-line can be detected from the polar-opposite views on the question of real property ownership under Roman and English law. There, the idea of *tenurial* landholdings in feudal England meant there could

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31 This is when medieval English jurists began to consolidate their understanding of the law. These are contained in works of the GLANVILL, BRACTON and Fleta treatises. Earlier, less reliable, treatises include: The *Liber Quadripartitus* (1113) and the *Leges Henrici Primi* (c. 1118) are widely regarded to have been written by the same, ill-informed person whose command of both Latin and Middle English was poor. The later *Leis Willelme* (c. 1150 to 1170) contained little of relevance Roman law. Overall, these early treatises provide little evidence of an influential reception of Romanic ideas. For brevity, see Ralph V Turner, 'Roman Law in Britain Before the Time of Bracton' (1975) 15 *The Journal of British Studies* 1, 4-6 and the references cited therein to the leading scholars who support this view.

32 Pollock & Maitland Vol I, 231.

33 Paul Vinogradoff, 'The Roman Elements in Bracton's Treatise' (1923) 32 Yale LJ 751. 752.

never be any common ground with the fully *allodial* ownership known to Romanic law.[34] In post-Conquest England, *all* landholders, other than the king himself, were simply vassals of varying degrees of seniority whose mere tenancy of real property would have been completely alien to the fief-holding continental Europeans. Nevertheless, that did not prevent the Bracton authors from making a valiant, but quite unconvincing, effort to do so.

(iii) The Avicennian Notions of Creation and Conditionality

Chapter 4 below will demonstrate how Classical Islamic scholarship, most notably under Avicenna, advocated how that all existent 'things' emanate from the One Necessary Being. Since all subsequent steps from the One's pure act of thought involve preceding 'causes', all 'things' in material reality exist only contingently depending upon the One's bidding. In that event, raising valid legal distinctions between 'things' - including contingent future interests - according to their conditionality then becomes logically unsound. Under this view, therefore, it is perfectly possible that a further conceptual fault-line of *Arabian* ancestry has run largely unnoticed through both Romanic and English jurisprudence.[35] Indeed, it will be argued that deficiencies in both legal systems may have resulted from the attempted design of rules which sought to distinguish between logically *inseparable* possibilities. By doing so, legal scholarship

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34 Pollock and Maitland would disagree. He claimed the consequential separation of concepts of 'seisin and right' in England and 'ownership and possession' in Romanic law were practically synonymous, per POLLOCK & MAITLAND Vol I, 62-63.

35 See further sub-sections *(i) Prefatory Contextual Observations* beginning on page 226 below and *(ii) Avicenna's Emanationist Model of 'Thingness'* beginning on page 227 below.

introduced flawed hybrid solutions to help avoid the politically unacceptable consequences of Neoplatonic distinctions between necessity and conditionality.[36]

(iv) Those Fault-Lines Writ Large

The overall significance of those fault-lines is the need they created for the early English jurists to construct 'bridging' solutions between Roman and English law. Regrettably, this led to increasingly eccentric and obfuscating explanations;[37] perhaps with the very purpose of throwing enquiring minds off the scent. If so, they succeeded admirably, and perhaps more so than they might ever have supposed: The overall result was to raise concerns beyond the lack of *institutional* centrality upon to new levels where English common law simply represented a catalogue of single instances rather than an integrated legal *system*.[38]

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36 That is, designing a land proprietorship scheme in which nothing was absolute, and everything was perpetually subject to a superior *whim*. See also page 82 below regarding the baron's continuing concerns over excessive royal power.

37 GLANVILL, the earliest, contains the most explicit references to Roman law. See further Seipp (n 24) 37-38; Thomas J. McSweeney, 'English Judges and Roman Jurists: The Civilian Learning Behind England's First Case Law", (2012) 84 Temp LR 827. See also page 196 below.

38 Peter Stein, 'The influence of Roman Law on the common law' (1994) BW-krant Jaarboek, 165. <https://openaccess.leidenunivnl/bitstream/handle/1887/36630/240.pdf?sequence=1> [online]", 165: "The strength of the common law has always been in its handling of cases, in finding pragmatic solutions to legal problems; its weakness has been in the theory of law. In particular, it had to face the problem that it is 'a wilderness of single instances' and to find a way of organising the fruits of a series of decisions in a systematic way."

Certainly, something seemed amiss, and this may partly explain why many of the great English legal actions of the day were litigated in Rome.[39]

If the Bracton authors deserve blame for casting a veil over two significant fault-lines In English jurisprudence, they might unwittingly have redeemed themselves by also providing us with unusually prominent signposts pointing to where the deepest fault-lines in common law jurisprudence could be found.[40] Indeed, it is almost axiomatic that these must necessarily lie where the Bracton authors performed the most violence to accepted principles of legal rhetoric and Romanic law. Here, if we accept Blackstone as our guide to where those difficulties are most prevalent, the more restricted topic of real property law helps identify itself as a most useful starting point.

(3) Narrowing the Focus to Perpetuities

Unfortunately, any thesis which attempted to rationalise English real property law is destined to failure. The scope of the material and the differential effect of external influences on the subject would be unmanageably broad. Yet, the opportunity exists to explore one sub-topic, namely the selection of a 'measuring life in being' under English perpetuity law, as a portal through which to extrapolate ideas about the nature of existence, conditionality and what it means to 'own' something. The author argues this will also help resolve the additional

39 See, however, Charles Sherman, 'The Romanization of English Law' (1914) 23 The Yale Law Journal 318, 238, suggested this may also have been because many of those cases would invariably have been appealed to Rome if lost in the English courts.

40 This is particularly evident in the contortions the Bracton authors performed in misapplying Roman law whilst analysing and attempting to explain the maritagium in sub-section *(i) Entails Before the Statute De Donis 1285: The Maritagium* beginning on page 127 below.

'fault lines' in notions of conditionality and the 'thingness' of materiality supplied by the Islamic jurisprudence considered in Chapter 4 below.

The author ventures that important consequences flow from the preceding approach: (1) Reconstruing the notions of conditionality under English common law which the author argues has not served legal scholarship at all well. (2) identifying the lawful boundaries of property ownership in England to reveal a 'centrality' which has so far evaded the English common law of property. (3) As a corollary of the second point, to help remedy the previously mentioned 'fault-lines' in English jurisprudence. (4) Providing a valuable opportunity to settle a still unresolved debate regarding the precise identity of a common law 'measuring life in being' – the effect of which was to expose a widespread misunderstanding of a rule of over 340 years standing works.[41]

The present investigation is assisted greatly by recent new discoveries into land proprietorship during the Anglo-Norman period. From this, we can see how perpetuities can be placed within a landscape of rising heritability, increasingly powers of alienation and a much wider diversity of ownership interests in land. Indeed, it will be demonstrated how the age-old problems of dynasticism, and the solutions presented by perpetuities became entangled in the so-called 'strict settlement' – ultimately to become the preferred instrument of landholdings in England.[42] To this extent, perpetuities and proprietorship of real property then became bedfellows, and it will be demonstrated that a cross-fertilisation of ideas was thereby achieved with relative ease, even if only in almost total seclusion.

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41 See further sub-section *(C) The Measuring Lives Conundrum* starting on 39 page below.

42 A pattern which was replicated in continental Europe. The family *substitutions* inherited from Romanic *fideicommissa* have emerged in the modern laws of the former Roman empire as a system of community property under which all domestic land is now held.

(B) THE OBJECTIONABLE CHARACTER OF PERPETUITIES

Nutshell

Throughout history, wealthy citizens have often sought to exercise significant post-dispositional control over assets by using conditional grants to restrict (or even prevent) descendants from enjoying that property as their own. The resultant socio-economic problems are well-known. Different societies and jurisdictions have confronted those difficulties in various ways, but English common law has been widely criticised for its particularly mysterious and unfair *modus operandi*. That growing discontent finally erupted in 1947 with a revolutionary plan to discard the Rule's 'initial certainty' requirement. Unfortunately, those reforms created many more problems than solutions.

(1) Perpetuities and Conditionality

At this point, however, it is equally important to be clear about what perpetuities are *not*. From what has been said so far, a perpetuity arises where assets are placed in contingent suspension awaiting the outcome of future events. From this, it would be easy to imagine how the element of perpetuity is supplied solely by its conditionality. However, the author argues how the terms 'perpetuity' and 'conditionality' are not necessarily the same. Although considered at length in Chapter 4 below in terms of Neoplatonism and Avicenna's emanationist hypothesis, the chief point at issue is illustrated by X's gift of Whiteacre:

> (2) To A's first grandchild to be ordained as a priest in the Church of England.

where A is alive, unmarried, and childless. Here, the author submits that a chain of *implicit* conditions sequentially anticipates that: A remains alive' A subsequently marries; A produces at least one child; at least one child survives to marry, at least one of them produces children;

and that one of them is accepted into training for the priesthood. A final *explicit* condition is that one of them must undergo a ceremony of ordination.[43]

Applying Gray's formula, gift (2) is void for perpetuity because there is no certainty that any grandchild to enter the priesthood must necessarily do so no later than twenty-one years after the death of someone living at the date of gift. Indeed, although factual circumstances suggest only A is the potential candidate as 'measuring life in being', that posited outcome never rises above a mere possibility. Instead, it depends upon the occurrence of foregoing *eight* conditional events, none of which are 'necessary' because each has a preceding cause that might *never* happen, let alone within the following twenty-one years.[44]

The question then becomes, precisely where does the potentially offensive character of perpetuity lie in gift (2)? *Firstly*, there is the attempt to ensure that A's grandchildren will be directed towards the priesthood. Is it socially desirable that persons can use their wealth to influence the career choices of someone who is not yet born? *Secondly*, it could be argued that an asset is now made subject to a *conditional chain of events* which invests X with substantial post-dispositional control over Whiteacre. However, that is a generalisation which may be correct only in particular circumstances. This is shown in the example of Z's gift of Blackacre to:

> (3) Such of my grandchildren who shall set foot on the planet Mars before my death.

43 See, for example, MORRIS & WADE 498.

44 The critical distinction between 'necessary' and 'conditional' events is explained in sub-*section (ii) Avicenna's Emanationist Model of 'Thingness'* beginning on page 227 below.

Here, gift (3) is similar to gift (2) above insofar that it is perfectly possible to list all the precursive events of marriage, procreation, fitness and training which must take place before the stated vesting contingency can be satisfied. However, the author contends that, despite having an equally long chain of implicit conditions, gift (3) does not involve any element of perpetuity at all. Effectively, the gift is postponed only during the *donor's own life*, which means the potential beneficiaries are simply denied access to Blackacre during a period which Z is perfectly able to control by his own actions. Z is alive and can deny those issue, or anyone else, access to his or her property without possibility of legal complaint. Perhaps this possibility of personal control supplies the 'necessity' identified by Neoplatonists as the counterpoint to 'conditionality'; although the author concedes that construction risks elevating humans to quasi-deities over property beyond that ever imagined by Avicenna.[45]

Curiously, a gift might also be considered perpetuitous even in the absence of express conditional terms. A strict settlement of the type stated in gift (4) on the page below contains no *express* conditions, only an *implicit* requirement of survivorship, yet it is clearly perpetuitous in character since it anticipates a lengthy chain of succession. Thus, it may reasonably be concluded that whilst potentially important, express conditionality *per se* cannot be the *only* key to understanding perpetuities. Instead, there may be questions of *excessive* prolongation afoot or, as the author contends, that the potential beneficiaries' *quantum* of property ownership interest in the suspended gift is too uncertain to be valid at common law, quite irrespective of the Rule's terms.

45 ibid.

(2) Introducing Policy Objections Against Perpetuities

(i) The Subtraction of Wealth

Experience teaches how perpetuities have caused significant social and economic costs. Here, these dangers are revealed in the following gift of Greenacre:

> (4) To my trustees to hold for A for life and thereafter to A's eldest male heirs in tail, with remainder to the University of Oxford.

Clearly, Greenacre now risks remaining in perpetual conditional suspension because the number of successive life tenants (the heirs) is potentially unlimited. Of course, the chief benefit for A's family is their future economic security since the estate is thereby protected from being squandered away by just one rogue generation. However, despite the outward appearances of prudent generosity, things are not quite as they first seem:

Firstly, there tends to be a net reduction in economic value. In many cases, those dynastic ambitions are achieved by carving out lesser interests from the gifted asset which deny the recipient donees any meaningful opportunity to exercise control over its management. True, the trustees would manage the estate on their behalf, but many would do so with conservative passivity and a high aversion to risk. Accordingly, the result of perpetuities was often that the donor's 'dead hand' thereby *subtracted* ownership authority from the gifted object, leaving the donees with greatly reduced control over an asset which might otherwise have passed to themselves as absolute and unconditional heirs. Here, this subtractive process might be explained by economists using the following formula:

$$S^{D} = U^{F} - U^{B}$$

Here, the economic value which the donor has *subtracted*, or withheld, from his or her gift ($\mathbf{S^D}$) is equal to the utility he or she previously enjoyed from their full, unconditional ownership of the asset ($\mathbf{U^F}$) *minus* the lesser utility received by the beneficiaries when they take only a *lesser* interest in that property ($\mathbf{U^B}$). The chief difficulty is that $\mathbf{W^D}$ is not 'banked' by the (usually deceased) donor or anyone else. Instead, it becomes a so-called 'deadweight loss' to both A's family and the overall economy.

Secondly, there is a very real prospect that A and his heirs will also begin a rather more insidious process of subtraction from the gifted property. Since no-one will enjoy Greenacre as an absolutely entitled owner, each generation is incentivised to take whatever they can from the land at the least personal cost. Indeed, since agricultural profits tend to be meagre, and the pay-back period for any capital investment is usually quite long, there is likely to be little or no reward for making any *personal* investment to enhance the land. The usual result was to starve the land of improvement whilst also liquidating anything worth selling. Once compounded over several generations, history reveals how otherwise productive estates often become derelict, with the result that adverse economic costs then fell upon society at large.[46]

(ii) Balancing Ownership Rights

Whilst perpetuities have often imposed problems of economic stagnation, they also impact significantly upon the social domain. Indeed, their influences have often raised

[46] See generally: Calisse (n 6) 632-633; Jean Brissaud, *A History of French Private Law* (Boston: Little, Brown & Co, 1912) 729; Rudolf Huebner, *A History Of Germanic Private Law*, [trans F Philbrick] (Boston: Little, Brown and Company, 1918) 12 note 1.

questions about the limits of property ownership which, typically, is seen as a struggle between two opposing forces:[47]

(a) On the one hand, an absolute owner, say Pauline, is likely to have an expectancy of sovereignty, or *dominium*, over her land which includes rights to hold, use or dispose of that property quite freely. It is fortunate that many of those expectancies were articulated by Honoré, whose eleven standard incidents of ownership help identify the rudimentary features of what it means to 'own' something.[48] This is particularly helpful where other theories, such as Kant's, tend to deal principally with *acquiring* property, rather than with ownership rights of property which had already been acquired.

However, beyond those basic expectancies, Pauline might also attempt more extensive ownership control such as by making the following *inter vivos* gift of *Whiteacre*:

> (5) To such of my lineal descendants as are living in 10 years' time.

Assuming this gift is *valid* in the jurisdiction where it was made, three observations may now be made about Pauline's relationship with her property. *Firstly*, she enjoys a power of alienation over Whiteacre, including an authority to *divide* the land amongst the beneficiaries.

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47 This idea is developed most famously in Professor Simes' work which proposed a main purpose of perpetuity law was to strike "... a fair balance between desires of members of the present generation, and similar desires of succeeding generations, to do what they wish with the property they enjoy.": Lewis M. Simes, 'Policy Against Perpetuities' (1955) 103 U Pa LR 707, 723.

48 See further n 510 below and the text to which it relates; Anthony M. Honoré, 'Ownership', in Anthony G. Guest (ed), *Oxford Essays in Jurisprudence* (Oxford: OUP, 1961) 107, 113-123.

Clearly there may be *numerous* claimants of the gift corpus in ten years' time. *Secondly*, Pauline has power to suspend beneficial ownership of, or impose conditions upon, Whiteacre such that she can partition her land *over time*. Plainly, there is both a present suspensive situation which may, or may not, be changed after those 10 years have passed. Indeed, Pauline may even make gifts to persons who are not yet born since there is no condition of them being alive at the date the interest was created. *Finally*, and perhaps most significantly of all, Pauline's ownership control over Whiteacre is not extinguished by her own death and may continue for a legally sanctioned period into the future. She could die the day after the interest was created, yet its conditionality and futurity would remain despite her demise.

Honoré's eighth incident of ownership, its potentially unlimited endurance, supports the idea that Pauline may exercise prolonged control over Whiteacre, although he provides no specific guidance upon how long that power might last. Indeed, he seems to dodge the key issues with vagueness:

> Since human beings are mortal, he will in practice only be able to *enjoy* them for a limited period, after which the fate of his interest depends upon its *transmissibility*.[49] *[italics emphasis added]*

The limitation upon *enjoyment* is obvious, but that says nothing directly about the permissible duration of *ownership control*. If the intention was to qualify that proposition according to its transmissibility, the author contends that since Honoré's seventh incident recognised the potential for perpetual ownership by persons that cannot die, the question of property being owned *perpetually* was acknowledged, but left unresolved.

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49 ibid section *(8) The Incident of Absence of Term.*

(b) On the other hand, there are situations in which *others* might have a legitimate interest in an owner's property. However, of all those third-party claims, the most relevant for this thesis lies with the heirs' interests in *succession*. This is not least because, to follow the contribution of Professor Simes, the rival ownership expectations of present and future generations play out explicitly *within* the sphere of perpetuity law.[50] Yet, is it not evident that any balance struck between those competing interests has a greater significance than simply reaching an *inter*-generational compromise? Those matters may also impact upon the essential character of property ownership. Unfortunately, as noted above, little support in this matter is gained from Honoré's eighth incident of ownership regarding its potentially unending character.[51] Thus, whilst Honoré has provided a vocabulary for justifying the *donor's* continuing ownership, the question of what interest the *expectant* heirs might enjoy under the interest remains in philosophical limbo.

It might also be questioned whether Honoré's work fatally undermined Simes' suggested balance struck between the living and the unborn. Here, this is because it is difficult to see what proprietary interest the heirs had which is available to be balanced against those of their ascendants. Indeed, the point was not lost on the fourteenth-century bench when those interests were discounted as being entirely *uncertain*.[52]

In those societies where perpetuities became widespread, it seems reasonable to extrapolate their effects upon society. Indeed, if the balance of ownership control struck

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50 Simes (n 47).

51 Honoré (n 48) 113-123.

52 Y.B. 18 Edw. II f. 578 (1324) Per Stonore CJ; *Geffrey Fitz Osbern's Case* Y.B. 10 Edw. 3. Mich. pl. 8 (1336) per Parning; Y.B. 11 Hen. IV Trin Pl. 14 (1410). See also Plucknett (n 26) 562-564; Simpson (n 27) 52.

between the living, the unborn and the dead is heavily weighted towards ancestors, there are few incentives for the rising generations. Again, that hardly engenders entrepreneurial zeal such that, by slow degrees, the likelihood of economic stagnation became almost inevitable.

(iii) The Problem of Disinheritance

Whilst there are many 'public' problems of perpetuities, the author submits that dynastic ambitions often create *private* effects which are better described in terms of *disinheritance*, rather than as general economic *stagnating or disincentivising* effects:

(a) The relentless subtraction of wealth from the land was much more likely to create a situation where *poverty*, rather than wealth, was passed down from one generation to the next. This was particularly problematic in France where up to *ninety-five* percent of land was held under a perpetual entail,[53] and families were forced to hide behind the outward appearance of affluence whilst secretly floundering in virtual bankruptcy.[54] In those circumstances, families would be condemned to live in a condition of perpetual *negative* inheritance as the entail proved to be little more than a poisoned chalice.

(b) The view of perpetuities as an instrument of *disinheritance* matches their parallel use throughout history to expressly *exclude* customary heirs from succession. Indeed, it was precisely those motivations which inspired the litigation in the ground-breaking *Duke of Norfolk's Case* (1681).[55]

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53 F. Hodge O'Neal, 'The Universality of a Curse: 'Future Interests' in French Law' (1941) 3 La LR 795,797-798.

54 Brissaud (n 46) 731-732.

55 *Howard v The Duke of Norfolk* (1681) 3 Chan Cas 14.

(c) The question of disinheriting heirs also suggests the problem that an 'imbalance' might arise between the rights of the living and those of future generations. This is the same policy argument famously voiced by Professor Simes[56] considered in sub-section (ii) above.

(iv) Ownership and Monopoly Power

The rival interests of the donor and donee suggest one less commonly considered policy objection to perpetuities. Here, there is a concern reflected in modern anti-competition policy,[57] that the weak might need to be protected from the strong:

(a) If absolute owners are empowered to exercise dispositional authority on terms which subtract rights of free alienation from the granted estate, the quantum of ownership control thereby transferred to the living and not-yet-living recipients risks shrinking to virtually zero. Using perpetual entails as an example, subsequent heirs might then be subjected to the socially undesirable situation of little more than relatively powerless, temporary possessors of a perpetually inalienable estate. Thus, the policy dilemma at the heart of perpetuities is expressed in terms of comparing the 'whole' with just a 'stub'; and by doing so, suggests that a fair inter-generational compromise should be struck between those living in the present, and those in the future. This is the same point as that proposed by Professor Simes in sub-section *(2) Introducing Policy Objections Against Perpetuities* beginning on page 22 above.

(b) If absolute owners have authority to substitute new heirs in the succession of their estates, any such disinheritance annuls the original heirs' expectations of both enrichment and support in favour of a new succession. However, whilst still a problem of subtraction, that

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56 Simes (n 47).

57 For example, the UK's Competition Act 1980.

is no longer a question simply of reaching an inter-generational compromise. Instead, new questions of *intra*-generational balance are introduced when those customary heirs lose all authority over the thing at hand. In theory, the question then becomes, why should one lineage, with long-standing, customary expectations of benefit lose out to another line which had no such expectations?

Since it is only the first, original owner who enjoys sufficient authority to make the subtractive choices in (a) and (b) immediately above, this thesis proposes that all perpetuities may also be viewed as the product of unreasonable first-generation 'monopoly' control, a problem recognised equally in ancient Rome. Indeed, it then becomes evident that policy complaints against perpetuities may now be further enlarged to include the problem of exploiting persons in a weaker bargaining position. Indeed, given the typically high social rank of donors throughout history, that power imbalance may also help explain why the burden of dead hand control has persisted for so long.

(3) Viewing Perpetuities Comparatively

Perpetuities in different legal systems may be distinguished according to the *consequences* of them being held invalid. Here, Chapter 2 (B) below will demonstrate how Roman law was designed mainly to fulfil the donor's original intentions by *accelerating* any failed contingent interests into absolute, unconditional ownership. This was achieved partly by the Roman law of conditions which imposed a test of *lifetime control* to determine how any such condition should be treated. There, if the suspensive condition was deemed capable of being controlled by a *living* person, or if it could be frustrated by someone who was alive at that time, the gift would then become entirely *unconditional*. This was, perhaps, the closest western jurisprudence came to recognising how a distinction could be made between the

'necessary' and the 'conditional'. That connection was made in Avicennian theory and the Neoplatonic ideas upon which it was based in sub-section (2) beginning on page 246 below. There, the element of 'lifetime control' was supplied by the *necessity* of its occurrence (or non-occurrence) within the life of the person invested with that determinative power. On the other hand, with the single exception of the rule in *Shelley's Case* (1581),[58] English common law took the opposite stance by *nullifying* unduly prolonged interests at the outset and returned the failed gift to the donor. However, there is also a scintilla of *Classical* Islamic philosophy in those solutions: The absence of *necessity* (that is, the possibility of a donor-imposed condition never being satisfied because it depends upon some un-knowable *preceding* cause), might then be used to justify why mankind's attempted exercise of purely 'Godly' power should be annulled. Immediately, our interest is drawn toward a broad range of culturally diverse contributions to English perpetuity theory.

Nevertheless, close attention must first be given to the leading case in English perpetuity law*, The Duke of Norfolk's Case* (1681).[59] There, the common law's fiercely anti-perpetuity stance was finally abandoned by deciding that a shifting use or executory devise in *equity* could also exist as a valid *legal* interest under English common law. The outline facts of the case are as follows:

In 1647, the Duke of Norfolk employed the leading conveyancer of the day, Sir Orlando Bridgeman, to make detailed arrangements that dealt with the insanity of the Duke's eldest heir, Henry. There, everything depended upon whether Henry proved capable of marrying and producing a *sane* heir to whom the title and estate could be transferred safely.

58 *Shelley's Case* (1581) 1 Co Rep 88b.

59 *Howard v The Duke of Norfolk* (1681) 3 Chan Cas 14.

Accordingly, an alternative executory devise was to be triggered in the highly probable event that Henry died without producing children. In that event, the second eldest brother, Thomas, would take the entire estate – but did so subject to the transfer of the Grostock barony to his younger brother, Charles, to provide him with financial security into the future. As expected, Henry died childless. However, Thomas refused to convey the Grostock estate claiming Charles' interest was void for perpetuity. Charles sued and later won his claim in the House of Lords,[60] which affirmed Lord Nottingham's *dissenting* opinion in the Court of Chancery.

Rejecting *Child v Baylie* (1618),[61] Lord Nottingham declared that terms, trusts of terms, remainders, future, springing, or executory devises to a *then-living* donee created valid estates at common law. By doing so, a new species of legal interest had been created at common law through the novation then called the '*Doctrine of Perpetuities'*, later to become known as the common law Rule itself. Unfortunately, the turbulence of late seventeenth century England meant the emergent Rule was framed somewhat vaguely, perhaps to reflect the dangerous politics of the day.[62] Nevertheless, *Norfolk's Case* is regarded as the father of the Rule as we now know it; albeit that the final developmental step was taken in *Jee v Audley* (1787).[63] Indeed, by that point, the common law's policy stance regarding perpetuities was later reduced to Gray's statement of the Rule quoted on page 4 above.

Thus, the Rule's overall effect was to prohibit the possibility of ownership control extending beyond a life then in-being plus twenty-one years thereafter. Here, to apply this to

60 *Howard v The Duke of Norfolk* (1685) 1 Vern 164.

61 *Child v Baylie* (1618) 79 Eng. Rep. 393.

62 See, for example, Herbert Barry, 'The Duke of Norfolk's Case' (1937) 23 Va. LR, 538.

63 *Jee v Audley* (1787) 1 Cox 324, 29 E.R. 1186 which finally settled the Rule's 'initial certainty' requirement.

a common form of perpetuity, such as the so-called 'strict settlement' or perpetual entail illustrated in gift (4) above, the Rule brings the intended cycle of donor control to a swift end by declaring it to be void *ab initio*. By doing so, the Rule then appears to have achieved the same policy outcome, albeit by different means,[64] as the much earlier right to bar an entail at common law.[65] Thus, by whichever method, English legal policy was that perpetuities should either be nullified, or be deemed *capable* of nullification, at or before the demise of a then-living person. In this way, we may also identify how any errant donor's intentions would be cut down where he or she took upon themselves a power of dynastic control which smacked too much of the absolute power reserved only for God.[66]

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64 The Rule operates prospectively to invalidate gifts which offended against its terms. Those dispositions then failed ab initio irrespective of the parties' wishes. Perpetual entails were perfectly valid interests that depended upon the beneficiary's choice to end it and take the property for him or herself absolutely. This later decision was achieved by a collusive action called a common recovery.

65 *Taltarum's Case* (1472) YB. 12 Edw. IV 19 to 21, There, a common recovery with single voucher was held insufficient to bar the entail in question. Thus, a better authority is to be found in *Capel's Case* (1531) 1 Co. Rep. 61a. There, final authority was given for the transformation of entailed interests into fully alienable fees by barring the interests of the heir, the remainderman and the reversioner under what later became known as the device of common assurance.

66 See further Chapter 4 – Tackling Perpetuity Theory Afresh starting on page 201 below.

(4) Discontent, Legislative Reform and Yet More Discontent

(i) The Rule's Allegedly Eccentric Behaviour

Regretfully, Professor Gray's definition did nothing to correct the common law's long-standing failure to identify precisely *which* life or lives could be used by the common law Rule.[67] Moreover, and this may ultimately prove to be his greatest oversight, Gray also failed to state whether a measuring life provided the *cause* or *effect* of validity at common law. In short, it remains unclear whether that life or lives served as a *necessary internal benchmark* of validity under English common law, or whether they were simply the *emergent* feature of interests which obeyed the Rule. In fairness, Gray may not have realised why this issue arose, or even if he did, that the answer would have depended upon a formula for identifying those lives which did not then (and still does not) exist. Thus, English perpetuity law remained in ignorance of how the Rule actually worked; a situation which persisted notwithstanding that other definitions have been proposed.[68] In short, no-one could state definitively who were the Rule's 'lives in being'. However, many believed the question had become redundant due to the newly proposed 'wait and see' reforms discussed in sub-section (ii) below.

The quirky behaviour exhibited by England's anti-perpetuity laws was not regarded as such until Professor Leach later identified situations where 'magic gravel pits', 'unborn

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67 Ronald H. Maudsley, 'Measuring Lives Under a System of Wait-and-See' (1970) 86 LQR 357, 360; Laurence M. Jones, 'Measuring Lives Under the Pennsylvania Statutory Rule Against Perpetuities' (1960) 109 U Pa LR 54, 57.

68 "At common law, the vesting of an interest may be postponed during the lives of persons in being at the time when the instrument of creation takes effect, plus a further period of twenty-one years after the extinction of the *last* life." [*italic emphasis added*] per G C Cheshire, *The Modern Law of Real Property* (London: Butterworths, 10th ed, 1967) 240.

widows', 'fertile octogenarians' and 'precocious toddlers' might spring up from nowhere to invalidate otherwise perfectly reasonable family dispositions.[69] The present author believes that attempts to discredit the Rule by using those so-called "freak"[70] cases to harangue it as a 'technicality-ridden legal nightmare'[71] or as a 'trap for the unwary'[72] were overstated. The problems arose from circumstances which made the Rule *seem* eccentric. To make matters even worse, judicial salt was rubbed into that open wound when the Rule's allegedly incomprehensibility was used to *excuse* a professional lawyer's ignorance of perpetuity law.[73]

(ii) Hail Pennsylvania?

The 'nettle' of discontent was first grasped by Philip Brégy[74] and the Pennsylvanian state legislature when a new 'wait and see' test was introduced by which the validity of contingent future interests would depend upon *actual*, rather than *possible* events. Effectively, this new 'actualities' test removed the Rule's initial certainty requirement; thereby potentially resolving Leach's four 'freak' cases noted above at a stroke. Plainly, the 'freakishness' of those possibilities would be eliminated by waiting to see whether or not they actually happened. If any of those freak outcomes occurred in *fact*, they might not be quite so eccentric as first

69 W. Barton Leach, 'Perpetuities in a Nutshell' (1938) 51 Harv LR 638.; *Re Wood* (1894) 2 Ch. 310; *Re Frost* (1889) 43 Ch D. 246); *Ward v Van der Loeff* (1924) AC 653; *Re Gaite's Will Trusts* (1949) 1 All E.R. 459 (Ch.).

70 Philip Mechem, 'Further Thoughts on the Pennsylvania Perpetuities Legislation' (1959) 107 U Pa LR, 965, 967.

71 W. Barton Leach, 'Perpetuities Legislation, Massachusetts Style' (1954) 67 Harv LR 1349.

72 Morris and Leach (n 11) 1.

73 *Lucas v Hamm*, 56 Cal. 2d 583 [California 1961]; cf *Millwright v Romer*, 322 N.W. 2d. 30 [Iowa 1982].

74 Brégy (n 76).

appeared. Plainly, they would then be revealed as being at least *possible*. The possibility of extending that experiment across the USA was led by Professor Leach,[75] and who was soon joined by equally eminent supporters[76] and opponents.[77]

Nevertheless, there was a fatal flaw in the logic underpinning the (now repealed) Pennsylvanian Estates Act 1947[78] which no-one had foreseen. Perhaps remarkably, it was that development, and not the arguably more revolutionary decision to abolish the Rule by the

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75 W. Barton Leach, *American Law of Property*, (A Casner (ed), 1952; W. Barton Leach 'Perpetuities: Staying the Slaughter of the Innocents' (1952) 67 LQR 35; W. Barton Leach, 'Perpetuities in Perspective: Ending the Rule's Reign of Terror' (1952) 65 Harv LR 721; W. Barton Leach, 'Perpetuities Legislation, Massachusetts Style' (1954) 67 Harv LR 1349; W. Barton Leach, 'Perpetuities Legislation: Hail, Pennsylvania!: And Three Cheers for Vermont, Washington and Kentucky; Two Cheers for Massachusetts, Maine and Connecticut; One Cheer for Idaho; And Respectful Applause for the New Hampshire Court' (1960) 108 U Pa LR 1124; W. Barton Leach, 'Perpetuities Reform: London Proposes, Perth Disposes, '(1963) 6 UW Austrl LR 11; W. Barton Leach, 'Perpetuities: The Nutshell Revisited' (1965) 78 Harv LR, 973.

76 These included: Phillip Brégy, 'A Defense of Pennsylvania's Statute on Perpetuities' (1949) 23 Temp LQ 313; D, S Cohan, 'The Pennsylvania Wait-and-See Perpetuity Doctrine -New Kernels from Old Nutshells' (1955) 28 Temp LQ 32; J. W. A. Thornely , 'Property Law - The Rule against Perpetuities- Reform' (1957) Cambridge LJ 30; Thomas Waterbury, 'Some Further Thoughts on Perpetuities Reform'(1957) 42 Minn LR 41; James Quarles, 'The Cy Pres Doctrine: Its Application to Cases Involving the Rule against Perpetuities and Trusts for Accumulation' (1946) 21 NYU LR 384.

77 These included: Philip Mechem, 'Further Thoughts on the Pennsylvania Perpetuities Legislation' (1959) 107 U Pa LR 965; Percy Bordwell, 'Perpetuities from the Point of View of the Draughtsman' (1956) 11 Rut LR 429; Lewis M. Simes, 'Is the Rule Against Perpetuities Doomed? The "Wait and See" Doctrine' (1953) 52 Mich LR 179; Bertel Sparks, 'A Decade of Transition in Future Interests' (1959) 45 Va LR 493.

78 Estates Act 1947; PA. STAT. ANN. tit. 20 § 6104.

Idaho Supreme Court in *Locklear v Tucker* (1949)[79] which received the most notoriety. There, the Idaho decision depended upon a constitutional issue about honouring the settlor's intent, which was said to override the Rule's public policy concerns.

(iii) The Legislators' Errors

In broad outline, the Pennsylvanian legislature exposed a problem which struck at the very heart of perpetuity law; the long-term consequences of which have received surprisingly scant attention in the literature. The problems were these:

To prevent accusations of committing too much violence upon the Rule's familiar terms,[80] the Pennsylvanian reforms expressly retained the common law's 'life in being plus 21 years thereafter' perpetuity period. It did so by referring simply to the "maximum period allowed by the common-law rule against perpetuities as measured by actual rather than possible events, ..."[81] That said, the legislator's failure to specify who was a 'life in being', or to provide a formula by which that life might be ascertained, was not regarded as being in any way problematic: Indeed, the process of selecting a 'measuring life in being' under the Rule was believed to be so fully understood that no such explanation seemed necessary. However, the author argues the Pennsylvanian legislators reached that point in ignorance of the most fundamental purpose served by the Rule – certainty.

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79 *Locklear v Tucker*, 203 P.2d 380 (Idaho 1949).

80 The Report of The Joint State Government Commission of The General Assembly Of Pennsylvania Relating To The Following Decedent's Estates Laws: Intestate Act Of 1947; Wills Act Of 1947; Estates Act Of 1947; Principal And Income Act Of 1947, 72 (1947).

81 Estates Act 1947, PA. STAT. ANN. tit. 20, §§ 301.4-5.

Unfortunately, the problem was, and still is, that if beneficiaries need to wait and see whether their interests vested within the permissible limits, for exactly how long were they expected to sit on their hands? No-one knew. Furthermore, there might even have been a fatal *non sequitur* hiding in plain sight.[82]

The Pennsylvanian tax authorities also suffered under the 1947 Act: How could tax assessments be made when the final beneficiaries remained unknown? The quantum of tax due often depended upon the precise identity of the final beneficiary; especially if the actual recipient was tax exempt (such as a spouse) or perhaps there was a charitable gift-over in default. Indeed, the fact that Pennsylvanian lawmakers left this question unanswered suggests they had overlooked the Rule's core purpose was to ensure *certainty* of vesting; a purpose which relies upon having a very clear idea where the boundary between 'reasonably proximate' and 'remote' vesting lies. Regretfully, the legislature did not have any such clarity since, methodologically speaking, they had succeeded in abandoning the Rule's excessive (if not eccentric) demand to operate within the bounds of certainty and replaced it with a new boundary that included *uncertain* possibilities. The author submits that was precisely when legislative perpetuity reform became doomed to failure.

The startling outcome was that no consensus view could be found amongst the academic community of the day regarding *which* life-in-being could be used to measure the limitation. Thus, the 'measuring lives'[83] debate appeared from the dark recesses of the 'wait and see'

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82 See further page 38 below and the second point on page 206 below.

83 This is purposefully referred to in the plural. Once freed from the rigours of the common law's initial certainty requirement, the preceding discipline of referring to a single measuring life no longer applies. See further sub-section *(a) Early judicial voices on the propinquity of living persons* beginning on page 144 below.

debate, and battlelines were then being drawn on three fronts *simultaneously*: *(a)* reform, or no reform? *(b)* wait and see, or some other method?,[84] and *(c)* If 'wait and see', which life or lives should measure the period of wait and see? However, *questions (a)* and *(b)* may now be set on one side since the clear direction of travel at that time favoured 'wait and see' reform. That leaves us to consider only question *(c). Accordingly*, the four competing hypotheses will be introduced in sub-section (4) immediately below and examined in more detail in Chapter 5 below. In the interim, it is submitted that Allan's 'Effective Lives' hypothesis[85] probably has the most to tell us about the dangers of reforming law in ignorance of how it works:

Allan argued there was only *one* 'life in being' which could be used to measure the gift, and this was the *one* person who validated the disposition at common law. All others were irrelevant. In short, the only person with whom the Rule concerned itself was the *one* person whose life proved *effective* to save the interest.

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84 'Wait and see' was not the only solution to emerge. In addition, there were those outside the 'wait and see' camp who proposed limited reforms to fix Leach's four problem cases of 'magic gravel pits', 'unborn widows', 'precocious toddlers' or 'fertile octogenarians' individually (A very good discussion of the issues at hand can be found in: Lawrence Waggoner, 'Perpetuity Reform' (1983) 81 Mich LR, 1718), or to save the gift by applying the doctrine of cy près (Quarles (n 76)). Furthermore, other states sought the Rule's partial or total abolition; although several did so with the explicit intention of boosting their inter-state trust management sector (Maryland, Illinois, South Dakota and Delaware). See further: Angela M. Vallario, 'Death by a Thousand Cuts: The Rule against Perpetuities' (2015) 25 *Journal of Legislation*, Issue 2, Article 3.

85 David E. Allan, 'Perpetuities: Who are the Lives in Being?' (1965) 81 LQR 106. Further support was provided by: Maudsley (n 67); Ronald H. Maudsley, 'Perpetuities: Reforming the Common-Law Rule - How to Wait and See' (1975) 60 Cornell LR.

If Allan's 'Effective Lives' hypothesis is correct (and the UK Law Commissioners, and others, say it probably is),[86] subsequent Pennsylvanian-inspired 'actualities' statutes might unwittingly have become completely self-defeating. The reason is clear: If the legislature assumed the appropriate 'lives in being' was supplied by the Rule itself, and if those lives existed only where the disposition was actually valid, beneficiaries could only 'wait to see' in circumstances where the sole life available to measure the gift had *already* validated the disposition. In that event, the beneficiaries would have had no need for statutory assistance since, as a valid interest, they could have 'waited to see' what happened by themselves.

The same problem arose in reverse for *invalid* gifts. There, Allan would say that, by definition, no such *effective* life existed because the interest is voided for lack of a validating 'measuring life in being'. Thus, in the absence of a common law life, and without any wider statutory list of life to rely upon, there would be no life available to measure the permissible period of 'wait and see' under the 1947 Act. Thus, void gifts would remain void, and the statutory saving provision of the new 'actualities' test then became quite pointless.

No further comment is needed on the reformist debate per se for the present time since the current thesis rests entirely upon the question of, 'Precisely who is the measuring life in being under the common law Rule?' Or, to put the matter in methodologically neutral terms, 'What is the *propinquity* of a measuring life under *valid* common law interests?'

Immediately, the very fact that such a question needs to be asked at all reveals an astonishing truth about perpetuity theory: Since the Rule was framed specifically in terms of living persons, any misconceptions about who those lives are must mean there was an equal

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86 LAW COMM 4.16. See also sub-section (c) Avicennian modality 2: Possibility - Existence v Essence beginning on page 242 below.

misunderstanding about how a Rule of some 350 years' standing actually worked. Moreover, it casts doubt upon whether the lessons learned about the nature of conditionality and the concept of certainty of causes necessarily leading to their intended effects have been forgotten. Indeed, it will be argued that the root cause of this misunderstanding lies in the failure to define the boundaries of remoteness, or perhaps even exposing a fundamental error in the 'mischief' to which the term 'remoteness' refers.[87] This might help explain why living persons became an elastic concept which could be stretched to achieve desired outcomes.

(C) THE MEASURING LIVES[88] CONUNDRUM

Nutshell

The perpetuity reform debates since 1947 have revealed significant disagreements about how and why the Rule employs its so-called 'measuring lives in being' as a benchmark of permissible prolongation. Indeed, there are now no fewer than four alternative hypotheses to explain the function and purpose of any such life *in esse*. The unfortunate result is that no-one can be certain how a rule of some *three hundred and fifty* years' standing actually works.

The Rule, in its modern form, now states that "no interest is good, unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest".[89] Moreover, this test is applied at the very moment when the interest is first created. In short, the Rule goes about its business by examining possible future events prospectively, not retrospectively. Thus, the Rule is often called the 'initial certainty' rule because it must be certain, *from the outset*, there is no possibility of the gift vesting outside the permitted period.

87 See further sub-section (ii) beginning on page 260 below.

88 See n 83 above.

89 Gray (n 7) § 201.

It does not seem unreasonable to suggest that no further explanation is required for the terms '21 years' or 'vest'. These are expressions within most lawyer's everyday vocabulary. Unfortunately, the same degree of familiarity does not apply to the term 'a life in being'. Indeed, any initial confidence that it must mean *every living person* will be quickly shaken when realising that it probably refers to fewer persons than the nearly eight billion people presently alive. If that is so, the question then becomes, how many fewer?

(1) Express Lives

There is no difficulty identifying the appropriate lives in being to govern a limitation where they have been chosen *expressly* by the settlor to restrict a gift's final vesting. Consider the following *testamentary* gift to:

> (6) Such of my lineal descendants who shall be living 21 years after the death of the last remaining survivor of my lineal descendants who is still alive at the date hereof.

This gift is valid at common law since, by its express terms, vesting must occur (if at all) no later than 21 years after the death of someone who is *necessarily* alive at the date of gift.[90] Any descendants living at that time may then take their shares in accordance with the gift's terms. Here, no objection can be raised as to the number of lives chosen to restrict vesting[91]

90 That is, whichever of the testator's descendants are living on the date of his death.

91 "… let the lives be never so many, there must be a survivor, and so it is but the length of that life, for Twisden used to say the candles are all lighted at once." *Scattergood v Edge* (1699) 1 Salk. 229; *Thellusson v Woodford* (1805) 11 Ves 112. per Macdonald C.B. at p. 167.

(provided those lives are both reasonably ascertainable[92] and human[93]), nor to their lack of any family relevance to the vesting contingency.[94] The chosen lives are relevant simply because the gift's final vesting is expressly set to depend upon them. Nothing else is required.

Clever draftsmen quickly realised that expressly selected lives could also be used to validate gifts which would otherwise be quite void. Consider the following gift:

> (7) To such of T's grandchildren who attain *twenty-five* within 21 years after the death of the last remaining survivor of the lineal descendants of His late Majesty King George VI who is living at the date hereof.

which is perfectly valid at common law. Here, the otherwise unlawful age contingency of attaining twenty-five[95] is made valid by its restriction to occur within the lawful vesting period of 21 years. Effectively, the grantor is then able to create a 'wait and see' settlement which allows his trustees to hold the fund and await the outcome of future events - something they are not otherwise entitled to do under the Rule's strict 'initial certainty' requirement. Thus, to summarise, it may now be stated the only formal requirement for the valid selection of

92 *Re Moore* (1901) 1Ch. 936; dictum of Astbury J in *Re Villar* (1928) Ch. 471 at pages 477 and 478.

93 *Re Kelly* (1932) I. Rep. 255 at pages 260 and 261; c.f. *Re Dean* (1899) 41 Ch.D. 512.

94 *Cadell v Palmer* (1833) 1 Cl & F 372; *Re Friday's Estate* 313 Pa. 328 (Pa. 1933); c.f. *Corwin v Rheims* 390 Ill. 205 (Ill. 1945) in which held that only a life tenant could be a life in being. The case was not followed.

95 *cf* Law of Property Act 1925 s. 163(1).

express lives at common law is that the terms of gift must identify precisely[96] which lives are appointed to restrict vesting.[97]

(2) Implied Lives

The difficulties begin where no living person has been expressly selected to control the vesting period. In this event, the common law may, by implication, select lives that control the limitation to serve as an *implied* measuring life at common law. Unfortunately, it is precisely here that the availability of any available lives then became a hotly debated, issue. Here, the each of the four main theories to emerge is now considered in turn:

(i) The 'Any Lives' Theory

Although there is some support for the view that *everyone* living at the date of gift is a potential 'life in being' for the Rule's purposes,[98] this suggests beneficiaries must wait until the vesting contingency actually occurs before they can ascertain whether any living person had survived to within 21 years of that time.[99] However, for the reasons already stated, that would be contrary to both the Rule's initial certainty requirement and to established case

96 Or provide a formula by which they may be readily identified. "All the babies in Australia" is not sufficiently precise - Allan(n 85) 107.

97 The Law Reform Commission examined the difficulties associated with the selection of 'extraneous' lives and concluded that amending the law would be "... too complex to be practicable." Law Reform Commission, *Fourth Report (The rule against perpetuities)* (1956) Cmnd 18, 7.

98 Lewis M. Simes *Handbook Of The Law Of Future Interests*, (2d ed. 1966) 272.

99 Ruth Deech, 'Lives in Being Revived' (1981) 97 LQR 593, 600 et seq.

law.[100] Thus, it is generally accepted that only those lives which are *implicated*[101] in a gift's ultimate vesting are candidates for being a 'measuring life in being' at common law. From this, it then becomes necessary to examine individual gifts to see whether their possible endurance is, in some way or another, restricted by any of the lives implicated therein.

Here, a useful starting point is provided by the following *testamentary* gift where T (who is survived by two children, B and C) gives property to:

> (8) Such of my grandchildren who shall attain twenty-one.

which is valid at common law. Here, all lives other than those of B and C are rejected as candidate measuring lives by reason of the following train of logic: T's death necessarily and irrevocably determines the final identity of his children - and thus the possible parentage of all grandchildren who may live to claim under this gift. Clearly, T cannot produce more children after his own demise[102]. From this, it follows that T's grandchildren must attain (or fail to attain) twenty-one within 21 years of the deaths of their now-living parents, B or C -

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100 *Thellusson v Woodford* (1805) 11 Ves. 112; *Re Villar* (1928) Ch. 471; *Re Leverhulme* (1943) 2 Ch.D. 274.

101 "… the only lives in being which can be of any assistance for the purposes of the perpetuity Rule are those which in some way govern the time when the gift is to vest. The only lives worth considering are thus those which are implicated in the contingency upon which the vesting has been made to depend." Per Sir Robert E. Megarry and William Wade Megarry R E and Wade W, The Law of Real Property, (London: Stevens and Sons, 4th ed, 1975) 218, or are "involved" therein per Mechem (n 77) , or who have a 'sufficient relation to the devise' Cohan (n 76) 330.

102 T's after-born children will also become candidate measuring lives of the gift since they would, by definition, be '*en ventre sa mere'* at T's death. As such, these after-born children can validate the contingent gifts to any of T's grandchildren which are produced by them.

meaning these persons have now implicated *themselves* as the only relevant life of a gift to their own children. Unfortunately, any apparent consensus largely disappeared once the detail of exactly how the Rule selects those lives was considered more fully. Indeed, some 'causality' theorists, including Dukeminier, have suggested extending the search for a life in being ever outward in a process that begins to touch upon the 'any lives' theory.

The author offers an entirely contrary view by rejecting the similarly conceived 'umbrella lives' theory beginning on page 162 below. There, it was demonstrated how a life in being can never be the sole survivor of a group of lives *in esse*. Accordingly, attention will now be directed to the three remaining[103] hypotheses which reflect the longstanding and unresolved[104] debate over how any such living persons are selected. However, the claim that none of these theories is assisted directly by case authority[105] means it becomes difficult to settle the matter other than by applying general principle and strict logic to the issues at hand.

(ii) The 'Constructive Lives' Hypothesis

The discussion in sub-section *(2) Identifying the Seeds of Change* beginning on page 122 below will demonstrate how the personal nature of tenurial obligations in post-Conquest England gave birth to ideas that interests in real property were to be measured in terms of the holder's own lifetime. Indeed, the common law of seisin made this connection formally by insisting that an identifiable living person must be in possession of the land. However, given that the constraints implied by the demands of actual seisin subsequently came to be

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103 These include Deech's 'Constructive Lives' theory: Deech (n 99).

104 Law Comm 4.16.

105 Maudsley (n 67) 360; Jones (n 67) 57. Yet, as will be seen later, *Pownall v Graham* (1863) 33 Beav 242 may indeed provide decisive authority on the point.

"encysted in the tissues of judicial thought",[106] it is hardly surprising that those same ideas of measuring landed interests in terms of living persons were later applied equally to *successive* interests. Indeed, it is clear from Bracton's work on *maritagia* that lives provided the sole benchmark against which their validity at law could be judged,[107] whilst also providing the foundations in seisin upon which issues of inheritance came to depend.[108]

Professor Deech applied those observations to help formulate an alternative theory of measuring lives at common law. However, like the 'Any Lives' theory, the resulting hypothesis is entirely non-formulaic in its approach. Instead, Deech argues that 'measuring lives' are largely artificial constructs more appropriate to medieval family settlements.[109] Regrettably, whilst this may provide a valuable additional insight the significance of lives under English common law, she makes no attempt to explain *how* lives are selected. Indeed, Deech acknowledges this very shortcoming in her article. Accordingly, given that the present concern rests entirely with unearthing a precise formula for identifying the measuring life under the common law Rule, no further consideration will now be given to this theory.

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106 George L. Haskins, 'Extending the Grasp of the Dead Hand: Reflections on the Origins of the Rule against Perpetuities' (1977) 126 U Pa LR 19, 31.

107 See further the discussion in sub-sections *(ii) Certainty and Living Persons: The Bractonian Model* beginning on page 129 below.

108 See further sub-section (*3) Ruminating Upon the Potentially Unifying Role of Seisin* beginning on page 123 below.

109 Deech (n 99) 607. However, her perfectly reasonable assertion that lives under the Rule have, since *Cadell v Palmer* (1833) 1 Cl & F 372 had become a generalised concept which has become completely detached from its beginnings in strict family settlements provides no testable formula to prove their selection. Thus, it would be quite impossible to subject that hypothesis to the testing process in the remainder of this thesis.

(iii) The 'Effective Lives' Hypothesis

(a) Statement of the hypothesis

Relying upon the Rule's initial certainty requirement,[110] Allan argues the only lives which may be implied at common law are those within 21 years of whose demise the stated contingency *must* occur, if it occurs at all.[111] When any such life is discovered, the gift is then bound to vest, if it will ever do so, within 21 years of that time, thereby validating the interest in question. Under Allan's approach, the selection of a common law 'measuring life in being' then becomes a relatively straightforward matter. Only a life which is *effective* in saving a gift can be a measuring life at common law.[112] From this, the logical conclusion of the Effective Lives hypothesis is that a 'measuring life in being' can be found only in gifts which are *valid* at common law.

Plainly, the Rule's initial certainty requirement provides the foundation stone upon which Allan's theory is constructed. Indeed, it was implicit in Bracton's outline formulation of conditions that questions of presumed certainty would always determine the validity of interests under English law. In this regard, it seems perfectly natural that Allan should employ

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110 "Because of the 'initial certainty' rule ... what one is really looking for at common law is some life in existence at the commencement of the period which shows, in light of circumstances existing at that date, that the interest must vest in time." Allan(n 85) 107.

111 "The commonly used statement that the measuring lives must be mentioned either expressly or by necessary implication in the dispositive instrument is not true by definition, but by operation of the initial certainty requirement." Thomas Schmitt, 'Wait and See Revisited' (1975) 51 Chicago-Kent LR, 738, 749.

112 "In other words, one is looking for a life that will show the gift to be valid and one rejects all others as irrelevant." Allan(n 85) 107.

the common law's conclusive presumptions[113] of mortality and fertility to support his theory. That said, however, he failed to explain why those two presumptions were so important. Accordingly, and by way of preface to the following analysis, it is submitted that the fourteenth century rule discussed above that heirship came to necessarily imply an uncertainty at page 26 above probably holds the missing key to the Effective Lives hypothesis. If all heirs must be treated as an uncertainty until after their fathers had died, the question of validity under English common law then fell to be determined by two uncertain events, that is, birth and death. From this, the author will argue how the modern rules which now require lawyers to postulate both immediate death and future procreation are inexorably linked to fundamental questions about whether possible future events may be treated as *dies certa*. In doing so, the bedrock of English jurisprudence is suggested to reveal its *Romanic* character.

Notwithstanding the foregoing argument, there is one alternative explanation that deserves special mention. It is quite possible the Court of Common Pleas' refusal to hear the parties' testimony[114] may have led to the formulation of the *initial certainty* rule. Here, if the validity or invalidity of an interest could be determined simply by examining the terms of grant, no external evidence was needed to prove whether the stated contingencies had, in fact, occurred. The courts could then continue their practice of not hearing any witnesses at all. However, it seems reasonable to suggest that since Bractonian theory pre-dated those judicial practices, the procedural rules simply reflected the difficulties of obtaining reliable evidence during those early times.

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113 Which appears to be rebuttable by proof to the contrary. *Re Gaite's Will Trusts* (1949) 1 All ER 459. This point seems to have been accepted in the New Jersey case: *Re Lattouf's Will,* 87 NJ Super 137, 208 A. 2d 411 (New Jersey App.Div 1963).

114 See, for example, Plucknett (n 26) at 178.

(b) The presumption of mortality

The validity of any contingent future interest may also be tested by presuming the immediate demise of *everyone* living at the date of gift. If the interest must vest, if at all, no later than 21 years after that time, it is valid at common law.[115] If not, the gift is void.

The validating effect of this presumption is illustrated by examining G's *inter vivos* gift to:

(9) A's first son to be called to the bar.

where A is alive. If both A and G are now presumed to die immediately after the gift took effect, neither of these lives would *necessarily* precipitate vesting within the next 21 years because the gift does not require that any of A's sons must be called to the bar either within that time, or at all. Indeed, vesting is dependent only upon an uncertain future *decision* to become a barrister, the bare possibility of which imposes no definite limit on the trust's possible continuance.[116] The gift is void because *no* lives are then implicated in the designated vesting contingency.

The outcome would be different if A had already died before the gift was made. Clearly, his first son to be called to the bar must necessarily do so, if at all, within that son's *own* lifetime and, thus, within the Rule's permitted vesting period. In these circumstances, the gift

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115 Samuel Fetters, 'Perpetuities: The Wait-and See Disaster a Brief Reply to Professor Maudsley with a Few Asides to Professors Leach Simes Wade Dr Morris et al' (1975) 60 Cornell L R 380, 391; Jones (n 67) 55 et seq. This approach was employed expressly in *Re Lattouf's Will* 87 NJ Super 137, 208 A. 2d 411 (New Jersey App. Div 1963).

116 Other than the eventual deaths of all A's, still unborn, children, or, where A dies without having produced sons.

would be perfectly valid since the possibility of vesting is logically restricted to occur within a life then in-being.

(c) The presumption of fertility

The common law's presumption of fertility deems that every person living at the date of gift can produce further issue.[117] This may be illustrated by the following gift to:

(10) Such of A's grandchildren who shall attain twenty-one

where A, an octogenarian, is alive with two children B and C.

If A had already died, the gift would be valid because the identity of all his living children would then be determined. Any furt5her issues are then bound to reach twenty-one within the next 21 years, if at all. However, since A is alive, the common law presumes he could produce a further child, D, after the date of gift. From this, the difficulty then becomes that D's issue are bound to attain twenty-one (if they ever do so at all) only within 21 years of *D's* death and not within 21 years of the death of anyone *necessarily* living at the date of gift; that is, B and C. Therefore, the entire gift must fail because it is now possible to project a scenario in which the gift could be claimed more than 21 years after the death of someone who was not alive when the gift was made.[118]

The critical reader might argue that while gift (10) is *voided* by the presumption of fertility, it is *validated* by the presumption of mortality. Plainly, if A, B and C were all presumed to die immediately after the disposition took effect, any then-living grandchildren are bound

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117 *Jee v Audley* (1787) 1 Cox 324, 29 E.R. 1186; However, note *Re Gaite's Will Trusts* (1949) 1 All ER 459 and *Re Powell* (1898) 1 Ch 227.

118 See Maudsley (n 67) 361, 362.

to attain twenty-one (if at all) within the next 21 years. In that event, the gift must then vest within the permitted period, thereby establishing itself as a valid interest at common law. Unfortunately, that argument ignores the Rule's initial certainty requirement, which examines *all* possible future scenarios to see whether any gift must vest, if at all, within its permitted period. Therefore, once one remote vesting scenario has been indicated, the gift must fail even if alternative scenarios would allow the gift to vest in time.

(d) Commentary

The presumptions of mortality and fertility are thus argued to support the proposition that only those lives which are *effective* in saving a gift can be a 'measuring life in being' at common law.[119] Here, support for Allan's conclusions was given by both Fetters[120] and Maudsley,[121] the latter of whom cites *Re Gaite's Will Trusts* (1949)[122] as a "vivid"[123] illustration of its soundness. Unfortunately, it is submitted that Maudsley has overstated the significance of the *Gaite's* decision. That case has been persuasively criticised[124] and, in any event, makes no assertion as to which life measured the limitation. Indeed, if *Re Gaite's* was to promote any single theory of how lives are selected, it would more likely be that a measuring life is

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119 Accordingly, a contingent gift "… does not fail because it would not vest within some standard measurement of time called 'the perpetuity period', but because no life can be postulated within twenty-one years of the dropping of which the interest must necessarily vest." Allan(n 85) 107.

120 *Re Gaite's Will Trusts* (1949) 1 All ER 459.

121 Maudsley (n 85) at 374; Maudsley (n 67) 363 et seq. See also *point 2 'Judicial Construction'* on page 60 below.

122 *Re Gaite's Will Trusts* (1949) 1 All ER 459.

123 Maudsley (n 67) at 363.

124 MORRIS & WADE 490 - particularly with regard to the status of overseas marriages.

determined by judicial *construction*. There, it was held that any children born within 5 years of the testator's death could not *lawfully* marry within the stated vesting period, which then allowed the gift to be succeed at common law.

On first inspection, Allan's claim that it is the Rule's initial certainty requirement which selects the candidate measuring lives appears quite sound. Indeed, the Effective Lives hypothesis provides a compelling explanation as to why lives are so important to the Rule's functioning. Yet, there are difficulties with Allan's work which require further investigation:

(α) The theory implies a definitional circularity

The critical reader may have begun to question whether the theory proposed says anything new about how the Rule operates. The Rule already tells us *why* a measuring life determines validity; a gift is valid because it is *effectively* limited to end within the 21 years following their demise. Yet, the problem is the Effective Lives hypothesis appears simply to reverse this proposition by stating that an effective measuring life serves to create valid gifts. Unfortunately, that is a rather uninformative definitional circularity[125] which provides no separate explanation for *how* the common law chooses a measuring life in being. If that is right, it follows that Allan's proposal cannot provide a new and extended understanding of the Rule since, it cannot be separated from its own initial certainty requirement.

(β) Is validity dependent upon lives at all?

The Effective Lives hypothesis is based on the unproven assumption that it is only a *living* person, rather than something else, which can validate gifts at common law. Thus, by focusing

125 See also, Deech (n 99) 605.

entirely on the presence or absence of any validating (effective) lives, the possibility that other conditions associated with (or implied by) making a contingent future gift is excluded.

> The flaw in this approach, it is submitted, is to treat the life in being as the validating factor, whereas in truth it is the certainty of the occurrence of the contingency within the *period* of perpetuity that is the test, and the period is one that can be objectively measured.[126]

In short, the Effective Lives hypothesis risks attracting the criticism that it sets out simply to prove its own existence. However, the issues are a little more complex than first appear, and which now require that the problem be divided into two separate issues: *(1)* the problem with the Effective Lives hypothesis, and *(2)* the problem with Deech's criticism:

1. Effective Lives*.* Initially, it may be noted that the Rule specifies a permitted perpetuity period of only 21 years in cases where no principal beneficiary can be found to measure the gift.[127] Clearly, lives *per se* then become entirely irrelevant to the question of validity under the common law Rule. Of course, it is in the very nature of things that exceptional cases produce anomalous outcomes. However, it is submitted that they demonstrate quite clearly how a perpetuity period measurable exclusively in terms of lives cannot be taken for granted, even if the vast bulk of English case law demonstrates that the presence or absence of lives is crucial to determining questions of validity.[128] Unfortunately, Allan fails to deal with this potential criticism. Indeed, it is submitted that he was unable to do so because effective lives never feature as an *independent* factor in his equation. They are simply stated to be the validating feature of dispositions which obey the Rule.

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126 ibid at 604.

127 *Pirbright v Salwey* (1896) WN 86; *Re Hooper* (1932) Ch 465.

128 See for example *Pownall v Graham* (1863) 33 Beav 242.

2. Deech. Professor Jones has argued most persuasively that there is no *time period* implied by the Rule at all. Instead, he claims that the Rule's benchmark for validity is simply a 'projection of possibilities' made as at the date the gift takes effect.[129] Thus, the foundations upon which Deech makes her criticism appear highly questionable. This point will be developed in much greater detail when considering the Causal Connection hypothesis at page 65 et seq. below. In the interim, it may be noted that Deech's criticism of the Effective Lives hypothesis appears to demonstrate the excessive influence of her so-called 'Constructive Lives' theory. If 'lives' are to be viewed as an inappropriate measure of perpetuity, it then becomes quite understandable how the projective character of that benchmark was replaced by the assumption that an objectively determinable perpetuity period actually exists. Thus, it is submitted Deech's argument appears to be swayed by her belief in what a perpetuity rule *should* say, rather than by what the Rule provides in *fact*.

(γ) Does the initial certainty Rule always apply?

Allan's thesis depends upon the Rule's initial certainty requirement identifying the 'measuring life in being'. For clarity, it must be certain from the very outset that one person alive at that time must restrict vesting to within 21 years of his or her own demise. In that event, if some instances occurred when initial certainty was not required, Allan's hypothesis would fail. This was precisely the stance taken by Tudor and Leach who claimed there were *four* instances where the court has been guided only by facts as they stood at the date of trial, not inception.[130] Here, by examining each of these instances in turn, perpetuity experts will

129 Jones (n 67) 55. See also sub-section *(v) 'Things' in Time* beginning on page 218 below.

130 Owen Tudor, 'Absolute Certainty of Vesting Under the Rule Against Perpetuities-A Self-Discredited Relic' (1954) 34 Boston ULR, 129.

realise this discussion involves re-visiting the 'wait and see' arguments of the 1950s and 1960s. However, since these issues have already been debated quite exhaustively the following analysis is restricted entirely to its significance for the Effective Lives hypothesis.

1. The court's refusal to ignore actuality. Tudor[131] cites *Merchants National Bank v Curtis* (1953)[132] to demonstrate the courts' alleged impatience with the Rule's initial certainty requirement. There, following the newly emerging 'second look' doctrine proposed in *Sears v Coolidge* (1952),[133] Chief Justice Kenison remarked:

> There is no logical justification for deciding the problem as of the date of death of the testator on facts that might have happened rather than the facts which actually happened. It is difficult to see how the public welfare is threatened by a vesting that might have been postponed beyond the period of perpetuities but actually was not[134].

Leach[135] cites *Re Bassett's Estate* (1963),[136] *Story v First National Bank* (1934)[137] and *Edgerly v Baker* (1891)[138] as strong precedent in support of an increasingly relaxed view of what 'initial certainty' means under the common law Rule. Yet, while these decisions may have been heaven-sent for the reformists, the author submits they should be viewed as truly exceptional decisions. Indeed, there is no similar precedent in English law. Both for this

131 Ibid 130.

132 *Merchants National Bank v Curtis* 97 A.2d 207 (NH 1953).

133 *Sears v Coolidge* 329 Mass. 340, 108 N.E.2d 563 (Mass 1952).

134 Ibid 212.

135 Leach (n 75) 746; Leach (n 75) 978; Leach (n 75) at 43.

136 *Re Bassett's Estate* 190 A.2d 415 (NH 1963).

137 *Story v First National Bank* 115 Fla. 436, 156 So. 101 (Florida 1934).

138 *Edgerly v Baker* 66 NH 434 (NH 1891).

reason, and because nearly half of Kenison's judgment related to the constructional dimension of perpetuity cases, they will not be considered further.

2. Judicial construction. No difficulties would have arisen for the Effective Lives hypothesis if the common law's 'remorseless' approach[139] to gift construction had not been gradually softened by an increasingly more forgiving approach.[140] The reformists may have seized upon this new tendency as evidence of a favourable shift in opinion towards the objectives serves by 'wait and see'. Yet, it must be doubted whether that was true. Somewhat confusingly, the common law has maintained *two* constructional preferences which, at first sight, appear to conflict irreconcilably. The *first*, the 'remorseless construction' mentioned above, construes gifts without regard to the consequences of it being declared void *ab initio*. Mistakes are always fatal. The *second* is the common law's 'constructional preference for vesting',[141] which has led to a line of decisions that appears to stand outside established theory.[142] Here, mistakes referable to ambiguities (whether actual or contrived[143]) have been

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139 *Pearks v Moseley* (1880) 5 App. Cas. 714 at 719; *Re Hume* (1912) 1 Ch. 693 at 698; *Ward v Van der Loeff* (1924) AC 653.

140 See further the cases cited in n 142 below.

141 *Duffield v Duffield* (1829) 3 Bli. (NS) 260 per Best CJ at 331. *Leeming v Sherratt* (1842) 2 Ha. 14.

142 *Re Powell* (1898) 1 Ch 227 (a gift to an octogenarian woman's children was construed to mean only those children living at T's death); *Re Hobson's Will* (1907) VLR 724 (a gift to A's children at 25 construed to mean only those living children who were to receive separate legacies); *Brownfield v Earle* (1914) 17 CLR 615 (a gift to A's sons at 25 construed to mean only those produced during A's first marriage).

143 Morris and Leach (n 11) 252 note 21, comment on the artificiality of the *Brownfield* construction since, the donor had specifically restricted a separate gift only to the issue of A's

saved by a very generous construction of dispositive intent. From these instances, it is easy to imagine that the initial certainty Rule had not been applied either strictly, or at all. If that is the case, how could a measuring life have been chosen by the processes postulated in the Effective Lives hypothesis? In fact, the answer is quite simple. Construction has nothing whatsoever to do with initial certainty, providing the construed gift is *still* valid under the Rule's strict initial certainty requirement. Indeed, since all those gifts were perfectly valid under the strictly applied Rule, none of them provides any authority for a contrary proposition. Thus, the argument seems to be ill-founded.

3. General powers of appointment. Here, general powers of appointment have the character of an absolute right of ownership and are not invalidated by the *possibility* that they might be exercised too remotely.[144] From this, it might then be argued that since the validity of any such ownership rights is determined upon the basis of *post-dispositional* events,[145] the Effective Lives hypothesis cannot now identify measuring life of the limitation. Yet, there is a confusion here. The gift must still be separately valid under the Rule's initial certainty requirement, and any powers of appointment simply operate *through* the gift by bringing an end to any control over some or all of the trust capital. Thus, the author argues that the potentially remote exercise of any such trust powers is not an exceptional instance of gifts being created outside that requirement since the appointor must then act *qua* owner.

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first marriage, (*Reid v Earle* (1914) 18 CLR 493.) so why had he not also done so for the devise then in dispute?

144 Morris and Leach (n 11) 146. *Re Raphael* (1903) 3 SRNSW 196; *Melvin v Hoffman* Mo. 464 235 S.W. 107 (Mo 1921).

145 Tudor (n 130) 137 et seq.; *Bartlett v Sears* 81 Conn. 37, 70 Atl. 33 (Conn 1908). They are, of course, invalidated if they were to be exercised too remotely in fact.

4. Split contingencies. The possibility that a gift will vest depending upon the outcome of two or more successive contingencies has allowed the court to 'wait and see' whether those events occur in fact. Thus, Tudor's illustration of a gift to "such of A's children as attain 25, or if all the children die under 25, then to B" allows the court to wait and see if A produces children.[146] If he does not, the gift to B is valid at common law. At first sight, the initial certainty Rule then appears to have been circumvented, thereby leaving the Effective Lives hypothesis without any means of identifying measuring life of the limitation. However, the situation is not quite so devastating as first appears. The author submits that since the only event for which the court will wait must occur during A's lifetime, all that has happened is that a 'long-stop' trust has been created similar to that in gift (7) on page 42 above. That is not a repudiation of the initial certainty Rule, it is simply a clever way of overcoming its strict consequences. Indeed, these devices have been exploited by conveyancers for many years.

In conclusion, whilst the Effective Lives hypothesis may have survived the criticism that the initial certainty Rule may not always apply, it is submitted the falsity of this argument remains problematic. By assuming the initial certainty Rule *always* applies, the Effective Lives hypothesis has little room to consider the possibility that it might not.

146 Tudor (n 130) 138 et seq; *Longhead v Phelps* (1770) 2 Bl. W. 704.

(iv) The 'Causal Connection'[147] Hypotheses

(a) Introduction

In contrast to the Effective Lives hypothesis, Morris and Wade suggest relevant lives under the Rule include those which do not, in fact, validate a gift. Instead, they theorise that a wider category of 'causally connected' lives exists at common law.

> The lives which are relevant at common law are those which restrict the period of vesting, they may or may not restrict it sufficiently to save it under the initial certainty principle. But it defies all logic to say that merely because lives may not confine the gift to save it at common law, they do not confine it at all.[148]

From this, a complex theoretical model is proposed which takes an entirely novel view of how the common law selects lives. Yet, there is a wider dimension to the Causal Connection hypothesis than first appears: Morris and Wade's claim that the common law could identify a broader range of measuring lives than those which actually validate a gift[149] was intended to present a strong argument against the need for a statutory list of lives under the 1964 'wait and see' perpetuity reforms.[150] Thus, their hypothesis must also be viewed in context with that agenda.

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147 Deech (n 99) 601 would disagree with this characterisation of Morris and Wade's hypothesis. However, it is a title which captures the general thrust of their work (and is, indeed, a term used by themselves at MORRIS & WADE 497) rather better than her chosen description of it being the 'Oxbridge' theory. Allen's characterisation of the theory as the 'Causal Relation' test works equally well.

148 MORRIS & WADE 500.

149 MORRIS & WADE 501. See generally, Deech (n 99).

150 The Perpetuities and Accumulations Act 1964.

(b) Relevant lives

Morris and Wade claim the common law engages in a two-stage enquiry by which a causal connection between any lives in being and the vesting contingency is established as the *first* step in determining a gift's validity. Morris and Wade then move on to suggest that *all* lives which in *some* way restrict the period of vesting are made 'relevant' to the limitation[151]. Here, they claim the common law is unconcerned whether a gift is valid in fact.

> The truth is, we submit, that there is a perfectly clear distinction between lives which restrict the period of vesting and lives which do not restrict it; that this distinction is inherent in the Rule against Perpetuities at common law; and that it enables the appropriate lives to be identified, whether the gift succeeds or fails. To argue that the common law cannot identify lives in being which do not save the gift at common law is to confuse the law as to the available perpetuity period with the question whether the gift is bound to vest ... within that period.[152]

Perhaps to avoid any risk of falling into a definitional circularity, Morris and Wade have explained the selection of candidate measuring lives quite separately from the Rule's initial certainty requirement. Plainly, 'relevant' lives do not necessarily validate the gift. In this regard, the Causal Connection hypothesis now seems to offer an outline explanation of *how*, rather than just *why*, these lives are chosen. That is most welcome, although, it must be said their hypothesis appears to raise more problems than solutions. Indeed, the theory has not

151 "The question ... is whether [those lives] as a matter of causality ... restrict the vesting period; and if they do, the next question is whether they restrict it sufficiently to satisfy the Rule." MORRIS & WADE 497.

152 ibid at 501.

received widespread support[153] and the Law Commission has concluded that Allan's work probably reflects the majority view.[154] Thus, the focus now falls on those difficulties.

(α) An inconsistency with established case law

Unfortunately, Morris and Wade offer no authority to support their assertion. Instead, they justify their proposals by example. In this regard, those examples [reproduced below as gifts (11), (12) and (13) are now analysed by reference to what may be described as 'orthodox theory'. Chapter 5 below will re-examine each of these gifts in terms of a new theoretical framework. From this, it should become clear whether their theory is defensible.

The first example provided by Morris and Wade is that of a gift to:

> (11) A's first grandchild to marry.

where A is alive with a son. Here, Morris and Wade claim:

> ... the lives of A and of that child of A both necessarily restrict the period of time within which the relevant grandchild can be born and so eventually marry.[155]

Nevertheless, this gift fails at common law for the reasons given in gift (9) on page 49 above. As Maudsley has rightly said[156], the only causal connection implied in this gift is a relationship between the parties to that marriage - neither of whom was necessarily alive at the date of gift. Thus, final vesting depends upon an uncertain *decision* to marry by

153 Deech (n 99) 602.

154 LAW COMM 4.16.

155 MORRIS & WADE 498.

156 Maudsley (n 67) 361.

unascertained persons - which implies those lives have only a *circumstantial* connection with the general dispositive scheme. This will be demonstrated later to be the proper construction of the term 'remoteness' under Aristotelean theory.[157] So far as the Rule is concerned, the possibility of vesting cannot now be measured by any projection involving then-living persons - and *all* lives become both causally and logically irrelevant to the vesting contingency.

Consider, further, Morris and Wade's second example gift to:

> (12) Such of A's grandchildren who shall attain twenty-one

where A is alive with two sons, B and C. This gift fails at common law for the same reasons given in gift (2) on page 19 above.[158] Nevertheless, Morris and Wade claim that B and C's lives are relevant to the limitation since, each confines the period within which the gift may vest in favour of his own children.[159] However, this proposal raises a fundamental difficulty with which Morris and Wade do not deal directly. A valid measuring life must restrict vesting under the so-called 'all or nothing' rule - which demands that if a gift cannot be wholly valid under the Rule it is wholly void.[160] Therefore, B and C (who Morris and Wade admit are irrelevant to any gifts not in favour of their own children[161]) must fail as candidate measuring lives of the entire gift[162] since they have no causal connection with a gift made to *all* of A's

157 See point (b) on page 260 below.

158 Morris and Leach (n 11) illustration 10, 62.

159 MORRIS AND WADE 500.

160 *Leake v Robinson* (1817) 2 Mer. 363.

161 MORRIS & WADE 500.

162 *Cattlin v Brown* (1853) 11 Hare 372.

grandchildren.[163] The gift must then fail for perpetuity "… not because it is incapable of vesting within 21 years of the deaths of A, B and C, but because it is not certain to vest within 21 years of anyone's death".[164]

It might be argued that A's living grandchildren (if any) might, themselves, become relevant to the limitation. Here, the possibility that one of them will be the first to reach twenty-one - and thereby close the class of eligible beneficiaries[165] - then establishes a causal connection between themselves and their after-born cousins.[166] However, whilst it is true the gift must vest within 21 years of the class being closed, it cannot be predicted with certainty that any first grandchild to reach twenty-one was, in fact, alive at the date of gift.[167] Therefore, given the uncertainty as to exactly *which* life may ultimately control vesting, no *single* life can then be said to be causally connected with its possible occurrence.

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163 Which might include D's children.

164 Fetters (n 115) 392.

165 The rule in *Andrews v Partington* (1797) 3 Bro. CC 401; *Re Lattouf's Will* 87 NJ Super 137, 208 A. 2d 411 (New Jersey App.Div 1963).

166 Here, the decision in *Re Cockle's Will Trusts* (1967) Ch. D. 690 might be used to support such an argument. See also Maudsley (n 85) at 374.

167 The possibility that the class might be closed outside the perpetuity period defeats the gift. *Curtis v Lukin* (1842) 5 Beav 147. The class would, therefore, need to be closed at the date of gift for it to be valid. Here, a grandchild must already have reached twenty-one as at that date if the gift is to be saved. *Picken v Matthews* (1878) 10 Ch.D. 264. The situation would be different if the doctrine of 'severable or severed shares' applied - see *Cattlin v Brown* (1853) 11 Hare 372 applied in the *Second Bank-State St. Trust Co. v Second Bank-State St. Trust Co.* 140 N.E., 2d, 201 (Mass 1957). See further, *Lanier v Lanier* 218 Ga. 137 (Ga 1962). There, the Georgia court construed a gift to grandchildren to be severable between those with a vested interest subject to divestment if they did not survive to the age of distribution and the interests of after-born children that were invalid.

The final example provided by Morris and Wade is that of T's *testamentary* gift to:

> (13) My eldest descendant living 30 years after the death of the survivor of all the lineal descendants of King George VI who shall be living at my death.

This gift fails at common law because the specified age contingency of attaining thirty is too lengthy[168] - the Rule specifies a maximum period of 21 years. Nevertheless, Morris and Wade claim those express royal lives are made relevant because T has expressly mentioned them in his gift - and has erred only by making the age contingency too remote.[169]

The problem revealed in gift (13) can be developed further by asking why those royal lives (who could validly measure a gift to T's descendants on attaining twenty-one) are not relevant lives of a gift dependent on them reaching thirty? The only difference between these gifts is the stated *age* contingency, not the available lives. However, while that is to promote a plausible (if not compelling) relationship between these lives and the *gift*, their argument ignores the required dependency between the lives and the *permissible vesting period*. Unfortunately, the relevance of the royal lives specified in gift (13) is proved, or disproved, entirely by the Rule's initial certainty requirement - whose presumption of mortality[170] resolves the matter completely. If all these royal lives are now presumed to die on the date of gift, it is logically impossible for T's descendants to live out another 30 years within the next 21 years. From this, T's chosen lives must then be rejected as irrelevant. This is simply because, to use Morris and Wade's own terms of analysis, there is no causal connection which

168 *cf.* Law of Property Act 1925 s.163 (1).

169 MORRIS & WADE, 500.

170 See further page 41 above.

logically ties these royal lives plus 30 years to the permissible period of *any relevant life* plus 21 years.

(B) The Rule tests future possibilities not relevance

It is not just by mischance that the Rule discounts lives which fail to validate a gift at common law. The Rule ignores them because the very idea of searching for a confining period[171] in terms of *possible* lives represents a misunderstanding of the Rule:

> ... the period allowed by the common law rule is not a period of time at all. It is a projection of possibilities made as of the effective date of the instrument ...[172]

The full significance of Jones' point may be seen by re-examining gift (9) above.[173] There, a gift to A's first son to marry is void for perpetuity - but that does not mean the common law is incapable of recognising the obvious family relationship between A and his sons. Here, the problem is simply the gift does not require that A's sons must marry within 21 years of A's death, at *any* particular time in the future, or at all. A then becomes entirely irrelevant to the vesting contingency - since neither his, nor *anyone* else's, life (or, more properly, their deaths) is then implicated in its possible occurrence.

The matter may, thus, be viewed simply as one of cause and effect. The *cause* of this disconnection between *any* lives and the appointed vesting contingency is that possibilities for the future are too open-ended. The *effect* of that disconnection is the gift must be held void for perpetuity because the 'projection of possibilities' is too great. Therefore, it is

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171 Deech (n 99) 604 makes the same error by imagining there is such a thing as a *period* of perpetuity.

172 Jones (n 67) 55.

173 See pages 41 and 42 above.

submitted the absence of lives which validate a gift is simply legal (or rather, perpetuity) shorthand for the Rule's finding that future possibilities are unacceptably open-ended. If so, the true measure of validity at common law then becomes whether a contingent future gift is sufficiently *self-restrained* that public policy is not offended by it being allowed to continue until its natural conclusion. When viewed from this perspective, the suggestion that lives could be relevant to *void* gifts can then be seen to miss the Rule's point entirely.

(γ) The common law's demand for initial certainty

The spotlight of criticism falls on the Rule largely because of its controversial initial certainty requirement. From this, the complaint is often made that it unfairly voids gifts to precocious toddlers, fertile octogenarians, unborn widows or 'magic' gravel pits.[174] However, the Rule's initial certainty requirement cannot be viewed as an isolated phenomenon in English law. This test simply reflects the common law's *general* requirement for certainty in the valid creation of equitable interests under trust.[175] Therefore, when viewed in context with the required certainties of words,[176] intention,[177] subject,[178] object[179] and powers,[180] the

174 See n 69 above and the text to which it relates.

175 *Knight v Knight* (1840) 3 Beav 148.

176 *Lambe v Eames* (1871) 6 App. Cas 597.

177 *Jones v Lock* (1865) LR 1 Ch. App. 25.

178 *Palmer v Simmons* (1854) 2 Drew 221; Sp*range v Barnard* (1879) 2 Bro.C.C. 585; *Boyce v Boyce* (1849) 16 Sim 476.

179 *Morice v Bishop of Durham* (1804) 9 Ves. Jr. 399.

180 *Burrough v Philcox* (1840) 41 ER 299; *McPhail v Doulton* (1971) AC 424. It is, perhaps ironic that the initial certainty Rule is not applied strictly to the exercise of general trust powers. There, the validity of those powers is decided upon when they are exercised. See generally MORRIS & WADE, 519; and point 3 on page144 above.

Rule simply provides an *additional* certainty requirement that vesting should not occur too remotely. From this, it is suggested that any assault on the Rule's initial certainty requirement also risks challenging the law's *general* certainty requirement.

If Morris and Wade's underlying complaint is the initial certainty Rule is unfair, nothing will be resolved by imagining that it does not exist. There *is* an initial certainty requirement - and whether it applies in *all* cases[181] - it certainly applies to all the illustrative gifts used by Morris and Wade. Fetters summarised the problem quite insightfully:

> If you go out looking for measuring lives, the danger is that you might just find some one or more persons whose continued life would serve to validate the interest in question, or whose death would cause the interest to fail. Once you have found a life in being by this erroneous line of analysis, you will find it difficult, if not impossible, to extricate yourself from a line of reasoning which usually leads to an erroneous conclusion.[182]

(δ) A confusion between prospective and retrospective analysis

The author argues that Morris and Wade have based their conclusions on the retrospective projection of entirely *subsequent* events to prove a reasonable and compelling relevance of those lives to the gift at its inception. Their commentary on the gift in example (11) presumes that a grandchild *will* marry. Their proposition made about example (12) anticipates that it is *only* B and C who produce children. Finally, their point in example (13) is based upon an assumption of *actual* survival to thirty. Yet, the Rule has no interest in these later events since its only concern is with the *forward* projection of *future* possibilities.

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181 ibid at point 3.

182 Fetters (n 115) 390.

(ε) An inconsistency with their own theory

It may also be noted the suggested relevance of the lives in gifts (11), (12) and (13) above seems contrary to Morris and Wade's own formulation of their hypothesis. If relevant lives restrict the period "… within which the appointed conditions for vesting can be fulfilled ...",[183] how can there be any such restriction where the appointed vesting contingency is too remote to be valid? Vesting cannot *lawfully* be fulfilled where the gift is void. Therefore, *all* lives then become irrelevant to void gifts since, their endurance to within *X* years of an unlawful vesting contingency cannot implicate *any* life in its occurrence within the Rule's strict remoteness boundaries.

(ζ) Does each contingent gift contain its own perpetuity period?

The Causal Connection hypothesis relies on the central assumption that each disposition has an inherent perpetuity period - a period constructed from the lives related to that gift:

> … the relevant lives in being should be those which restrict the period of time within which the appointed conditions for vesting can be fulfilled, and no others. In other words, every contingent gift has its own inherent perpetuity period.[184]

From this, all such lives are thereby argued to be made relevant to the gift at common law. Unfortunately, the premise and conclusion of this claim must now be questioned. As Allan has rightly said, Morris and Wade appear to have confused the perpetuity period (which in policy terms may be described as the *permissible* vesting period) with the *actual* vesting period created by the terms of gift as realised by subsequent events.[185] Contrary to their

183 MORRIS & WADE 501.

184 ibid at 498.

185 Allan(n 85) at 111.

suggestion, the actual vesting period - which may, or may not, be longer than the permissible vesting period - is useful only as a guide to seeing whether or not the vesting contingency is valid under the Rule's permissible 'projection of possibilities'.[186] Where it is longer, the gift will be held void for exceeding lawful bounds. To suggest otherwise is to argue that the actual vesting period prescribes the period within which the gift may *lawfully* vest.[187] That cannot be right. Indeed, if it was, the Rule would become quite pointless, since the draftsman's tail would then wag the perpetuity dog. Yet, Morris and Wade were not wrong in principle. Every gift implies a its own relevant perpetuity period - which, to adapt Allan's view, is defined not by its available lives but, by reference to its stated vesting contingency.[188] This point will now be explained further:

The Rule's permissible vesting period of a life in being plus 21 years thereafter is not a fixed period during which any contingent abeyance in vesting is allowed. In fact, the Rule prescribes only a *maximum* projection within which vesting must occur (if at all) for a valid interest to be created. This argument may be explained further by the following valid gift to:

(14) Such of A's children who shall attain eighteen.

Here, an interesting question now arises. What is the perpetuity period applicable to this gift? If the permissible vesting period remained at a life in being and 21 years thereafter, a

186 Jones (n 67).

187 "... this seems to have tempted Dr. Morris and Professor Wade into taking the rules as to when an interest will vest as their guide for measuring the period within which it must vest if it is to satisfy the Rule". Allan(n 85) at 111.

188 "Each limitation has its own built-in vesting event which is usually defined by reference to certain lives". ibid at 111.

remarkable situation might result. The trustees could then be allowed to wait for up to three years after A's demise to see whether any children born of his frozen sperm might ultimately claim. Clearly, the terms of gift do not permit such nonsense - and the grantor's stated vesting period then shortens the relevant perpetuity period to a life in being plus *eighteen* years thereafter.

If the preceding argument is right, every contingent gift has a perpetuity period which is *peculiarly relevant* to its stated terms - provided always that any such period does not exceed the Rule's permitted maximum. Plainly, the gift would then fail for perpetuity. Moreover, this inherent perpetuity period can never exceed the stated *vesting* period, for the reasons already given above. Thus, the author asserts that Morris and Wade were right to suggest that a relevant perpetuity period[189] is implied by each gift, but for the wrong reasons.

A further criticism of Morris and Wade's assertion is that it contains a serious misunderstanding of the temporality of conditions. This has already been touched upon in sub-section *(ii) The 'Constructive Lives'* Hypothesis beginning on page 45 above. However, since a full understanding of that proposition requires considerable foreknowledge, this matter will be postponed until sub-section *(α) The problem that no 'thingness' implies regions in space where time may not exist* beginning on page 267 below.

(η) Is the connection one of cause or of effect?

From the analysis of Neoplatonic philosophy in Chapter 4 below, the author will conclude in *point (ii)* on page 283 below that Morris and Wade's hypothesis is flawed by a confusion between cause and effect. Indeed, it is founded upon a misinterpretation of what the Rule's policy objections against remoteness mean. Indeed, this thesis will argue that future interests

189 MORRIS & WADE 498.

are not tainted with 'remoteness' because of their excessive *prolongation*, but rather because the causal chain which connects a gift's inception to its final realisation is not *necessitated* to occur, if at all. This was implicit in the Bractonian assertion that English common law demanded *annexation* of conditions to the modus;[190] that is, a living person being *necessarily* attached to the vesting contingency. Perhaps this would have been more obvious to Morris and Wade if they had recognised how their three illustrations of *void* gifts could have been used to explore the *lack* of proximity those lives enjoyed with the gift. Instead, the learned scholars should have asked themselves why those gifts were void, rather than trying to imagine ways in which they *should* be made relevant. For Morris and Wade, that flaw was compounded further by their failure to consider the implications of Avicenna's model of an infinitely conditional universe and the early Neoplatonist arguments that 'motionless' contingencies may fall outside *objective* 'time' altogether. In this event, Morris and Wade may also be said to have applied notions of temporality inappropriately since those conditional events may not exist in 'time' at all.[191] In this event, conditionality and time are connected only on a scale depending upon probability, not temporality. See further figure H on page 242 below.

(c) Subsequent developments in Causality theory

Dukeminier claims to have produced a similar hypothesis in his article of 1960.[192] However, closer inspection reveals that remark is probably closer to wishful thinking. No such

190 See further sub-section *(b) Annexing conditional terms to the modus* beginning at page 138 below.

191 See further sub-section *(α) The problem that no 'thingness' implies regions in space where time may not exist* beginning on page 245 below.

192 Jesse Dukeminier, 'Kentucky Perpetuities Law Restated and Reformed' (1960) 49 Ky LJ 1.

detailed argument exists in that, rather general, article. Nevertheless, that did not stop Dukeminier and Waggoner engaging in a battle royal over Causation theory during 1985,[193] a debate made even more remarkable by them both being the leading causality theorists of the day. The author believes that Waggoner's caution that notions of causality could become ambiguous and arbitrary – and might create enough puzzles to cause litigation for years to come[194] – is much the better view. Indeed, his argument that "Only persons who are connected in some way to the transaction have a chance of supplying the requisite causal connection demanded by the requirement of initial certainty"[195] seems to be a model of common sense, rather than an opportunity for Dukeminier's petulant derision.[196] Perhaps the more likely reason is that Waggoner had become something akin to the Trojan horse of perpetuities by concluding that "… even perpetuity scholars, to say nothing of non-experts in the field, cannot agree on the precise meaning of [causality theory] language".[197] However, since the author contends that Causality theory has not been advanced appreciably by Dukeminier's later contributions, the preceding criticisms of Morris and Wade's thesis seem quite sufficient for this thesis' present purposes. In any event, whatever solutions may be

193 Jesse Dukeminier, 'Perpetuities: The Measuring Lives (1985) 85 Columbia LR, 1648; Lawrence Waggoner, 'Perpetuities: Perspective on Wait-and-See' (1985) 85 Columbia LR, 1714; Jesse Dukeminier, 'A Response By Professor Dukeminier' (1985) 85 Columbia LR, 1730; Lawrence Waggoner, 'Rejoinder By Professor Waggoner' (1985) 85 Columbia LR, 1739; Jesse Dukeminier, 'Final Comment by Professor Dukeminier' (1985) 85 Columbia LR, 1742.

194 Waggoner (n 193) at 1724 requoting Dukeminier's objections to the draft Restatement USRAP (1986).

195 Waggoner (n 84) 1722 note 9.

196 Dukeminier (n 193) from 1742.

197 Lawrence Waggoner, 'Prefatory Notes and Comments', *Draft Uniform Statutory Rule Against Perpetuities*, April 30th 1986, 9.

found to the ‘measuring lives in being’ conundrum, this thesis argues that *none* will be supplied by Causality theory.

(d) Interim conclusion on Causality theory

Causality theory was built upon the simple proposition that causally related or connected lives provide a pool of possible lives from which the Rule can choose the ‘measuring life in being’. Under this view, therefore, the propinquity of living persons is supplied by their causality in bringing the gift’s conditionality to an end. By doing so, the huge leap forward taken by causality theory was to explain the selection of candidate measuring lives separately from the Rule's own initial certainty requirement.

The chief difficulty is that Morris and Wade’s so-called 'relevant' lives do not necessarily validate the interest created, which means the propinquity of those lives is no longer limited by their effectiveness. In this regard, there is the clear benefit of having an outline explanation of how, rather than just why, those lives are chosen. That is most welcome, although, their hypothesis appears to create more problems than solutions. This is particularly evident from the examples chosen to support causality as a unifying model of selecting a common law measuring life in being. However, the seemingly insurmountable problem remains that a broad search for a ‘relevant’ life does not address the arguably central concern of finding *one specific life* whose endurance is *necessary* for the gift to succeed. Indeed, the very idea of searching for preceding causes takes us back to the discredited theory based upon conditionality, rather than certainty. In short, ‘causality’ theory is not just in error, it violates the logic which insists that conditional events cannot be controlled by entities (in this case, a

candidate 'measuring life in being') who are actually defined by their conditionality.[198] As a preliminary to the more detailed criticisms developed in Chapters 4 and 5 below, the Causal Connection hypothesis appears to fail in its attempt to prove the existence of a two-stage enquiry at common law.[199] Indeed, it will be argued there could *never* have been any such enquiry for one good reason. To suggest otherwise is to ignore the Rule's initial certainty requirement which demands that actual validity is the first and only question with which the Rule has ever been concerned. Therefore, it is submitted that Morris and Wade's mission was flawed from the very outset. The perpetuity puzzle will never be solved by ignoring the Rule's initial certainty requirement and the necessity that which leads to a certain outcome.

The author concludes that Causality theory's benefits in avoiding a definitional circularity do not outweigh its failure to predict invalidity, or indeed, to accurately reflect established case law. In this regard, it is submitted that a middle course must be charted. Here, it is suggested the initial certainty requirement must be *re-defined* if an informative, non-circular, explanation of the Rule's operation is to be found.

Notwithstanding those criticisms, Morris and Wade's plea to incorporate what they claimed were principles "... inexorably deducible from the common law rule ..."[200] within the new 'wait and see' rule has merit since their overriding purpose was to maintain a link

198 This is the argument that a conditional entity cannot resolve a conditional possibility. See sub-section *(b) Avicennian modality 1: Conditionality – Causality v Necessity* beginning on page 234 below.

199 A two-stage test is also proposed in Chapter 5 below. However, that methodology is suggested only as a useful way of describing the Rule's underlying logic.

200 MORRIS & WADE 500.

between the common law's methodology and the new statutory rule. Unfortunately, the author submits those arguably laudable ends do not excuse their unsupportable means.

(3) Later Perpetuity Reforms

In broad outline, the proponents of 'wait and see' reforms addressed the difficulties discussed in sub-section (2) immediately above by aligning themselves with one of the following three positions: *(a)* The identity of the so-called 'measuring lives in being' was already well-known and needed no further explanation, or *(b)* A statutory list of lives should be attached to the reforming legislation to specify which lives could measure the interest, or *(c)* The perpetuity period should be amended to become a fixed period of years, thereby removing any remaining question about how long the beneficiaries would need to wait.

Some legislatures added a statutory list of the lives which could be used to measure the 'waiting' period. Other states, such as Kentucky, adopted a formula to select the approved lives, but without adding a list. In both cases, however, the available lives were based largely upon the alternative 'Causally Related Lives' hypotheses proffered by Morris and Wade and others. Accordingly, the 'actualities' test was then able to work in the way intended since the permissible 'wait and see' period could then be measured by more lives than simply those which actually validated the gift. So far, so good. However, there was a real danger that any statutory list might not include all the lives available under the common law Rule. In this event, a gift which might otherwise be valid at common law could then fail the 'actualities' test because the only validating life able to save it was not contained within the statutory list.

England and several commonwealth jurisdictions avoided those emerging difficulties by making a statutory list available (which included several more causally related lives) – but only

when the gift was already void under the common law Rule. Immediately, this ended the theoretical possibility that otherwise valid interests at common law might be invalidated under 'wait and see'. Perhaps even more significantly, the UK Parliament added an alternative fixed 'wait and see' period of 80 years (now 125 years). This approach of providing a fixed period of permissible prolongation has been adopted widely, although some jurisdictions have taken the further step of abolishing the Rule completely; often on the disputed basis that tax measures such as Canada's "deemed disposition by trust" rules, made the Rule's founding purposes irrelevant in modern times.

The author submits that whilst those policy decisions have side-stepped the 'measuring lives' problem, they have done so only at the cost of removing living persons as a mandatory component of perpetuity law. By doing so, the author argues the effect of the reformist process has been to introduce new 'eccentricities' into common law jurisprudence by eliminating the bedrock concept upon which common law anti-perpetuity policy was built; that is, complaints against *uncertainty*. Yet, Chapter 4 will argue how the pursuit of that certainty depends upon the presence or absence of a necessitating condition which insists that posited outcomes must occur. By those means, the debatable and infinitely elastic boundaries of excessive prolongation employed by causality theory would then be replaced by longstanding 'black or white' notions of certainty, uncertainty, and necessity. Here, the author argues this search for concrete 'centrality' also offers a ready solution to the problem of perceived eccentricity by reconnecting English common law with its feudal past and the intellectual heritage from ancient Greek, Roman and Neoplatonic times.

(D) CONCLUDING MATTERS

Nutshell

The preceding matters reveal an unwelcome void in English perpetuity theory. Clearly, this deficit must be filled with a better understanding of how and why the Rule employs a 'measuring life in being' and or of any shortcomings in its accepted definition. Accordingly, this section sets out those failings as a list of features to be expected of a new and improved theory on how the Rule works.

(1) The Need For A More Comprehensive Theory

For the reasons already given, the author submits that none of the hypotheses discussed in Section (C) above can be said to have provided a compelling theory regarding both how *and* why the Rule selects lives to measure a gift. Moreover, there is little common ground between them excepting the apparent consensus that it is the terms of gift which select the available measuring life. At the very least, strong support thus exists for the view that a free choice between the nearly eight billion humans presently alive is not a realistic option. Yet, the differences between them raise important difficulties and leave us asking why are we still unsure about how a law of over three hundred years standing actually works? In this regard, the task now falls to construct a more reliable theory about how and why lives are selected by the common law.

As an introduction to that endeavour, it seems appropriate to list the improvements expected of any such new theory and so establish the benchmark concepts against which it might then be judged. Accordingly, the author submits that no improved theory on how the Rule operates would be provided unless many of the following criteria are satisfied:

(i) The Rule's initial certainty requirement should be explicitly included and so build on the strengths of the Effective Lives hypothesis.

(ii) Unlike the Causal Connection hypothesis, the Rule's remoteness boundaries cannot be ignored.

(iii) The theory must not simply repeat the Rule's own terms for validity and thereby avoid the tautology within the Effective Lives hypothesis.

(iv) The theory must discriminate against lives which do not validate the gift since any theory which fails to predict invalidity will remain incomplete.

(v) The theory must distinguish clearly between the gift's own vesting period and the Rule's perpetuity period.

(vi) The theory must discriminate between the various conditions implied by the stated vesting contingency and thereby avoid placing any reliance upon a purely circumstantial relationship between any lives associated with the gift and its eventual vesting.

(vii) The theory should extend the search for validity beyond the presence or absence of any measuring life to establish whether the existence of any such life is a matter of either cause or effect.

(viii) The theory must describe exactly how *one* valid measuring life is implicated in the vesting contingency.

(ix) The theory must solve the problem by identifying a life "… within 21 years of whose demise the appointed conditions for vesting can be fulfilled ...".[201]

(x) The theory should accommodate the philosophical principles relating to causality, conditionality and temporality which were known in the Bractonian era.

201 MORRIS & WADE 501.

(xi) The theory should incorporate Bractonian notions of how and why conditions were annexed to the modus.

(xii) The theory must be new and should also provide an explanation of benefit to current practitioners and law students alike.

(2) Assumptions, Caveats, Conventions and Definitions

(a) Subject to (b) below, whilst every effort has been made to use gender-neutral language, consideration must be given to the regrettable fact that, throughout history, women have often been excluded from inheriting, owning or dealing with property. In these situations, the use of phrases such as "he or she" would convey an entirely inaccurate view of reality.

(b) The Christian doctrine of the Trinity identifies a long tradition of referring to God using the masculine pronoun, particularly regarding the Father and the Son. However, since the incarnation of God explored in Chapter 4 below is that of the Holy Spirit, this thesis follows the not uncommon practice of referring to this entity as He, His or Himself. Yet, in other contexts where God is de-anthropomorphised as a 'what' not a 'thing', the neutral pronoun of 'It' will be used.

(c) This thesis, particularly in Chapter 4, uses a number of terms, such as "*no*-'thingness'", "*no*-'thing'" and "*every*-'thing'" rather than their usual spellings. This is entirely deliberate to help distinguish the technical features of 'things' from words in common usage.

(d) The common law Rule Against Perpetuities is cited throughout as "the Rule".

(e) The terms 'perpetuity', 'contingent future gifts' and 'conditional future interests' refer to the same 'thing' and are used interchangeably. None of what follows restricts perpetuities only to unbarrable entails. Furthermore, unless expressly mentioned to the

contrary, the effects of the UK Settled Land Acts 1882 to 1925 and the right to bar an entail at common law are all ignored.

(f) In accordance with long-standing practice and the explanatory press release which accompanied the House of Lord's Practice Statement of 1966, the English and American courts have given equal weight to judicial precedent from both jurisdictions.

(g) The problem of perpetuities has been evident in ancient Rome, the continental civilian jurisdictions and in England. Moreover, continental Europe and England both embraced similar notions of feudalistic control.

(h) Each of the following chapters begin with a summary of its content and significance in the overall argument. Wherever needed, each major section is introduced with a 'Nutshell' which states the overall significance of what is contained therein. Whilst this risks duplication, there are overriding benefits of signposting the direction in which those complex arguments lead.

(i) The term *propinquity* is used in its ordinary sense to connote a relationship or connection between things; but does so by avoiding any bias towards either the 'causal relationship' or 'causal connection' hypotheses.

(j) Two broad types of perpetuity will be considered in this thesis: Firstly, dispositions such as, "To A's descendants who are living one thousand years after the date hereof", where the required element of perpetuity is measurable in terms of unreasonable prolongation in time. Secondly, there is another kind of disposition, such as "To B's first legitimate great-great-grandchild to marry", where the gift's perpetuitous character depends upon the outcome of unreasonably remote future possibilities. There, if B is unmarried, the interest hangs on five fertile, heterosexual persons successively deciding to marry and produce issue, each of whom then survive into adulthood. That said, due to the overwhelming pressures of

space, no consideration will be given to commercial transactions such as lengthy options to purchase property. These are largely unconnected with living persons and are usually made in commercial contracts for a money consideration. Accordingly, they fall outside the scope of the present thesis.

(k) This thesis draws interconnected elements together, each of which should arguably be discussed first. Clearly, that is quite impossible. Thus, the reader is recommended to 'read ahead' to the relevant sections to help explain the points at issue.

(l) The reader is advised that the ancient references to '*efficient*' causation mean the Aristotelian notion of the agency by which a planned final cause is brought into effect. There was no distinct notion of '*necessary*' causation in those times except, possibly, by reference to the overall causative process. However, in more recent times, and particularly regarding the closely related concept of conditionality, common use has been made of the terms *necessary* and *sufficient* conditions. Here, the distinction between causation and conditionality is crucial although, in many respects, there is considerable overlap between what is efficient and what is sufficient since both connote events which involve or depend upon intermediate steps being taken by an agent. In summary, therefore, what is *efficient* refers to matters of causality and what is *sufficient* refers to matters of conditionality – although both represent similar ideas of an agent being used to create an intended effect.[202]

(m) The reader should be aware that the terms 'measuring life' and 'measuring lives' are used precisely. Measuring 'lives' refers to the broad range of theories that advocate a departure from the initial certainty Rule's insistence upon a single measuring life. There are occasions when "lives" are used in context with theory which postulates a *number* of

202 These matters are considered further in the references contained in n 617 below.

candidate lives in being. The remaining references to a single "life" follow the author's adherence to the Rule's strict initial certainty requirement which insists there can be only one 'measuring life in being'.

(n) Variations upon the example gifts and situations used in this thesis have appeared in other publications. Many have become part of perpetuity lore. However, only where original authorship is important, such as in Morris and Wade's 1964 article, will express reference be made to its source. The remainder may not be traced reliably to just one founding author.

(o) The term 'concurrent interests' is used to describe both the contingent beneficial and reversionary interests which subsist until a conditional future gift is ended by the occurrence or non-occurrence of the designated vesting event.

(p) The reader may question why the more recent 'causal connection' debates between Dukeminier and Waggoner *et alia* have not received extensive treatment in this enquiry. The answer is simply that the propositions made herein depend upon much more fundamental points than those which turn on subtle twists of wording.

(3) Desired Outcomes

The author submits the current investigation into conditionality, perpetuities and the Rule's antecedent influences offers considerable benefits by helping to identify important centralities in English property ownership theory:

(a) The present thesis will benefit from employing comparative analysis to help untangle the causative threads since medieval England, ancient Rome and the civilian nations all share a common experience of *dynasticism*.

(b) An important connection will be revealed between *substantive* Roman and English law. The author contends this is provided by the common use of living persons as a benchmark for determining whether those dispositions are valid or not. However, this thesis will go further and tackle the still-unexplained connection (or, in more descriptively neutral terms, the *propinquity*) which living persons have with valid and legally enforceable property interests under English common law in terms of whether they are constrained by *necessity*, and thus *certainty*.

(c) Once that propinquity is demonstrated to apply across the entire landscape of English property-ownership, it becomes possible to extrapolate a likely Romanic and Neoplatonic influence into England's doctrines of seisin and annexation of conditions to land. Here, familiar concepts of *necessity* and *certainty* reappear to provide the outermost limits of its permissible conditionality.

(d) The intervention of Neoplatonism and the work of Avicenna to suggest that every 'thing' exists only conditionally helps explain the Bracton authors' reception of Romanic principles of *deemed* certainty. By those means, the question of *necessity* then allowed a clear distinction to be drawn between conditionality and uncertainty.

(e) Living persons then share a common purpose across the ages; that is to eliminate *uncertainty* in the disposition of land, rather than the English objective of using lifetimes to measure the passing of generations over time and ensure continuity in seisin.

(f) A valuable opportunity exists to settle the recent, but still *unresolved*,[203] debate about who are the common law 'measuring lives in-being'? By doing so, it is evident that after

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203 LAW COMM 4.16; Dukeminier (n 193) 1659 observed: "there has been no authoritative decision whether the causal relationship principle, or some other, governs the period of

some 1,700 years of perpetuity problems across Europe, English jurisprudence has been unable to provide a convincing explanation of either its policy motivations or its rationale – perhaps as a partial effect of the Neoplatonist view that 'lives' exist only as contingent entities. Correcting that deficit of understanding is long overdue and should, simultaneously, help explain why the Rule's apparently eccentric behaviour is not quite so strange after all. Here, the ten criteria for any new theory beginning on page 77 above also belong here.

(g) The impact of ancient Greek theory that 'time' is necessitated by 'motion' leads to an important new understanding of conditionality beyond present notions of temporality.

(h) Using living persons other than as a measure of 'time' allows the proper boundaries of property ownership to be mapped in more conceptually rigorous terms. This includes investigating the 'thingness' of contingent future gifts as a valid and lawful *property interest*.

(i) The strong reliance placed upon property ownership theory – particularly New Essentialism (or 'Architecture' theory) and 'thingness' theory – allows the re-explained doctrine of estates to stand on conceptual foundations which embraces the temporality of perpetuities as '*things*'. By doing so, the proposed model seeks to provide a similarly high degree of theoretical cohesiveness as that found in Romanic jurisprudence.

Thus, as a 'roadmap' of the journey to be taken by this thesis, the interconnectedness of these matters is depicted in the diagram depicted in Figure A below:

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waiting. In the few cases that have arisen in these jurisdictions under wait-and-see, the courts have not explicitly adopted any principle to govern the selection of measuring lives". See further *Pearson Estate*, 442 Pa. 172 (Pa. 1971) cited in n 505 below, and the text to which it relates.

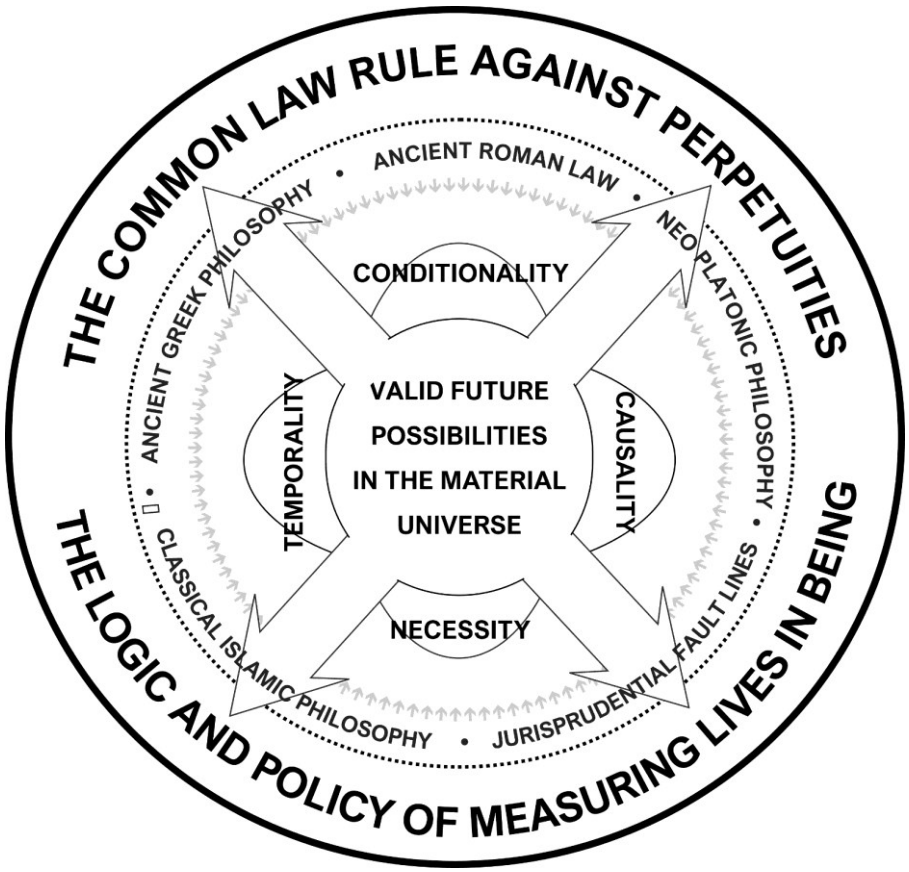

Figure A: Hypothesised influences on the Rule's use of lives in being

CHAPTER 2 - PERPETUITIES IN HISTORY AND THE LITERATURE

(A) PREFATORY EXPLANATION AND OUTLINE

Nutshell

The development of perpetuities in ancient Rome, the Islamic nations and post-Conquest England share common themes of dynasticism. Moreover, at least insofar as civilian and common law is concerned, these dispositions have also helped fashion the legal instrumentality by which land came to be held in modern times However, unlike the ancient precedents, living persons came to be insinuated into English property law in mysterious and unexplained ways which created significant confusion about how and why those lives were selected under the common law Rule.

This chapter develops a background understanding of the literature and history of perpetuities across the two great legal systems of Roman and English common law. From this, it will become evident that both faced similar challenges, which lawmakers met in remarkably similar ways. The present author will argue this was not coincidental and that the Bracton authors were likely influenced to greater or lesser extents by *(i)* Ancient Greek philosophy, *(ii)* Ancient Romanic jurisprudence, and *(iii)* the *Neoplatonica Arabica* of Alexandra of Aphrodisias, al-Kindi, and Plotinus, and *(iv)* The Classical Islamic philosophy of Avicenna when formulating the nascent English common law.

Whilst England eventually received Romanic and Islamic elements into its jurisprudence, and may thereby have largely succeeded in its ambitions to develop a jurisprudence to rival the ancient precedent, it did so by performing some violence to principles of theoretical coherence. Indeed, it will become clear that the absence of those explanatory connections to ancient ideas eventually gave rise to the very fault-lines which provide the supporting superstructure of this thesis.

(B) Property and Perpetuities in Ancient Rome

Nutshell

Managing the final destiny of their estates became the main concern of Roman citizens. Indeed, whether through wills or the later institution of *fideicommissa*, the 'dead hand' cast a lengthy influence over Roman cultural and economic affairs. Moreover, the impact of Romanic jurisprudence was such that it laid substantial foundations for civilian law whilst also helped fashion a new English jurisprudence at the hands of the Bracton authors.

(1) Contextual Introduction

The ancient Roman empire grew to become a political and military entity that incorporated disparate societies bound by a common law, the *ius commune*. However, Roman law was a privilege to which only free Roman citizens had access until citizenship was granted to all free men in the empire by the Edict of Caracalla 212 CE. Beforehand, Rome practised a purely racial legal system based upon ideas of *personality*; that is, the relevant law to be applied to each person was the law of their birthplace not of their residence. In short, ancient Roman law operated a kind of jurisprudential apartheid, which tolerated a broad range of different values. This is of most crucial importance when attention is given to the much later rise of a feudalistic, rather than slave-based, system in continental Europe.

The tendency to assign different rights to different types of people is nowhere more evident in classifying Romans according to criteria including gender, marital status, and procreative success. These all created large classes of persons who were excluded from owning property based upon distinctions which modern observers might consider ridiculous.

The critical significance of property ownership in ancient Rome was that it connoted complete *dominium* over those things. Indeed, ancient Rome which did not admit any notion of greater or lesser interests over property, it was a society built upon absolutes and

certainties. Here, for example, land could be owned absolutely by one person, whilst another might be an absolute owner of an easement over that land. Thus, there was no need to rank those absolute claims of superiority by different interest holders since the plea *meum esse*[204] in actions for *vindicatio* was available to each of them separately and simultaneously. Thus, ownership (*dominium*) amounted to saying, 'it is mine, and that gives me the right to exclude you'. However, unlike the relativistic approach taken in England, Birks resists the idea that two competing pleas of *meum esse* would be resolved by the court choosing between the parties based upon who had the *better* right. This was because the court was free to determine that *neither* had dominium.[205]

The net effect of those notions of dominium was that every property-owning Roman citizen was 'king' of his own 'castle' in the most real sense imaginable. Indeed, we can see how those notions of total sovereignty over property later evolved so far as to risk challenging the territorial integrity of the state. Here, for example, the entirely allodial ownership of land by the medieval Germanic territorial princes created huge centrifugal pressures which increasingly withdrew control from a weak and embattled central administration.

Finally, the role of property in Roman society was so permeated with notions of absolute individual ownership that the great imperative of life was to impress control over assets after an owner's death. Perhaps in similarity with the ancient Egyptians who had their belongings entombed with them to take into the afterlife, wealthy Romans were also eager to remove their goods from the earthly realm and subject them to perpetual 'dead hand' control.

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204 Literally, "*It's mine!"*

205 Peter Birks, 'The Roman Law Concept of Dominium and the Idea of Absolute Ownership' (1985) *Acta Juridica* 1, 25-28.

(2) The Importance of Testate Death

In ancient Rome, the desire for *testate* death acquired a significance which goes well beyond that known in modern times. This was because Romanic wills had developed into an instrument under which the appointed "… heir did not simply acquire the property of the deceased: he succeeded him as a person, and so was entitled to benefit from and was bound by (almost) all obligations in favour of or against the deceased."[206] From this, the heir took over the deceased's affairs and legal identity in a process which ensured that the decedent continued to enjoy representation in the earthly realm. By those means, therefore, the reader is introduced to one of the most important features of ancient Roman life – a societal propensity towards dynasticism and the pursuit of a kind of civil *immortality.* That said, however, the Roman eagerness to execute a will[207] must be viewed equally as a reaction against the potentially dire consequences of *intestate* death. There, the rules of intestacy contained in the Twelve Tables (451 to 450 BCE)[208] specified a narrow *agnatic*[209] succession

206 Johnston (n 5) 2-3.

207 However, this view was not shared amongst later civilian jurisdictions. Nowadays, many French and Germans are content to die intestate since the enforced heirship claims made by their dependants makes testamentary succession of limited importance: See Barry Nicholas, *An Introduction to Roman Law* (Oxford: Clarendon Press, 1975) 252.

208 *Duodecim Tabularum*; a set of ten bronze tablets which codified the law, and to which a further two were added in the following year.

209 Here, agnatic succession connotes restricting claimants only to relatives through the male line whilst its counterpart, cognatic succession, widens claimants to persons not claiming through one line exclusively.

which excluded inheritance even between mother and child.[210] Furthermore, the Roman's prejudice against female succession was so deeply entrenched that if no a*gnates* were living at the decedent's death, an intestate estate would then pass outside his family by division amongst male *gentiles* of the same *name*.[211] When viewed in this light, it is unsurprising to find that testate death became such a deeply-rooted *cultural* predisposition amongst wealthy Romans such that a mere possibility of intestacy would have been met with total horror.[212]

By the *Classical* period, however, a testator's earlier freedom to bequeath his property to whomsoever he wished,[213] and thus to choose who would stand in his shoes after death, had become much more heavily restricted. Firstly, the interest a *suus*[214] possessed in his[215] forebear's estate was expanded beyond a simple expectancy of benefit to become a 'pre-vested' right to inherit his ascendant's property.[216] There, the most important restriction could be found in the lex Falcidia (40 BCE) [217] which required that legacies to individual heirs

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210 It should be noted that freedom of testation under the Twelve Tables (451 to 450 BCE) has been the subject of some debate. See further the interesting, but not altogether convincing, analysis in Alan Watson, *Rome of the XII Tables. Persons and Property* (Princeton: Princeton University Press, 1975) 58-66.

211 TABLE V 3; Watson (n 210) 66-67.

212 BUCKLAND A 64; Nicholas (n 207) 251; Henry Maine, *Ancient Law*, [1861] (London: J M Dent & Sons, 10th ed, 1917) 128-129.

213 TABLE V 1 provides: "No matter in what way the head of a household may dispose of his estate, and appoint heirs to the same, or guardians; it shall have the force and effect of law." See also Inst. 2.22 and Nicholas (n 207) 252-255.

214 A family heir.

215 Note the prohibition against women being instituted as heres.

216 This was Gaius' principle of *legitima simul ac naturalis*.

217 DIGEST 35.2.1.

must not be reduced below one quarter of their inheritance rights under intestacy, and further provided that any legacies exceeding three-quarters of the net estate would be cut down *pro rata.*[218] Furthermore, disinherited heirs who were entitled to receive a share upon intestacy could bring an action known as the *querela.*[219] There, by means of disputing the testator's sanity,[220] the heirs could seek redress for having been irrationally denied future financial support.[221]

Restrictions were also imposed upon which persons could be instituted as *heres*. These included women,[222] *coelebs,*[223] *orbi,*[224] *peregrini,*[225] slaves,[226] *incertae personae*[227] and *postumi*[228]. Clearly, many of those persons, who could easily have been the testator's nearest

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218 GAIUS (161 CE) II 227. See also BUCKLAND B 99 to 200 and 213; Fritz Schultz, *Classical Roman Law*, (Oxford: Clarendon Press, 1951) 327; Johnston (n 5) 34.

219 More properly, the *querela inofficiosi testamenti* – which is the complaint of an unduteous will.

220 Robert. W. Lee, *The Elements of Roman Law with a Translation of the Institutes of Justinian* (London: Sweet and Maxwell, 4th ed, 1956) 214.

221 BUCKLAND A 328-329 notes the possibility the querela may, indeed, have arisen to support the heirs' entitlements under the lex Falcidia.(40 BCE).

222 Under the lex Voconia (168 BCE); Lee (n 220) 207; Johnston (n 5) 24- 25.

223 Unmarried persons, being males over 25 or females over 20. ULPIAN 16.1.

224 Married, but childless, people received only half of their legacy under the lex Papia Poppaea (9 CE). GAIUS II 286a; Johnston (n 5) 31-33. Here, Roman's policy objectives were to promote procreation and the founding of new families. Accordingly, gifts to persons who failed to satisfy those criteria were discouraged.

225 Meaning both aliens and Roman traitors banished to that status; ULPIAN 22.2.

226 See also BUCKLAND A 207-208.

227 Persons of an indeterminate class: GAIUS II 238; ULPIAN 22.4; INST. 2.20.25. Schultz (n 218) 258-260; Lee (n 220) 206-207.

228 Persons who were not yet conceived; GAIUS II 241 and 287; INST. 2.20.26.

relatives, then fell outside the boundaries of permitted heritability and were denied the opportunity of future financial support.[229]

Those restrictions conspired to ensure that the institution of wills became mistrusted as an instrument for ensuring the appropriate descent of property. Accordingly, widespread dissatisfaction amongst wealthy Romans, and a desire to circumvent the Roman law of succession, encouraged the use of *fideicommissa* to help achieve their dynastic ambitions by alternative means. However, since it quickly emerged that this device was employed solely to help donors evade the lex Falcidia (40 BCE),[230] vociferous complaints were raised that a 'fraud' was thereby being committed upon Roman law.[231]

(3) Fideicommissa

(i) The Institution of Fideicommissa

Initially, grantors employed a publicised 'honour' contract called a *fideicommissum*[232] which sought to impress a purely *moral,*[233] *and legally unenforceable,* duty upon an heir to

229 Interestingly, the distinction between male and female succession continued until just before the Roman empire's collapse in the sixth century CE; NOVEL 118 (543 CE) and NOVEL 127 (548 CE).

230 Restrictions against instituting peregrini as heirs was noted to be the main reason for the development of fideicommissa: GAIUS II, 285; Cicero*, De finibus bonorum et malorum* (45 BCE) at 2.17.55; BUCKLAND A 353; Johnston (n 5) 21.

231 Jerome, *Epistulae* 52.6 "*Per fidei commissa legibus inlumidus*, …" which translates as "by the fiction of trusts the law is cheated"; See also Johnston (n 5) 21-22.

232 This term is derived from the expression fidei alicuius committere, which means to commit something to the faith of a person.

233 INST. 2.23.1.

disclaim any personal interest in the legacy for himself.[234] Instead, that heir would promise to serve only as a conduit through which the estate would then be passed to others, most usually someone who was otherwise prohibited from being a recipient under ancient Roman law. Thus, three parties were involved in this scheme: the donor (most often the testator of a will), the *fiduciarius* (the legally designated heir who accepted the 'entrustment' created by the *fideicommissum*), and the *fideicommissarius* (the person intended to be the final beneficiary); all of whom were then bound together by a common understanding of doing something which, by reason of the previously-mentioned restrictions on *institutio*, would not be legally enforceable if attempted by direct means.[235] That said, however, Watson believed the impact of moral pressure upon the *fiduciarius* has been exaggerated. Indeed, he cited three cases in which, despite each testator's clear attempt to publicise his entrustment, and thus shame the appointed *fiduciarii* into performing their promised duties, they sought to keep the gifted property for themselves.[236]

The purely voluntary character of *fideicommissa* continued until *circa* 15 BCE when Augustus sought to prevent the increasing practice of 'good faith turning bad' and decreed[237] that *fideicommissa* would thenceforward become legally binding upon all parties concerned.[238] From this, *fideicommissa* then emerged as an entirely new institution of the

234 Again, it must be remembered that women could not be instituted as heres under a will until 543 CE. See further n 222 above.

235 Francis de Zulueta, *The Institutes of Gaius* (Oxford, Clarendon Press, 1946)) Part 2, 113.

236 Watson (n 210) 36 -39. See also Johnston (n 5) 25-27.

237 INST. 2.23.1 and 2.23.5.

238 Johnston (n 5) 271- 273.

iuus nouum enforceable under *cognitio extraordinaria.*[239] However, once established as legally binding, the 'floodgates' quickly opened when *fideicommissa* were applied for the entirely new purpose of 'tying up' property in lengthy succession. From this, donors enjoyed considerable opportunities to impose 'dead hand' control over their property and thereby achieve expressions of self-perpetuation not possible under the institution of wills.

It deserves repetition that persons who were prohibited from taking under wills could no longer be prevented from being appointed as the lawful object of a *fideicommissum.* Accordingly, a chief benefit of *fideicommissa* was that testators could now distribute their property amongst a much wider range of potential beneficiaries, thereby facilitating substantial donor interference in customary descent. [240] That said, however, the *sc Pegasianum* (circa 73 CE) still prevented *coelebs* (males over 25 or women over 20 who were unmarried) and *orbi* (married, but childless, persons) from benefiting under trusts[241]. Nevertheless, quite apart from frustrating gifts to those persons, the *Pegasian* restrictions simply encouraged wealthy Romans to make new attempts at avoidance by means of employing tacit *fideicommissa*, or secret trusts, for that purpose[242].

Discontent soon emerged that gifts could then be made to persons who fell outside the boundaries of legal descent.[243]. However, any temptation to draw parallels between those

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239 See also BUCKLAND B 389-393.

240 See generally GAIUS II 268-289.

241 GAIUS II 286; Johnston (n 5) 37-38.

242 Any detailed analysis of those devices is beyond the scope of this work. For an in-depth examination of secret trusts in ancient Rome: Johnston (n 5) Chapter III.

243 See further n 231 above concerning allegations that fideicommissa performed a 'cheat' upon Roman law.

concerns and English notions of remoteness should be resisted. Indeed, Chapters 2 (C) and 4 below will demonstrate how the policy objections to perpetuities in England were directed largely against either the *duration* or *the remote vesting* of future interests, rather than the *identity* of those to whom any such interests were granted. See also the comparison of Roman and English perpetuities in sub-section *(A) Justifying and Proposing the 'Necessary Life' Hypothesis* beginning on page 313 below.

Finally, it deserves mention that none of the stringent formalities affecting wills were required for the creation or revocation of *fideicommissa.*[244] Indeed, in contrast to English trusts, Roman *fideicommissa* could be entirely informal arrangements under which important and far-reaching dispositions were made at "the nod of a head".[245] From this, a principal advantage of *fideicommissa* over wills was that they could not face legal challenge on purely technical grounds. Moreover, it appears that *fideicommissa* were also imposed as a restitutional remedy against *mala fides* in circumstances largely akin to that of a constructive trusteeship in modern English law.[246] Thus, it is evident that *informal* consent was not always needed to create a legally binding fideicommissary relationship.

(ii) Enforcing Compliance with the 'Entrustment'

Roman citizens remained somewhat suspicious of the institution of *fideicommissa*, and with good reason. *Firstly*, although the *fiduciarii* stood in a roughly similar position to that of English trustees, they enjoyed an entirely different relationship with the fideicommissary

244 Schultz (n 218) 322.

245 ULPIAN, 25.3.

246 INST. 2.23.12. See also n 277 on page 59 below and the text to which it relates concerning the 'bad faith' non-performance of conditions under legacies.

property than their later common law counterparts. In contrast to trust assets in England, any *fiduciarius* became the *principal* beneficiary of the entrustment under the doctrine *semel heres, semper heres,*[247] with the effect that he could not protect the *fideicommissary* property against seizure by his own creditors.[248] The same risks did not attach to testamentary dispositions where gifts could always be assured of reaching their intended beneficiaries. *Secondly*, the further possibility that a *fideicommissarius* might enter bankruptcy meant the *fiduciarius* would then lose any *enforceable* claim to be compensated for any breach of the stipulations[249] given by the *fideicommissarius* on any sale of the fideicommissary property. Accordingly, it became commonplace that a *fiduciarius* would avoid the risk of attracting *personal* liability by refusing to accept the donor's 'trust' - thereby causing the *fideicommissum* to fail completely. This was particularly likely when he was not to be paid for his trouble.[250] Plainly, any such possibility also meant donors then faced the additional uncertainty of whether their entrustments would be honoured, even by a perfectly solvent *fiduciarius*.

The *sc Trebellian* (circa 56 CE) [251] provided the first remedy against both the donors' unease and the possible failure of *fideicommissa* by making stipulations unnecessary. Instead,

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247 Which translates as 'once an heir, always an heir'.

248 A similar difficulty may also arise with the Germanic *Treuhander*.

249 For present purposes, these may be described as a guarantee.

250 INST. 2.23.5; See also BUCKLAND B 220.

251 DIGEST 36.1.1.2, the text of which reads as follows: 'Whereas in all fideicommissary inheritances it would be most equitable, should any actions be pending concerning those goods, that those actions should lie against those to whom the rights and the fruits are transferred rather that any man should be endangered by keeping faith, it is resolved that those actions which are commonly granted against the heir shall be granted neither against

all civil rights and liabilities were passed to the *fideicommissarius* alone in a measure which effectively made the entrustment completely transparent to all potential claimants. However, notwithstanding the strong protection thereby given to *fiduciarii*, many remained unwilling to enter a *fideicommissa* until they received payment for their services.[252] Unfortunately, this meant *fideicommissarii* increasingly found themselves being held to ransom by their *fiduciarii*. Again, donors would have questioned the wisdom of using *fideicommissa* when they might simply become instruments of extortion.

An attempt to restrict those opportunities for abuse appeared in the sc Pegasianum (75 CE). There, *fiduciarii* were granted the right to receive a compensatory 'legacy' under the *lex Falcidia* amounting to one quarter of the total estate.[253] If a *fiduciarius* still refused to enter, he could then be compelled to do so, but at the cost of losing his rights to any compensation at all. Any civil actions then proceeded as under the sc Trebellian (circa 56 CE),[254] This must have created a very significant incentive for the *fiduciarius* to honour his 'entrustment'. However, the overall effect of that measure was to complicate the process of entering *fideicommissa*, which then fell under two separate laws. Indeed, it even became necessary to declare under which *senatus consultum* entry was being made.[255] Justinian sought to remedy that administrative complexity by repealing most of the sc Pegasianum (75 CE) and

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nor to those who have restored that which was committed to their faith as they were asked to do, but to and against those to whom the fideicommissum was restored under the testament, that the last wills of persons deceased may be better confirmed for the future.

252 BUCKLAND A 355-356.

253 INST. 2.23.5.

254 INST. 2.23.6; Johnston (n 5) 34; BUCKLAND A 356.

255 BUCKLAND A 356.

consolidating its retained measures with the sc Trebellian (circa 56 CE).[256] Thenceforward, the *fiduciarius* was bound to make formal entry, but no longer suffered the *Pegasian* penalty of losing his right to the one-quarter compensatory legacy if he was compelled to do so. That said, the provisions of the lex Falcidia (40 BCE) were effectively annulled by Justinian's later decree which gave testators the power to prohibit *anyone* from taking a quarter share of the gifted property.[257] That *volte-face* changed the character of ancient Roman entrustments entirely. Not only had the office of *fiduciarius* become an unpaid and compulsory duty, *fideicommissa* had emerged as a vehicle by which to lock away an 'entrusted' gift *corpus* for a lengthy period. A donor's 'dead hand' control could then be used to ensure that neither the *fideicommissarius* nor the *fiduciarius* would enjoy any beneficial access to his property.

(iii) Inalienability

It deserves emphasis that the doctrine *semel heres semper heres* ensured that both *fideicommissa* and wills were thereby made *equally* incapable of satisfying the donors' dynastic purposes. Accordingly, it was not until later when Justinian made all *fideicommissary* property completely inalienable[258] that *fideicommissa* became the ideal device for tying up property over countless generations. Wealthy ancient Romans would have been quick to see how these legally enforceable and perpetually inalienable settlements provided benefits which were unmatched by Roman wills. By doing so, common lawyers would recognise those developments as the final appearance of potentially *remote* vesting in ancient Roman society.

256 INST. 2.23.7; GAIUS II at 269; Johnston (n 5) 13 note 23; Schultz (n 218) 328-329.

257 NOVEL 1,2.2.

258 CODE 6.43.3.2a. He further provided that a testator's express prohibition against alienation operated in rem against the fideicommissary property; CODE 4.51.7.

(iv) The Use of Donor-Appointed Conditions in Ancient Rome

A general assimilation of the law relating to legacies and *donatio mortis causa*[259] with the rules of *fideicommissa*[260] meant conditional grants became equally possible under the institution of wills.[261] That said, the ability to make f*ideicommissa* dependent upon the outcome of unknown future events,[262] and even impose them *post mortem* upon the *heres* of an *heres,*[263] might suggest that *fideicommissa* would still have been preferred because they facilitated the creation of conditional *future* interests. However, there was probably no such preference in practice. Accordingly, and in marked contrast to English efforts to introduce conditional terms which created uncertainty about who might eventually take the gift,[264] Roman law adopted two policies that prevented donors making their gifts dependent upon the outcome of conditional future events:

Firstly, Roman law of the Classical period stipulated that gifts to *incertae personae* took effect only if made either to persons living at the testator's death or to their *immediate*

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259 Buckland A 257 to 258.

260 INST. 2.20.3; DIGEST 35.1.91; See also BUCKLAND B 222.

261 INST. 2.20.27, 28; BUCKLAND A 363.

262 GAIUS II 250.

263 CODE 6.42.30; BUCKLAND A 362.

264 See gift (3) on page 21 above regarding how, in England, a gift to "Such of my grandchildren who shall set foot on the planet Mars *before my death*", creates a perfectly valid suspensive condition under the common law Rule against Perpetuities. There, the gift corpus can then be held in contingent abeyance, awaiting return to the donor's estate (from which it was never seriously intended to leave), until all A's sons have died out; cf. Roman law, where virtually impossible conditions are struck out completely; DIGEST 35.1.6.

issue.[265] Therefore, in contrast to the lengthy entails permitted by the English *maritagium,*[266] no opportunity then existed to postpone beneficial enjoyment contingently beyond the *first* degree. In this regard, it is submitted that the ancient Roman's maximum permissible boundaries of uncertainty (and thus, *conditional* remoteness) were limited by events which must happen within only *one* lifetime.

Secondly, even where *certae personae* were instituted as *heres*, Roman law treated the insertion of *dies incerta*[267] in wills as the creation of a valid conditional legacy.[268] However, it could be suggested that the creation of *fideicommissa* involved the conditional transfer of property upon 'trust' to benefit the *fideicommissarius*. However, conditional *institutio* (that is, to institute the *fiduciarius dies ad quem*[269]) was impossible under Roman law as being contrary to the principle *semel heres, semper heres.*[270] Thus, the fideicommissary entrustment operated as only the *modus*, or direction, under which ownership still passed irrevocably to the *fiduciarius* as *official* heir. As a direct consequence of this rule, any *donor*-appointed conditions then acted only upon the *fideicommissarius'* entitlement as against the

265 DIGEST 31.32.6.

266 By means of *maritagium* this could extend to at least the third degree. See further n 429 below and the text to which it relates.

267 DIGEST 35.1.41, 75.

268 BUCKLAND B 209.

269 That is, until he honoured the entrustment.

270 See further BUCKLAND B 182; *cf*. the rules under Justinian, per BUCKLAND A 210.

fiduciarius.[271] Indeed, those same principles largely eliminated any possibility of the gift reverting to the donor or his estate.[272]

The question then becomes, what opportunities existed to control beneficial entitlements by applying conditional terms in *fideicommissa*? In broad outline, this question can be answered by observing that a main purpose of Roman law was to 'vest' conditional gifts in the donee *from the very outset*, and to annul many of the terms upon which any such dispositions were made to depend. In this regard, consideration is now given to how conditions in both wills and *fideicommissa* were treated in ancient Rome law:

(a) *Dies* were treated as *certa*, with ownership passing *immediately* to the donee,[273] where the conditional event was bound to happen, if at all, within the donee's own lifetime.[274] Moreover, as part of the general rule that one could not leave a legacy at another's pleasure,[275] the gift would fail completely where performance of the appointed condition fell outside the donee's *direct* control.[276] Indeed, as a further attempt to prevent any third-party influence over conditional events, Roman law expressly stated that "… whenever the

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271 DIGEST 35.1.44.4; *cf*. where the *fideicommissa* is itself made conditional upon another event- DIGEST 35.1.89.

272 This is certainly true of the Classical period. The donor's only remedy was a personal action under *Condictio*; See also BUCKLAND B 150-151.

273 DIGEST 35.1.1.

274 DIGEST 36.2.4; 35.1.22, 79, 79.1, 91.

275 DIGEST 35.1.52.

276 "When a legacy is left to a woman under the condition 'if she does not marry' and is further charged on her honour to make it over to Titius if she does marry, the opportune rule is that even should she marry, she can claim the legacy and need not comply with the further charge." DIGEST 35.1.22.

fulfilment of a condition is prevented by one who has an interest in its nonfulfillment, the condition is to be treated as though it had been satisfied."[277] Thus, a test of *lifetime control* was used to distinguish *dies incerta* from *dies certa*, with any such treatment of the *dies* being *certa* then passed ownership immediately to the donee free from any charges or obligations.[278] At this point, however, Avicenna's convincing counter-argument that only an unconditional entity (effectively God) can control future contingencies is left to Chapter 4 beginning on page 219 below. Nevertheless, it deserves note at this early point how the (deemed) existence of *dies certa* is argued to have served a purpose of similar effect to being *necessary* under Avicennian thinking.

(b) Illegal, immoral or virtually impossible conditions were treated as though they had never been written.[279]

(c) Negative conditions were also prohibited. That said, however, the donee could elect to save the gift by grant of *bonum possessio secundum tabules* under the *Cautio Murcania* when he offered security against the possibility of any subsequent breach of the stated condition.[280]

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277 DIGEST 35.1.24. See also DIGEST 35.1.40 and 35.1.81.1.

278 The legacy to a son described in DIGEST 35.1.83 failed, presumably because the required proof of paternity then fell under the judiciary's, rather than the donee's control. Here, any question of that condition's post-death assessment seems immaterial given issue born after their father's death are considered to have arrived during his lifetime; DIGEST 35.1.61. See also DIGEST 35.1.72.5, where it was questioned whether 'bad faith' could be inferred from the deliberate non-performance of a condition upon which the gift would not otherwise have been made. However, see Digest 35.1.85 which suggests that, in different circumstances, it might not.

279 DIGEST 35.1.3,6; See also BUCKLAND B 183.

280 DIGEST 35.1.7, 18; See also BUCKLAND B 210.

(d) A similar rule prohibited gifts founded upon *resolutive* conditions, that is, conditions which sought to revoke a legacy dependent upon an uncertain future event. However, in parallel with the law relating to negative conditions, Justinian allowed them in *legata* only when the donee offered similar security to that required under the *Cautio Murcania.*[281]

(e) The modality of *dies* could be construed as a mere *direction* regarding how the gifted property was to be applied. In this event, as illustrated by GIFTS to construct monuments,[282] ownership of the gifted property would then be transferred to the donee *without* conditional restriction.

(f) Extrinsic (implied) conditions could not be used to impose a conditional limitation upon the gift.[283]

(g) If the effect of any donor-appointed condition was to *disinherit* a son without formally doing so, the legacy failed completely.[284] Since that son would then inherit through intestacy, this rule effectively allowed him to take an entirely *unconditional* estate.

In summary, the Roman law of conditions had important consequences for the character of perpetuities in ancient Rome. *Firstly*, gifts to unascertainable persons were prohibited since *incertae personae* could not be instituted as *heres*. *Secondly*, the possibility of creating conditional uncertainty about which persons were to take the property was prevented by the requirement of 'vesting' that gift immediately in the beneficiary. These two principles combined to virtually eliminate any possibility that enjoyment could be set to depend upon

281 See also BUCKLAND B 210.

282 DIGEST 35.1.6; 35.1.14; 35.1.27.

283 DIGEST 35.1.99.

284 DIGEST 28.2.28.

remote possibilities. Instead, the Romanic notion of perpetuity was founded upon employing seemingly unending *fideicommissary* entails as instruments of perpetual *heritability* which, of itself, suggests the ancient Romans were content to impose prolonged *certainty* (secured by lifetime control enjoyed by the successive heirs) upon the destiny of their estates.

(v) Restraints on Fideicommissa

The preceding discussion identified several benefits that *fideicommissa* enjoyed over wills, and which quickly led to the full and unrestricted establishment of perpetuities in Roman jurisprudence. However, within the next thirty years, Justinian came to realise the potential dangers of what had then become permissible.[285] There, when confronted with Herius' will of 555 CE, the emperor considered the interests created thereunder had gone on for quite long enough and decreed that *fideicommissa* should not continue for more than *four* generations.[286] From this, an allowable period of four successive heirships was established as the civilian legal system's permitted limit of both *heritability* and *perpetuity*. In doing so, a new legal boundary upon *remoteness* was thereby established beyond the *fourth* degree, with that same limitation being later applied as the law of *fideicommissary substitutions*[287] in those jurisdictions which subsequently received Roman law.

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285 See, for example, the truly perpetual will of Dasumius (108 CE) discussed further in: Johnston (n 5) 78-79; BUCKLAND A 362; Lee (n 220) 246.

286 In estate of Herius, NOVEL, 159.

287 Here, 'substitutions' means the successive substitutions of heirs, like that of an English entail.

(4) Concluding Remarks on Roman Fideicommissa

The preceding discussion leads to *three* outline observations the creation of perpetuitous gifts in ancient Rome. *(a)* So far as the donor was concerned, conditions *per se* had limited use when seeking to reserve post-dispositional control over gifted property. In many cases, as demonstrated in sub-*section (iv) The Use of Donor-Appointed Conditions in Ancient Rome* beginning on page 99 above, the donee either acquired immediate ownership of the gift, or, the legacy would fail completely. Indeed, the attempted insertion of *dies certa* became rather pointless where the donee's performance of them had little bearing on his entitlement to ownership of the gifted property. Accordingly, it is proposed that the opportunity to *postpone* beneficial enjoyment contingently was virtually eliminated by those *inherent* restrictions against *remote possibilities*. *(b)* The Roman preference to *substitute* one absolute owner for another through the device of potentially unending entails[288] suggests that perpetuities in ancient Rome were founded entirely upon postponing the donees' rights of free alienation until the distant future. *(c)* By choosing to place a four-generation limit upon perpetual *heritability*, Roman jurisprudence had thereby forged a new Roman law against perpetual entails by employing a *time*-based boundary of excessive *prolongation*, rather than of conditional *uncertainty*.

Although inalienable 'trusts' limited to only four generations offered a substantial improvement over the unbridled perpetuities allowed under earlier Roman law, that 'four lives' period still seems rather long. This is particularly so when there was no gradual re-injection of free capital into society by each successive *fideicommissarius* reserving his own

288 Which may, for clarity, be described as the designation of certain heirship rights held by as yet unknown claimants.

quarter from the entailed estate. Accordingly, the Roman *fideicommissa* now provides a very clear example of how capital could be 'locked' away for a lengthy period. Yet, ancient Rome cannot have been immune to the adverse effects of perpetuities as noted by modern complainants. If they are 'bad' for economic growth because capital is taken out of circulation for too long,[289] four generations of that 'dead hand' control seems quite long enough to bring those economically stifling influences to bear.

In that regard, it must be asked, *firstly*, why was such a lengthy period chosen as the permitted limit of perpetuity? Perhaps the most compelling explanation is that the stated *inviolability* of Roman law[290] meant there was little alternative but to fashion its policy in terms of *existing* legal rules. In many ways, this was virtually identical to the *numerus clausus* principle in English common law in sub-section *(1) Conceptualist Theory and Perpetuities* beginning on page 177 below. From this, it may reasonably be supposed that the 'four generation' rule was simply borrowed from the *Pegasian* law of reserved quarters because any pre-existing settlement would have been largely exhausted by the successive deduction of quarters within the same four generation period.[291] Nevertheless, Roman law was

289 "The power to lease, sell and re-invest, instead of impeding, facilitates the transfer of property, and [this] is the very purpose the Rule against Perpetuities seeks to promote". *Melvin v Hoffman* (1921) Mo. 464 235 S.W. 107. See also Simes (n 47); Simes (n 77). See also Carl Emery, 'Do We Need a Rule against Perpetuities?' (1994) 57 *The Modern Law Review* 602, 603 et seq.

290 "It is not allowable to alter this law nor deviate from it, nor can it be abrogated. Nor can we be released from this law, either by the Senate or by the people." Cicero, *De Re Publica*, Book 3, 22.

291 An alternative explanation is that limit may have been derived from Justinian's constitution of 528 to 529 CE. There, under c. 19, only recipients 'up to the third succession' could claim annually paid legacies. See further Johnston (n 5) 110.

fortunate to have an *existing* measure which it could use to restrain perpetuities, even if this also meant that the legal limits on what English lawyers would call *remoteness* were then fixed only at the *outermost* boundaries of permissible *heritability.* Had this not been the case, it is submitted that the prohibition against fashioning new law meant Roman jurisprudence had no other means of dealing with the legal difficulties of *fideicommissa*. Normative thinking was quite alien to Roman jurisprudence.

The *second* question concerns the reasons for Justinian's perpetuity reforms. However, when attempting to examine this issue, it is apparent that *two* separate factors have each cast a veil of darkness over the matter: - *(i)* There is no record of any *public* discontent regarding the institution of *fideicommissa*. Indeed, there was every reason why both the donors and the *fideicommissarii* should have been silent about any difficulties which may have arisen. So far as the *fideicommissarii* were concerned, their inheritances might have been rendered virtually worthless by decades of misuse and neglect, but that still offered substantially greater benefits than being excluded completely under the Roman law of *institutio*. Furthermore, there was no reason why *donors* should have objected to the *fideicommissary* system. Plainly, *fideicommissa* provided them with new opportunities to avoid the risks of *querela* and to exercise complete discretionary control over their property. Perhaps the only real complaints were voiced by the *fiduciarii*, but those protests related only to the onerous duties of managing *fideicommissa*, rather than expressing any legitimate concerns about the potentially adverse economic effects of perpetuities. *(ii)* Few records have survived to help identify what impact perpetuities may have had on the ancient Roman

economy.[292] Indeed, the Western Roman Empire had ended in 476 CE, almost 100 years before the death of Justinian. That means it is virtually impossible to separate the economic effect of inalienable *fideicommissa* from the devastating invasions of plague, Vandals and Visigoths which signalled the end of the old Roman Empire. Thus, the long-term impact of Romanic-style perpetuities may be better illustrated after the reception of Roman jurisprudence into continental law through the Italian School of Glossators in Bologna.

Finally, it is an interesting curiosity to ask whether the institution of *fideicommissa* served rather higher purposes than economic growth, and for which the ancient Romans were prepared to sacrifice society's future prosperity. The core principles which originally permitted truly perpetual entails, and which also sought to annul conditional dispositions out of the control of living persons, is suggestive of a jurisprudence which prized certainty very highly. Indeed, it will be demonstrated in Chapter 4 below how the *necessity* of living persons producing heirs in family entails, and the search for a living person who held control of a conditional event in his or her own hands, each represented different aspects of the same belief; that is, an unyielding preference for certainty despite any adverse consequences.[293]

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292 Johnston (n 5) 77 notes that only five instances of perpetual fideicommissa have survived to the present day. Of these, the most notorious is that of Dasumius' will mentioned in footnote 285 on page 61 above. Although much more extensive evidence exists regarding settlements within the *nomen*; that is, settlements made on terms that property is not to leave the family name until ownership passes to a single person, it must be questioned whether any truly perpetual interests were then created at all; Johnston (n 5) 88-97.

293 These include - *(i)* the problem of economic stagnation resulting from perpetual entails, and *(ii)* the danger of interfering with the donor's wishes regarding the destiny of his or her own wealth.

(C) PROPERTY AND PERPETUITIES UNDER ISLAMIC LAW

Nutshell

Although Muslim jurists constructed their legal system upon the Qur'an and hadith, the Islamic world developed a similar instrument to the Roman *fideicommissa* – the so-called *waqf*. Indeed, due its religious and charitable foundations, the *waqf* has proved to be much more persistent into modern times.

The detailed analysis of *Classical* Islamic philosophy and the emanationist theory propounded by Avicenna in Chapter 4 below will be better understood when read in context with the necessity to obey the *interpreted* command of Allah. This is principally because the placing of God at the very centre of all creation includes the design of laws introduced at His bidding. The two lie in tandem such that it is argued 'Islamic law is the epitome of Islamic thought, the most typical manifestation of the Islamic way of life, the core and kernel of Islam itself.'[294] Indeed, following the diversity of views within the Islamic faith, the overlap between theology and jurisprudence is nowhere better illustrated than by the four Sunni schools of jurisprudence and one Shia.[295]

It is interesting to find to that wealthy medieval Moslems adopted a functionally similar, but entirely secular, device to Roman *fideicommissa* by employing truly perpetual endowments called *waqf,*[296] and by which three important purposes were served: *Firstly*, to avoid the Holy Qur'an's detailed system of compulsory succession.[297] *Secondly*, to support the donor's family in perpetuity under the Qur'an's injunction to make proper provision for

294 Joseph Schacht, *An Introduction to Islamic Law,* (Oxford: OUP 1964) 1.

295 The Sunni schools are Hanafi, Maliki, Shafi'i, and Hanbali.

296 Which, in Arabic, translates to mean detain, stop, tie up or even to imprison.

297 *Sura* IV, v 11 and 12.

any surviving next of kin.[298] *Thirdly*, and equally importantly, to earn the favour of Allah, which explains why private *waqf* invariably contain residual gifts to charity;[299] a development possibly influenced by the precedent of *piae causae* in ancient Rome.[300] Nevertheless, those charitable gift-overs were regarded as a 'sham' by the UK Privy Council in its controversial decision in *Abul Fata Mohamed Ishak v Russomoy Dhur Chowdry* (1894).[301]

(1) The Traditional Islamic Law of Succession

In similarity with customary inheritance law in ancient Rome,[302] and the emergent civilian jurisdictions,[303] the right of legal heirs[304] under Islam to inherit a substantial portion of their

298 *Sura* II v 180.

299 The following gift was typical: 'To support my descendants and maintain the family's honour and prestige in perpetuity, but, if none of my descendants all die out, then to the blind beggars of Calcutta'. Thus, *waqf dhurri* thereby function as a kind of *private* family charity that also create *public* benefits (see also n 325; n 327; n 329; n 330 below) perhaps similar to that recently upheld in England; see further *Re Segelman* (1996) 2 WLR 173 per Chadwick J.

300 William W. Buckland, *The Main Institutions of Roman Private Law* (Cambridge: University Press, 1931) 88-90.

301 (1894) 22 LRI App. 76

302 See further sub-section *(2) The Importance of Testate Death* starting on page 50 above.

303 Huebner (n 46) 308. This was a direct consequence of its antecedents in *joint* family ownership: Calisse (n 6) 663 notes a father could not alienate without consent since his children were obligatory heirs to the family rights of ownership. Similarly, Brissaud (n 46) observes, at 621, the institution of community was bolstered by the rights of *pre-emption* and *repurchase* enjoyed by the members. See also Brissaud (n 46) at Chapter II Topic 8; Calisse (n 6) 681 685.

304 The Qur'anic heirs are the: husband, wife, father, true grandfather, mother, true grandmother, daughter, son's daughter, full sister, consanguine sister, uterine brother and uterine sister. The *residual* heir is the nearest *agnatic* relation - usually the eldest son.

deceased relative's estate was protected by the doctrine of *ultra vires*. There, *testamentary* freedom under Islam was restricted to only *one third* of a decedent's estate – thereby invalidating any bequests which either exceeded the one-third limit or were made to legal heirs exceeding their Qur'anic entitlements.[305] Moreover, in similarity with both English and French law,[306] the *ultra vires* rule also protects heirs against the testator dispositions[307] made one year before death.[308]

A decedent's estate was then distributed *unequally* amongst the heirs by operation of three general principles. *Firstly*, the Qur'an emphatically states that, in determining the portional claims of survivors,[309] a female claimant takes only half that given to a male of equal consanguinity under the so-called 'double shares to the male' rule.[310] *Secondly*, the only recognised *female* legal heirs are the widow, daughter, mother, agnatic grandmother, agnatic granddaughters[311] and sisters of the deceased. *Thirdly*, the decedent's nearest *male* heir, usually his eldest son, enjoys the prerogative of *all* residual succession after deduction of the Qur'anic heirs' portional claims. Thus, in similarity with pre-vested rights enjoyed by the

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305 Any individual heir may be ratify or reject *ultra vires* bequests, but is done so entirely without prejudice to the rights of other heirs: Noel J. Coulson, *A History of Islamic Law,* (Edinburgh: Edinburgh University Press,1978) 228.

306 See footnote 358 below and the text to which it relates concerning a largely similar rule against death-bed gifts in medieval English law.

307 Which can include a marriage, divorce, creating a *waqf*, acknowledgement of a debt or the fraudulent sale of goods: Coulson (n 305) at 228.

308 This is the so-called 'death sickness' rule: To be held void, the deceased must have logically apprehended the imminency of his death. Coulson (n 305) 120-121, 228.

309 The so-called 'Qur'anic portions'.

310 *Sura* IV verse 11.

311 Matrilineal granddaughters are not Qur'anic heirs.

ancient Roman *suus*, the compulsory partition of a decedent's estate amongst a potentially wide circle of survivors gave them a *quasi-proprietary* interest in their ancestor's estate.[312]

(2) The Waqf

The rise in popularity of waqf can be traced to five factors: *Firstly*, it appears that waqf provided an ideal device for escaping the risk of land being confiscated. Rulers were loath to seize land that had all the outward appearance of being held under a charity.[313] *Secondly*, given that testators could not make separate testamentary provision for their legal heirs, they were powerless to improve the position of female dependants. Plainly, their rights of inheritance depended solely upon the unequal treatment specified under the 'double shares to the male' rule. However, provided that a testator had no immediate apprehension of his demise, he could then rely upon the freedom to alienate property during life[314] and 'settle' a substantial portion of his estate upon *waqf* for his female heirs without possibility of challenge under the ultra vires rule. Thus, it seems likely that inter vivos *waqf* were viewed as an ideal means to achieve during life what could not be accomplished at death. *Thirdly*, founders could take advantage of the opportunities provided by *waqf* to impose perpetual dynasties of their *own* design upon the endowed property and thereby extend the possibility of significant donor interference over Qur'anic descent. In this regard, *waqf* share a similarity with Roman *fideicommissa* insofar that gifts could then be made to persons who were otherwise

312 This is certainly true where the ascendant is terminally ill; at which point his powers of alienation are thus curtailed by the 'death-sickness' rule. See n 308 above.

313 Moshe Gil, 'The Earliest Waqf Foundations' (1998) 57 *Journal of Near Eastern Studies* 125.

314 See generally: International Encyclopaedia of Comparative Law (IECL) (Brill, 1972) 138.

prohibited from receiving an enlarged beneficial interest.[315] That said, however, the opportunity to make gifts to non-family members does not appear to have been a significant founding purpose of the *waqf*. Instead, this instrument was used almost entirely as a device to reallocate wealth *within* a family, although possibly by favouring heirs in excess of their Qur'anic entitlements.[316] *Fourthly*, it raised the possibility of controlling the final destiny of endowed property by making *waqf* contingent upon the outcome of uncertain future events. *Finally*, it may be that *waqf* also provided a device which could be used most effectively to avoid the compulsory fragmentation of estates. Indeed, as noted on page 112 above, avoidance of very similar *partitioning* laws of inheritance provided the main reason why *fideicommissa* became extremely popular across continental Europe, and it seems likely that Muslim testators might have shared many of those same concerns.

(i) Outline of the required elements of *waqf*

Any person of full legal capacity who enjoys unfettered rights of disposal over an object capable of yielding a usufruct[317] may endow that property upon *waqf*. Indeed, the founder[318] (the *waqif*) may do so without any of the formalities required of English trusts, save only the need to express his clear intention to make the gifted property *waqf* property. From this, the informality of *waqf* creation then stands in complete contrast to the English rules regarding

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315 See further sub-section *(2) The Importance of Testate Death* beginning on page 85 above.

316 Paul Stibbard et al, 'Understanding the waqf in the world of the trust' (2012) 18 *Trusts & Trustees* 785, 788.

317 Property capable of being endowed on waqf includes land, cattle, books and some movables. However, excepting Pakistan, stocks, shares and money may not be so endowed: David S. Pearl, *A Textbook on Muslim Law* (London: Croom Helm, 1979) 162.

318 In general terms, the equivalent of the English settlor.

the proper constitution of trusts.[319] Instead, *waqf* are fully capable of constitution by simple *personal covenant,* thereby permitting a degree of informality in their creation even beyond that allowed under Roman *fideicommissa.*[320]

According to *Hanafi* law, *waqf* must be inalienable,[321] irrevocable,[322] perpetual[323] and contain objects pleasing to Allah.[324] Clearly, the perpetual character of *waqf dhurri* means that Islamic law has no constraining notions of remoteness which are employed to restrict their potential endurance. Indeed, with the exception of *Maliki* law, the gift *must* endure into perpetuity.[325]

(ii) Waqf in context with perpetuities

The Islamic *waqf* provides an excellent example of a classic perpetuity. Indeed, it offers a most informative illustration of how badly things can go wrong under perpetual gifts. Unless expressly authorised by the terms of *waqf* or the *Qadi*[326], there is no power to mortgage,

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319 *Milroy v Lord* (1862) 4 De GF & J 264, per Turner LJ at 274 to 275.

320 Which required intermediate 'vesting' into the hands of the *fiduciarius*.

321 Excepting that, with the consent of the *Qadi*, *waqf* property may be sold or exchanged for new *waqf* property, or, let on short leases - although usually not for a period exceeding three years. Pearl (n 317) 163.

322 The majority interpretation appears to be that waqf cannot be revoked and must be capable of lasting forever: Pearl ibid164.

323 ibid 163.

324 See eg, Mussalman Waqf Validating Act of 1930 dealing with the predominantly Hanafi law extant in India.

325 Muhammad Z. Abbasi, 'The Classical Islamic Law of Waqf: A Concise Introduction' (2012) 26 *Arab Law Quarterly* 121, 131.

326 A religious court with jurisdiction over family affairs.

which means that *waqf* money cannot be spent on improving the endowed property.[327] Moreover, to the extent that income may not meet repair costs, *waqf* property might quickly fall into ruin.[328] Since the increasingly derelict property cannot usually be sold and the proceeds invested in a more productive asset, the intended beneficiaries may find they will eventually lose the *value* of their inheritances. However, empirical evidence that points to waqf as the reason for relatively low economic growth in Islamic economic history may be affected by other legal institutions such as usury and partnership laws.[329] Nevertheless, these dangers will be quite familiar to lawyers of the common law tradition, but there are interesting questions of cause and effect at play. If the Islamic waqf became a precedent which the English trust followed,[330] is it not possible this may also have influenced a longstanding abhorrence of perpetuities in England?

Similar difficulties arose from *fideicommissary substitutions* in continental Europe There, the continuing practice of imposing both *apanages*[331] and marriage portions upon the estate meant each new life tenant suffered a significant subtraction of both value and economic

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327 Even if there was, one imagines that few financial institutions would willingly lend when, as noted by Kuran, *waqf* property was routinely nationalised to help fund cash-strapped exchequers: Timur Kuran, 'The Provision of Public Goods under Islamic Law: Origins, Contributions, and Limitation of the Waqf System' (2001) 34 *Law and Society Review,* 848, 888.

328 ICEL (n 314) 139.

329 See generally: Timur Kuran, *The long divergence: how Islamic law held back the Middle East* (Princeton, 2011); Adeel Malik, 'Was the Middle East's economic descent a legal or political failure? Debating the Islamic Law Matters Thesis', https://extranet.sioe.org/uploads/isnie2012/malik.pdf

330 Monica M. Gaudiosi, 'The influence of the Islamic Law of Waqf on the Development of the Trust in England: The Case of Merton College' (1988) 136 U Pa L R 1231.

331 A privilege or prerogative.

vitality from his inheritance.[332] Indeed, as with the Italian experience,[333] each succeeding generation simply plundered the land with rank indifference to what legacy of impoverishment would remain for those who followed. Thus, to follow Brissaud's insightful analysis of the situation, the net effect of those continental family substitutions was to provide the life tenant with only a very limited *quantum* of ownership interest in, and proprietary control over, the land he had inherited.[334]

The statistics indicate that these difficulties were by no means a minority experience. Since Justinian's amending legislation[335] was never applied in Gallia, substitutions had evolved into entirely *unrestricted* dispositions with the result that, during medieval times, ninety-five *per cent* of French land was held under an inalienable perpetual entail.[336]

Perhaps the chief problem of perpetuities in Islam is that, unlike *fideicommissa* in ancient Rome, or English trusts, *waqf* cannot be tailored to meet *short term* objectives.[337] This is because *waqf* are valid under *Hanafi* law only when they are established in *actual* perpetuity. In that regard, donors are then forced to choose between either endowing their property upon *waqf* over a period which greatly exceeded any reasonable period of usefulness or to accept the consequences of compulsory succession. Accordingly, we find that by the end of

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332 This situation had considerable parallels with that of England during the Middle Ages. See further: S. F. C. (Toby) Milsom, *Historical Foundations of the Common Law* (London: Butterworths, 2nd ed, 1981) 72-173 and See further sub-section *(i) Entails Before the Statute De Donis 1285: The Maritagium* beginning on page 127 below.

333 See generally Calisse (n 6) 632-633.

334 Brissaud (n 46) 729.

335 See sub-section (v) Restraints on Fideicommissa on page 99 above.

336 O'Neal (n 53) 797-798.

337 *cf* under Malaki law.

the Ottoman empire, *three quarters* of Turkish, *one half* of Algerian and *one third* of Tunisian land,[338] together with *one third* of land pre-Revolutionary Greece[339] were held under *waqf*.

(3) Concluding remarks

The central conundrum of Islamic succession law seems to be that beneficiaries' hopes of receiving long lasting support will be frustrated by *whatever* choice is made by their ancestors. Whether by the economically stifling effects of *waqf* as a classic perpetuity, or by compulsory succession and excessive sub-division of ancestors' property amongst descendants,[340] there were no easy solutions for property owners. Only in relatively recent times have liberalising reforms been introduced, but the picture is somewhat piecemeal when viewed across all jurisdictions where waqfs are employed. However, opinions on the waqf remain divided, with some arguing that western eagerness for Islamic nations to seize waqf property and repay their debts may mean the waqf's inefficiencies were 'exaggerated'.[341]

338 Abbasi (n 325) 122.

339 Haitam Suleiman, 'The Islamic Trust waqf: A Stagnant or Reviving Legal Institution?' (2016) 4 Electronic Journal of Islamic and Middle Eastern Law, 27, 32. http://www.ejimel.uzh.chby.

340 Jeffrey Schoenblum, 'The Role of Legal Doctrine in the Decline of the Islamic Waqf: A Comparison with the Trust' (1999) 32 *Vanderbilt Journal of Transnational Law* 1191, 1197.

341 Kuran (n 329) 889.

(D) PROPERTY AND PERPETUITIES IN POST-CONQUEST ENGLAND

Nutshell

Perpetuities in post-Conquest England enjoys a centrality to the notion of landholdings not shared with its Islamic and ancient Roman counterparts. Indeed, through rising expectations of heritability and alienability in the early feudal era, the rapid introduction of the *maritagium* sealed the role of living persons at the heart of how interests in land could be 'owned' and transmitted across the generations. However, the Bracton treatise was somewhat circumspect about from where those principles originated, with the result that a fog descended upon how and why a life *in esse* was important in English perpetuity law. Those mists were lifted only briefly by Lord Nottingham in 1681 before quickly descending again at the hands of Mr Justice Twisden.

(1) Comparative and Contextual Introduction

The contrast between Roman and English property law could not be starker. Indeed, even the concept and vocabulary of property ownership are opposites of one another. Accordingly, it seems useful to begin by comparing these two juristic systems:

Firstly, even the conceptual structure and vocabulary of the two systems are entirely distinct. The Romans conceived of property in terms of 'ownership' and 'possession', whilst English common law knew only of 'seisin' and 'right'.[342] Although Seipp's analysis of the early Year Books reveals that possession and right were the predominant concepts of land disputes at that time,[343] the Romanisation of the *Assize of Novel Disseisin* implicit in Maitland's claim

342 Joshua C. Tate, 'Ownership and Possession in the Early Common Law' (2006) 48 The American Journal of Legal History 280. See also sub-section *(2) The Confluence of Fault-Lines in the Bracton Treatise* beginning on page 10 above and also page 178 below.

343 David J. Seipp, "The Concept of Property in the Early Common Law", (1994) 12 *Law and History Review* 29, 39.

that Roman and English concepts were practically synonymous with one another[344] has been strenuously disputed[345] and probably does not reflect modern opinion on the matter.[346]

Secondly, Roman and English law are also distinguishable by the *feudalistic* concept of landholdings in England.[347] There, unlike the system of allodial property ownership in ancient Rome (which persisted into the feudal fiefdoms held by individual barons in medieval Germany) the common law *schema* was founded by William of Normandy taking *sole* ownership of all his newly conquered English lands.[348] He then replaced (or rather, displaced[349]) the upper tier of an *existing* feudal system[350] by installing his allies and

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344 POLLOCK & MAITLAND, Vol. I, 62-63.

345 Milsom (n 332) 39-40, 71,

346 See for example: Tate (n 342).

347 Milsom (n 332) 39-40.

348 See, for example; POLLOCK & MAITLAND, Vol I, 232; *Doe d. Hayne v Redfern* (1810) 12 East 96 at 103; *AG of Ontario v Mercer* (1883) 8 App. Cas. 767 at 772. cf. Simpson (n 27) 47 in which he notes the premise of the king's absolute ownership of land is, in fact, only of recent invention. He claims the early lawyers did not perceive the king's role in those terms. Indeed, it is submitted the Ordinance of 1256, in which the king's consent was required before any alienations could be made by tenants-in-chief, would have been unnecessary. See Sir William Holdsworth, *History of English Law*, (London: Methuen, 3rd ed, 1923) 83. Against this stands the holding of the Council of Salisbury 1086 when, following the Doomsday Survey, the king sought homage from all significant landowners.

349 A considerable number of Anglo-Saxon families became extinct between the Conquest and the completion of the Doomsday Survey. Many suffered forfeitures or moved overseas to serve foreign princes – Sir Frank Stenton, *Anglo-Saxon England,* (Oxford, Clarendon Press, 3rd ed, 1971) 680-681.

350 Which Professor Stenton claims differed substantially from the system of social organisation created by post-Conquest feudalism; *id,* 681-682.

supporters as tenants-in-chief under military or other official tenure.[351] In turn, the higher nobility began to *purchase* desired services,[352] both for the crown and themselves, by *subinfeudating* their lands to sub-tenants under a revised system of feudal tenure.[353] Thus, unlike continental medieval Europe, all land in post-Conquest England was held, mediately or immediately, under a system of *precarious tenure* at the king's grace and favour. Land *ownership* was, therefore, a concept unknown to anyone other than the Conqueror. Indeed, William's crown-centric model of landholdings distinguished himself fundamentally from all other citizens, and thereby created a single Anglo-Norman nation under one supreme monarch. Interestingly, precisely the same ambitions were played out in Scotland. There, the Treaty of Abernethy 1072 and the Treaty of Falaise 1174 forced the Scottish kings to pay homage to the English crown.

Thirdly, unlike the community property system in continental Europe,[354] early English law had no outright prohibition against making testamentary dispositions of personal property.

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351 See further Plucknett (n 26) 516-517.

352 Including the vassals' obligation to fight in the lord's army.

353 See further; Milsom (n 332) 112.

354 This was a direct consequence of its antecedents in joint family ownership: Calisse (n 6) at 663 notes that a father could not alienate without consent since his children were obligatory heirs to the family rights of ownership. On a similar point, Brissaud (n 46) observes, at page 621, the institution of community was bolstered by the rights of pre-emption and repurchase enjoyed by the members. See generally: Brissaud (n 46) at Chapter II Topic 8; Calisse (n 6) 681-685.

Only *legal* interests in land[355] could not be alienated *directly*[356] by will until largely, although not completely, authorised by the Statute of Wills 1540.[357] Indeed, the only *direct* point of similarity between Roman, civilian and English succession law was that *death-bed* dispositions of property were prohibited by them all.[358] In this regard, it is submitted that freely alienable

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355 At least not without the heirs' consent; Glanvill VII, 1.

356 The indirect method involved uses; whereby the landholder could enfeoffing himself as the first cestui que usent [CO LITT 272a.; Plucknett (n 26) 577 to 578; J L Barton, 'The Medieval Use" 81 LQR (1965) 562, 566] and who was then able to devise that interest by will to someone who was not an official heir. [*Rothanhale v Wychingham*, 2 Cal.Proc.Ch. iii; *Williamson v Cook* (1417-1424) Selden Soc. X, 115; *Butler and Baker's Case* (1591) 3 Co. Rep. 25; *Audley's Case* (1559) 2 Dy. 166a; *Sir Edward Clere's Case* (1599) 6 Co. Rep.17b; Holdsworth (n 348) IV, 420; Robert E Megarry, 'The Statute of Uses and the power to devise' (1941) 7 Camb. L. J. 354; cf. *Lord Dacre's Case* (1535) YB 27 Hen. VIII Pasch. f. 7, pl. 22 which led to the common law lending its support to the correcting measures taken in the Statute of Wills 1540] Although both the devices were subsequently challenged as contrary to the Statute of Marlborough (1267) 52 Hen. III, c. 6, Milsom argues they continued to be used, with only the most blatant breaches running the risk of being overturned by the courts; Milsom (n 332) 208-210.

357 Statute of Wills 1540, 27 Hen. VIII c.1. as amended by the Statute of Wills 1542, 34 and 35 Hen. VIII c. 5. That said, complete testamentary freedom was granted only over socage land; with land held in knight service being devisable only as to two-thirds. The lord had wardship of the remaining third. Indeed, it was not until all land held under knight service was converted to common socage by the Tenures Abolition Act 1660 that most land became devisable. However, since copyhold land was left untouched by the 1660 Act, it was not until the Wills Act 1837 that these estates became fully devisable.

358 GLANVILL VII, 1; Milsom (n 332) 122; n 308 above.

fees in England finally emerged from a process which lay entirely *outside* the concept of wills, and without any *legal* right to inheritance.[359]

Finally, as a corollary of the third point immediately above, English law did not recognise any right of inheritance, but only of heritability. Even so, any claim brought in the Assize Mort d'Ancestor demanded proof of the seisin held by the ancestor from whom the claimant sought to inherit.[360] In complete contrast, Romanic jurisprudence had placed inheritance upon the high altar of *social cohesion* with its functionally indistinguishable twin, *succession*. Indeed, the ancient Roman doctrine *semel heres, semper heres*[361] formalised that transition, even to the point of forbidding any rights of reversion.

(2) Identifying the Seeds of Change

There is much scholarship regarding landholdings during the Anglo-Norman and Angevin periods. However, relatively little of this is in context with the civil turmoil during the Anarchy of 1139 to 1154, meaning that full consideration may not have be given to distrust in the potentially partisan seignorial courts. Those suspicions may also account for the medieval obsession with written evidence and witness lists to verify the legitimacy of their land transactions. In all likelihood, that lack of contextualisation resulted in the purposes of those consents being misunderstood. Thus, Hudson treats the matter as almost entirely one of 'piling up evidence', rather than simply one of obtaining required consent.[362] Moreover, into

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359 2 BLK COMM 12; Sir Francis Bacon, Bacon F, *The Elements Of The Common Lawes of England* (1630) 66. See further Simpson (n 27) 62.

360 See further n 401 below and the text to which it relates.

361 Which may be translated as '*once an heir, always an heir*'.

362 John Hudson, *Land, Law and Lordship in Anglo-Norman England*, (Oxford: Clarendon Press, 1994) 205, 229.

this caldron of uncertainty was added the possibility of feudal lords being dispossessed of their lands by enemies or relatives whilst absent on Crusade; a number of whom would never return. When viewed in this context, it is unsurprising that the Angevin reforms under Henry II sought to re-establish the rule of law by settling land disputes peaceably under the king's authority, although often at the cost of unfairness. The king's justices took a pragmatic view of rival claims by favouring *possessors* in actual possession over non-possessory title holders.[363] By those means, therefore, seisin then began to take centre stage in land disputes, and claims based upon succession and legal title were relegated to lesser roles.

In many ways, it is surprising that feudalism in England proved to be no-where near so enduring as it was in continental Europe.[364] Indeed, little more than two hundred years after the Conquest, the process of dismantling English feudal relations had begun.[365] There, the statute Quia Emptores 1290[366] prohibited the further creation of *personal* tenancies through

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363 Frederick W Maitland, 'The Mystery of Seisin', in *Select Essays in Anglo-American Legal History* (Boston, Little, Brown & Co, 1909) 594.

364 See further n 376 below and the text which follows.

365 The Tenures Abolition Act 1660 finally abolished feudal relations by converting most tenures into free and common socage. Interestingly, frankalmoign and copyholds were excluded; of which the latter continued, despite the reforming Copyhold Acts between 1841 and 1894, until the Law of Property Act 1922 enfranchised all copyhold land in 1926. Frankalmoign had largely disappeared many centuries earlier since it could not survive any alienation made after Quia Emptores in 1290.

366 Quia Emptores 1290, Statute of Westminster III, 13 Edw. I c. 1; entitled "A statute of our Lord The King, concerning the Selling and Buying of Land" and sub-titled "Freeholder may sell their lands; so that the feoffee do not hold of the chief lord".

subinfeudation and *substitution*[367] and thenceforward prescribed the free *inter vivos* alienation of estates in fee simple.[368] However, the transformation thereby effected cannot be viewed as one of *sudden* revolution, since the seed-germ of this fundamental change must surely have been planted many years earlier. Indeed, it is most likely that the statute Quia Emptores (1290) simply gave legal recognition to the changes which had *already* taken place over the preceding two centuries.[369] This may be demonstrated, in part, by the speedy weakening of feudalistic landholdings. Stenton has also argued how there was a growing practice of treating the tenant's fee as something distinct from the feudal service owed in respect of that land. The fee may have been somewhat artificial and did not take a permanent form until rather later,[370] Indeed, Stenton referred to one situation where one enfeoffed tenant was promised to have his landholdings increased at some later time. This suggests that portions of land were being distributed without extra feudal dues, and must, therefore, have seemed very much like the tenant's *own* property.[371]

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367 Which, although deserving of separate analysis, is beyond the entirely introductory purposes of this Section. See further Milsom (n 332) Chapter 4 in which detailed consideration is given to the differences between these two means of alienating land.

368 The preceding policy against alienation could be found in a Doom of King Alfred which prohibited alienation of inherited book land outside of kinship [Alf. 41].

369 In broad outline, these included: - (i) Possession of land had largely become separated from the holding of public offices. (ii) Military service had been made redundant by the imposition of taxes: POLLOCK & MAITLAND Vol I, 266-275. (iii) Feudal dues were largely incidents of land occupation alone. (iv) Land then became recognised as just another form of property which could be bought and sold as a free market commodity; Milsom (n 332) 112.

370 Stenton (n 349) 158.

371 ibid.

Yet, to consider how that point was reached, it is submitted the first step on this exploratory journey must be taken by establishing a definitional benchmark against which those transformations can be measured. Accordingly, it now seems appropriate to define full estate ownership in terms of the *free alienability* granted by Quia Emptores 1290.[372] If that is right, it follows the development of any such proprietary rights must have depended upon the rising *heritability* of land. Undoubtedly, the grantor needed an interest of greater endurance than his own lifetime if he was to have a *non-precarious* estate worth conveying.

It is, however, precisely at this juncture that a prefatory explanation seems necessary. If perpetuitous interests in land are to be defined, at their very broadest, as *inalienable* estates of restricted *heritability*, the designation of free alienability as the central issue of property ownership would then place perpetuitous interests as their very antithesis. In short, that perpetuities and freely alienable fees lie at opposite ends of a 'property ownership' continuum. If that is right, the question of how and why perpetuities first arose in England would then appear to offer a useful portal through which to examine the emerging character of individual land ownership interests. This is not least because perpetuities *preceded* the rise in those interests, and any progress towards freely alienable fees would, under this view, necessarily imply a movement *along* that suggested continuum. To these ends, and by way of introduction to the following arguments, the concepts of alienability and heritability are now examined to help: - *(i)* define the limits of remoteness and thus, perpetuity, in law;[373] *(ii)*

372 It has been noted that freedom to alienate is quite essential to some common law definitions of ownership; Hudson (n 362) 175. The present author follows Hudson's argument as the preferred view.

373 Clearly, if those formal devices were to designate express restrictions upon heritability, the question of whether the grant was alienable by its recipient will help measure objectively

demonstrate how those devices also served as instruments of *indirect* testation,[374] and *(iii)* identify the processes which led to the gradual elimination of restrictions upon *beneficial proprietorship* and the subsequent rise in *individually* owned fees.

Unlike the *allodial* character of land ownership in both ancient Rome and the later civilian legal system, landholdings in post-Conquest England were entirely tenurial; with William of Normandy taking absolute title to his newly conquered lands. That system of feudalistic control was completely unknown to ancient Rome,[375] which employed slavery, rather than serfdom, as its preferred source of cheap labour. That said, the continental nations embraced feudal servitude. Indeed, in contrast to the early steps taken in England to abandon tenurial relations, feudalism persisted across continental Europe for much longer,[376] some even as

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its perpetuitous tendencies. Moreover, if those dispositions also attempted to create an inalienable interest over property, the question of whether there were to be any heritable rights over the gift corpus will help assess any tendency towards remote vesting.

374 In similarity with their European counterparts, legal restrictions on testation meant English donors sought to employ settlements or uses to achieve during life what could not be accomplished at death.

375 Birks (n 205) 19-20 argued that praedial rights, outwardly similar to the performance of services under feudalism, operated only in contract and did not run with the land. Successive feudal tenure was, therefore, quite impossible in ancient Rome.

376 In contrast to the German philosophy that viewed feudal rights as simply a servitude upon land in divided ownership where the vassal's duties were considered almost noble (Heubner (1918) at page 336), the French treated feudalism as a system of mortgages where the tenant's land was pledged under promise of repayment by means of performing feudal services to his lord, the mortgagee. (Whitman (1990) at page 169 and particularly the references in footnote 75). From this, the belief that feudal relations amounted to a system of perpetual indebtedness thereby provided the French Revolutionists with a clear focus to

late as the early *twentieth* century.[377] Nevertheless, whilst there are different views on *when* or *how* those seeds of change were sown, each of the following theories has an important lesson to teach regarding the emergent propinquity of living persons:

(i) Early Heritability

Firstly, both Sir Frank Stenton[378] and Professor Maitland[379] claimed that knights' fees[380] were heritable from the time of the Conquest.[381] Indeed, the heritability[382] (or, more properly, the *succession*[383]) of land tenure largely followed the *primogeniture* rule[384] extant in England since Edward I's time.[385] However, it has been suggested this was not because of

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express their contempt for the old world; and which quickly took root as a fundamental policy objection against both feudalism and its supporting institution of fideicommissa.

377 Mecklenburg, Lippe, Reuss and Waldeck retained feudal relations until the twentieth century: Huebner (n 46) 348.

378 Sir Frank Stenton, *The First Century of English Feudalism, 1066-1166,* (Oxford: Clarendon Press, 1932) 160.

379 POLLOCK & MAITLAND, Vol I, 314-316.

380 Which, by Magna Carta 1215 c. 2, is used as a collective term referring to all feudal fiefs.

381 cf. Simpson (n 27) 49; S E. Thorne, 'English Feudalism and Estates in Land' (1959) 17 Cambridge LJ 19.

382 Indeed, it is highly significant that a later canon of English law was that the words 'inheritance' and 'heir' could only be used to describe the destiny of land: POLLOCK & MAITLAND Vol. II, at 255.

383 Roscoe Pound, Pound R, *Jurisprudence*, (USA: West Publishing, 1959) Vol. 3, 143.

384 Thorne (n 381) 198.

385 Simpson (n 27) 51. Note also that Hyams translates Cnut (11 CN 79) from the original OE as: land held with all obligations satisfied would give the owner '... power] to alienate and give to whomever he please.' Paul Hyams, Property Talk in Old English: Did Anglo-Saxon

any legal right to inheritance by the eldest male child, but rather, it simply reflected the convenient presumption that an older son was probably better able to perform the dues of military service.[386] If so, this would seem to suggest a preference for choosing *known*, and therefore *living*, persons as the most reliable provider of feudal dues. Indeed, the possibility of personal familiarity supplying the required *propinquity* between the donor and donee will be examined further in subsection *(α) 'Known' lives* beginning on page 162 below.

Professor Hudson agreed and claimed Norman-English landholders did not conceive themselves to be just life tenants. Instead, they had always believed that land would descend within their families. He claims this was because many of the first post-Conquest grants were acquisitions under *military* tenure, and their succession within favoured families was fairly well-assured over the next fifty years.[387] Furthermore, the easy transmission of land from one generation to the next also arose from the seignorial courts' pressure upon a new lord to honour his father's promise of *successive* rights to the tenant's family,[388] and from which customary expectations developed that the king's early land grants thereby created *heritable* interests.[389] Certainly, freemen enjoyed rights to make reasonable alienations of their landholdings by Glanvill's time; particularly regarding marriage gifts to daughters.[390]

England Know the Concept of Seisin?' in John Witter Jnr, Sarah McDougall and Anna di Robilant (eds), *Texts and Contexts in Legal History: Essays in Honor of Charles Donaghue,* (Berkeley: Robbins Collection, 2016) 37 at note 67.

386 See also the analysis in; POLLOCK & MAITLAND, Vol II, 260-274; and Thorne (n 381) 209.

387 Hudson (n 362) 206.

388 GLANVILL VII, at 5.

389 Hudson (n 362) 198-199.

390 'Every freeman, therefore, who holds land can give a certain part in marriage with his daughter or any other woman whether he has an heir or not, and whether the heir is willing or

A similarly early rise in heritability was proposed by Simpson who traced its origins to the Coronation Charter of Henry I in 1100. There, heirs could 'take up' their ancestors' lands by payment of just and lawful relief and were no longer required to buy back that land from the lord.[391] From this, Simpson claimed there was an implicit right of *heritability* subject only to ascertaining the proper heirs, paying relief and performing homage. Moreover, after 1176, that implied right became a full *entitlement* under the Assize *Mort d'Ancestor.*[392] Thenceforward, the lords could no longer use their seisin of the disputed land as security to compel the payment of relief, with the heirs then being allowed to claim seisin even where no such payment had yet been made.[393] From this, the Assize quickly came to assume that estates *were* heritable unless *expressly* granted only for life.[394] Indeed, by Glanvill's time, this

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not, and even against the opposition and claim of such an heir. Every man, moreover, can give a certain part of his free tenement to whomsoever he will as a reward to his service, or in charity to a religious place, in such wise that if seisin has followed upon the gift it shall remain perpetually to the donee and his heirs if it were granted by hereditary right. But if seisin did not follow upon the gift it cannot be maintained after the donor's death against the will of the heir, for it is to be construed rather than a true promise of a gift. It is moreover generally lawful for a man to give during his lifetime a reasonable part of his land to whomsoever he will according to his fancy, but this does not apply to deathbed gifts, for the donor might then, (if such gifts were allowed) make an improvident distribution of his patrimony as a result of a sudden passion or failing reason, as frequently happens. However, a gift made to anyone in a last will can be sustained if it was made with the consent of the heir and confirmed by him.': GLANVILL VII, 1.

391 Charter of Liberties, 1100, s 2; Simpson (n 27) 49.

392 Founded by the Assize of Northampton 1176. Indeed, he could compel the lord to accept relief and homage by writ; GLANVILL IX, 5.

393 Simpson (n 27) 50.

394 POLLOCK & MAITLAND, Vol. II, 58

presumption finally led to it becoming settled law that to hold a fee was to hold it *heritably.*[395] That said, it would be mistaken to imagine that a right of heritability by *successors* was thereby imposed upon the fee. Medieval technicalities fashioned treacherous waters through which skilled use of drafting language was needed to navigate safely. Thus, grants 'to A and [to] his heirs' risked creating either; *(i)* a *joint* interest to be shared equally by A and his present heirs for the currency of their lives[396] or *(ii)* an impediment which prevented A from dealing with the land without first obtaining his heirs' consent.[397] That was often not the grantee's intention. Moreover, the seemingly belt-and-braces language of a grant to 'A *in feodum et heridatum perpetuam*' was held to devise only a life interest.[398] From this, questions of heritability and alienability began to teeter on precisely the same knife edge of drafting construction, with the result that any meaningful distinction between testamentary and inter vivos alienations to others, virtually evaporated. Indeed, once alienors began to dispose of their estates by *substitution*, and expressly appoint the alienee as his heir,[399] it is unsurprising that Bracton then came to describe assignees as *quasi heredes.*[400] Furthermore, it seems likely that two common law maxims drew the question of heritability and alienability still closer. The heirs' right to claim succession of land was constrained by the overriding influence of seisin and the maxim 'N*on jus, sed seisina facit stipitem'* (it is not the right but

395 GLANVILL VII, 3.

396 John M. Kaye, *Medieval English Conveyances*, (Cambridge: CUP, 2009) 71.

397 POLLOCK & MAITLAND, Vol. II, 13-14

398 Kaye (n 396) 71 note 50.

399 Milsom (n 332) 109.

400 BRACTON f. 67.

the seisin which determines the stock from which the inheritance must descend).[401] Thus, any claimant first needed to establish that their decedent ancestor enjoyed seisin of the land at his death. Similarly, regarding inter vivos alienations, any acquisition would be governed by the maxim 'a right of entry cannot be alienated amongst the living'[402]. If the alienor did not have seisin, he had nothing to assign; and there is abundant evidence that ceremonies such as 'beating the bounds', or perambulations, were intended to demonstrate publicly that the alienor *did* have seisin to grant.[403] From these principles, therefore, notwithstanding whether heirship claims were *actual* or *quasi*, seisin has had a pivotal role in determining the outcome of property claims.

Continental scholarship supports Hudson's view. Indeed, the consensus is that the new Norman settlers had high expectations of heritability long before they set foot on English soil. Here, Duby claims the territorial princes had acquired those expectations by the mid-tenth century, the lesser nobility by 1000 CE and ordinary knights by around 1050 CE.[404] Whilst there may have been regional variations across France, Douglas has shown those expectations

401 Henry A. Broom, *A Selection of Legal Maxims,* (Philadelphia: Johnson Law Booksellers, 1845) 154, citing Fleta VI (1290) C. 14.

402 BRACTON f. 376.

403 See, for example Allegra di Bonaventura, 'Beating the Bounds: Property and Perambulation in Early New England' (2007) 19(2) Yale Journal of Law & the Humanities Art. 1, 115.

404 Georges Duby, 'The Diffusion of Cultural Patterns in Feudal Society' (1968) 39 *Past and Present*, 6. See also James C. Holt, *Colonial England, 1066-1215*, (London: Bloomsbury, 1997) 115-116.

were already well-entrenched in Normandy,[405] and thus by many of the people to whom William's initial land distributions were made. Holt also argues that since the hereditary landholdings of pre-Conquest England were replaced directly by the *feodum* in the twelfth century, the newly styled fee would also have been regarded as being equally heritable.[406] That said, White raises a strong, if not somewhat vitriolic, counter-argument that Holt's thesis is merely conjectural and lacks any supporting evidence.[407] However, as with the present paper, a veil of darkness hangs over early English common law since no case reports exist before 1217 to confirm or deny the deductions and inferences made; a point with which Milsom would most probably have concurred.[408]

The implications of those ideas upon the propinquity of lives seems reasonably straightforward: If post-Conquest landholdings were *immediately* heritable as Hudson has suggested, the passing of each life would simply mark an inevitable break between one generation and the next. Thus, the shortness or length of any one life or family generation would have been of no great import since, in theory, land proprietorship existed as an endless sequence of successive interests punctuated by the death of each life tenant. In other words, living persons would have no use other than simply to count the *number* of generations, and

405 David C. Douglas, *The Rise of Normandy*, Proceedings of the British Academy (1947) 115-120; David C. Douglas, *William the Conqueror*, (Berkeley: University of California Press, 1964) 83-104.

406 Holt (n 404) 115-116.

407 Stephen D. White, 'Succession to fiefs in early medieval England' (1974) 65 *Past and Present* 118.

408 S. F. C. (Toby) Milsom, *Historical Foundations of the Common Law*, (London: Butterworths, 2nd ed, 1981) 73.

not the passage of *time* per se. This is a point of great importance given the three-heir postponement of taking homage permitted under the *maritagium*.[409]

(ii) Later Heritability

Secondly, an alternative view was expressed by Thorne[410] who argued the first sub-tenures were simply interests for life.[411] Indeed, he claimed that, quite contrary to any apparent rise in seemingly heritable interests through grants 'to A and his heirs', those dispositions created succession rights only by the terms of *gift*, and not by any right of *inheritance.* Thorne argued this was because the homage owed from the original grant still operated to bar any successor's denial of his lord's superior title.[412] Thus, the additional words '… and his heirs ...' were ineffective to create any interest in the heir's favour because, as the Bracton authors had also proposed,[413] those were only words of *limitation* which gave the heirs no interest by way of grant or *purchase*, but only by (customary) *descent.*[414]

That said, the picture was complicated, even if for only a relatively brief period, by the early rule that expectant heirs were entitled to repurchase their ancestor's alienations by compulsory redemption within 366 days of the date on which he or she had died; sometimes even at a discount.[415] From this, the emergence of those rights might then appear to suggest

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409 GLANVILL 18; BRACTON f. 21b.

410 Simpson (n 27) 47; Thorne (n 381).

411 Thorne (n 381) 195; François L. Ganshof, *Feudalism* (London: Longman, 1952) 120-121; Plucknett (n 26) 524.

412 Thorne (n 381) 202-204.

413 BRACTON f 17.

414 Kaye (n 396) 70-72.

415 POLLOCK & MAITLAND, Vol I at 632.

that heirs enjoyed a *heritable* interest *in rem* over their deceased ascendant's estate. However, the matter was soon concluded in *Randolph's Case* (1225)[416] which finally annulled that right of redemption and established an *irrevocable* power of alienation over *military* fiefs.

The propinquity of lives under this alternative view now seems equally clear: Whilst landholdings might initially have been granted as purely lifetime interests, dispositional control over the land appears to have been in the hands of *two* generations (*ie*, father and son) simultaneously. Evidently, until 1225, the heirs' right of redemption imposed a fetter upon their ascendant's dispositive freedom which many alienees would have been unwilling to ignore. However, after 1225, that situation was reversed completely when the heirs' control over, and expectant interest in, their ancestor's property was reduced to zero. Thus, even if not already established before that time, England had invented for itself a new core conception of real estate ownership: Thenceforward, the control wielded by the *seised* landholder reigned supreme; a situation which then makes it difficult to dispute that only the life tenant was propinquitous to the holding of real property.

The author submits that any counterargument that a widow's right to dower implies that her life was as propinquitous to the estate as that of her husband would be false. Dower was never a right of succession per se since it arose only if agreed in *advance* of the marriage as part of an entirely separate bargain negotiated with the prospective bride's kinsman. It was, therefore, an entirely contractual matter; and helps explain why even a prearranged grant of

416 *Randolph's Case* (1225) 12 Curia Regis Rolls, 47.

dower would be invalidated if not proclaimed publicly at the church door before the wedding ceremony began.[417]

(3) Ruminating Upon the Potentially Unifying Role of Seisin

The preceding matters raise several important theoretical issues; some of which can be revealed by speculating upon a *separate* confluence of events and ideas which came to curtail the heirs' inheritance claims; that is, through the pervasive properties of seisin. Indeed, this should not be surprising since seisin has already been explained to have become "encysted in the tissues of judicial thought".[418]

Firstly, in stark contrast to the Romanic view that conditions of heirship were always to be treated as *dies certa,*[419] fourteenth century English law determined that no heirs could exist during their father's lifetime because they could not be identified with certainty until after his or her own death.[420] From this, estate ownership of land then appears to have involved *two* separate possibilities, and from which *two* distinct varieties of living persons emerged. On the one hand, there are the living occupiers (that is, the official heirs installed as the next lawful successors) who, once invested with seisin of the land, then become

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417 George L. Haskins, 'The Development of Common Law Dower' (1948) 62 Harvard LR 42, 43-45.

418 See n 106 above.

419 Yet, by doing so, this development marks a further departure from Roman law since, the Romanic view has always been to treat the production of heirs per se as dies certa; DIGEST 35.1.61.

420 Y.B. 18 Edw. II f. 578 (1324) Per Stonore CJ; *Geffrey Fitz Osbern's Case* Y.B. 10 Edw. 3. Mich. pl. 8 (1336) per Parning; Y.B. 11 Hen. IV Trin Pl. 14 (1410). See also Plucknett (n 26) 562-564; Simpson (n 27) 52.

instruments through which continuity of seisin was assured. On the other hand, there are those living heirs (plus any still unborn heirs) who are uniformly treated as instruments of *uncertainty* irrespective of whether they were alive or dead. They had not taken seisin of the land, and there was no certainty that they would ever do so because everyone other than the seised heir was to be disregarded. From this, the Bracton authors leave us in the interesting situation that being alive per se provided no guarantee of enjoying any legal connection with, or claim over, real property in medieval England unless also invested with seisin. Moreover, as developed further in sub-section *(iv) Possible Eighteenth-Century Views of Measuring Lives at Common Law* beginning on page 157 below, the author will demonstrate how the identification of *two* species of living persons thereby planted the seed which created an artificial distinction between a 'measuring life in being' and a 'living person'; a classification which will be argued to have led modern perpetuity scholarship entirely astray.

Secondly, the preceding point is further illuminated by the common law maxim that land descended according to *seisin as of fee*, and not by any right of inheritance.[421] This principle had truly profound consequences. Since it then became necessary for customary heirs to prove their ascendant had seisin at the date of his or her death, the pre-condition of supplying proof meant the heirs had no *right* of inheritance at all. Instead, and in contrast to the position under ancient Roman law, the heirs enjoyed only a customary claim to succession which differed considerably across England.[422] Precisely the same requirement existed, at least in Glanvill's time, regarding any *inter vivos* gifts.[423]

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421 That is; 'non jus, sed seisina facit stipitem'.

422 Haskins (n 417) at 45.

423 See also n 390 above.

Thirdly, if seisin was the common law's sole concern in the descent of land, the propinquity of lives to landholdings also identifies an often-overlooked connection between succession and the problem of perpetuities. Indeed, as Lord Brougham later observed, the common law's abhorrence for any interval arising between a 'particular' estate and the 'remainder in possession' also succeeded in preventing the creation of a perpetuity.[424]

Finally, it seems likely that the qualities of seisin as the 'glue' which attached proprietors to their land dovetailed very easily into the closely related concept of *annexation*. Indeed, it seems difficult to separate them, and particularly where perpetuities are concerned. Applying the discussion in sub-section (b) *Annexing conditional terms to the modus* beginning at page 151 below, the author suggests that annexing living persons to the limitation achieves virtually the same ends as making a living person 'seised' of the property; even more so when that person thereby becomes *necessary* to the disposition. In short, the land and the person are thereby united in a 'oneness' of the kind described by Avicenna and discussed further in Chapter 4 particularly at sub-section *(4) A Life as a 'Necessity' Implicitly 'Annexed' to the Modus* beginning on page 297 below and Chapter 5 below.

The preceding four points now lead the author to propose that the crucial role played by seisin in the common law of real property might even be *under*-appreciated. Indeed, the possibility that both seisin and England's anti-perpetuity laws served the same purpose reveals a previously unnoticed thread of legal principle which connects the propinquity of living persons in preventing any abeyance in seisin, their equal role in constraining perpetuities and living proprietors as *necessary* instruments of certainty. Although Rostill is

424 *Cole v Sewell* (1848) 2 HLC, 186 at 232.

perfectly correct to say that seisin now has become obsolete,[425] the author contends the formative influences upon early English common law mean the influence of seisin remains highly significant in the present enquiry.

These matters are applied to reconstruing English perpetuity theory in sub-section *(c) That E is alive at the date of gift* beginning on page 333 below. However, these matters must be left until *intermediate* steps in this thesis are first completed.

(4) Briefly Concluding upon the role of Living Persons Thus Far

The early development of England's law of estates reached a more settled point after 1225 when the heirs' enforceable interest in their ascendants' lands fell away completely. At that point, there was only one life to consider - the life of the *current* proprietor. From this, a yawning chasm had emerged between English and Roman law, only the latter of which gave entrenched *rights* of inheritance to dependants. Nevertheless, this thesis argues the shift towards a single life thereby set the future direction of travel for English common law. Thus, attention may now be given to the second stage in this journey; that is, where property interests and perpetuities begin to touch through the instrumentality of the *maritagium*, and from this, whether living persons came to exert a *time*, a *generational* or a *conditional* restraint against perpetuities.

(5) The Insinuation of Living Persons Into English Perpetuities

This section explains how living persons came to offer a mechanism which provides a benchmark measure of the permissible limits of perpetuities under English common law. At

425 Luke Rostill, Fundamentals Of Property Law: Possession, Title And Relativity (Oxford University D.Phil. 2016) 165.

this point, however, our concern is largely with the historical processes which help us understand what may now be called 'conventional' theory. The counter-argument—which explores the Neoplatonic-based conclusion that living persons are logically irrelevant to the fulfilment or non-fulfilment of conditional terms— is detailed in Chapter 4 beginning on page 219 below.

(i) Entails Before the Statute De Donis 1285: The Maritagium

Following the Bracton treatise, Simpson observed how the ingenuity of conveyancers produced fresh varieties of restricted fee under a new "… sort of private law which governed the descent of lands."[426] It is no exaggeration to say that birth of the *maritagium* single-handedly marked the genesis of perpetuities in England, whereby the donor sought to establish a new family estate headed by his daughter and her intending husband,[427] but with the safeguard of a reversion if that line died out prematurely.[428] Those plans were further supported by the rule that homage did not arise until after the *third* successive heir had entered;[429] and by those means, the donor could effectively *postpone* his lordship of the land and avoid all risk that the 'lord and heir' rule would bar him (or his heir) from reclaiming the gifted estate. Moreover, by the same stroke, the donor gained additional protection by rendering the land practically inalienable since prospective purchasers would never wittingly buy land which might suddenly be re-taken due to events beyond their own control.[430] The

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426 Simpson (n 27) 63.

427 Plucknett (n 26) 549; Milsom (n 408) 171-172.

428 Kaye (n 396) 139-140; Plucknett (n 26) 549.

429 GLANVILL 8; BRACTON f.21b. Indeed, "to take homage would create [a] fee" per Milsom (n 408) 71.

430 Simpson (n 27) 52.

donors could then realise their ambitions to create an inalienable settlement of at least three generations length. The grant would then be safe from attack for an extended period until, presumably, the new blood line had become so firmly established that it was no longer needed. In that regard, as noted earlier, it may reasonably be concluded that the heirs' lives at that point had resolved itself into simply serving as a device for counting down the passing of each new heir's entry to the estate. In terms of estate ownership, there was nothing else for them to do.

Unfortunately, the donors' plans to create inalienable interests often failed as donees began to alienate the gifted land with relative impunity.[431] Few remedies were available either to the donor,[432] or, by means of the barring effect of warranties,[433] to the donee's own heirs. Thus, for all practical purposes, land gifted upon *maritagium* increasing became a freely alienable interest outside any usual understanding of the term 'perpetuity'. Plainly, the donor had no perpetual control over the gifted land if his or her ownership authority could be annulled instantly by the donee making alienations to third parties. That apparent conflict between legal theory and pragmatism demanded a swift resolution which the Bracton authors tackled by attempting to supply a legal formula that explained the seemingly shifting sands of validly reserved donor control. There, the chief difficulty was that they had little precedent to work with, and another fifty years would pass before the statute De Donis 1285 introduced the roughly comparable perpetually inalienable legal entail. Thus, the author argues that although the Bracton treatise did not expressly say so, the net effect of their work was to formalise the nascent role of living persons in the English common law of property.

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431 Holdsworth (n 348) Vol. III, 122.

432 Simpson (n 27) 65.

433 Plucknett (n 26) 547; Milsom (n 408) 179.

It is no exaggeration to say how that insinuation of living persons into the notion of landholdings provided the 'centrality' from which English common law subsequently flowed. Indeed, the author contends it was only because the role of living persons was made implicit, rather than explicit, that the 'fault lines' discussed in sub-*section (2) The Confluence of Fault-Lines in the Bracton Treatise* above resulted in the misapplication of legal principle at the hands of Twisden J and Lord Talbot in sub-section *(a) Early judicial voices on the propinquity of living persons* below. Here, there is no better evidence that the Romanic origins of the theory the Bracton authors devised was thereby hidden behind an explanation based upon the donors' rights of reversion; a right which did not exist in ancient Roman law. Regrettably, what follows will, therefore, prove to be a rather convoluted path before even an *escale intermédiare* is reached.

(ii) Certainty and Living Persons: The Bractonian Model

(a) Deconstructing the maritagium

The Bracton authors' path towards explaining how donor authority over the *maritagium* (and thus the significance of that life in determining the granted fee's security) began with the assertion that appointed conditions (the *modus*) must control the disposition because:

> … the *modus* imposes a law on a gift; the *modus* must be observed even if contrary to common right and to what the law would provide, for the modus and agreement defeat [the common] law.[434]

From this, the *modus*, established a *condition* of restricted heirship which governed the line of descent by overriding whatever was prescribed by law. However, as Plucknett correctly

434 BRACTON f. 18.

observed, if the authors had stopped there, English law would then have been spared the "curious" theory which contradicted that otherwise sound statement of legal principle.[435] Instead, the Bracton treatise went on to say that any stated *modus* did not always control the descent of land because the law would *imply* numerous conditions upon which the gift must logically depend.[436] Thus, it is at this juncture that the Bracton authors' obfuscation and subterfuge in receiving Romanic jurisprudence appears, and with it the charge of 'eccentricity' which has long-plagued English common law.

At that point, the Bracton treatise introduced two alternative gift scenarios to explain how a donor could validly reserve a right of reversion over the disposition. From this, it could then be discerned whether the donee did, or did not, take a fee capable of being alienated to others; and thus, whether the donee had the ability to end the donor's attempted exercise of perpetual control. By doing so, the current discussion thereby ventures one step closer towards identifying the sphere of control exercisable by the lives associated with the gift.

The Bracton authors' first example, wrongly said to be a *maritagium,*[437] was a gift to A:

> 15. To hold to him and his heirs born of his body and that of his wedded wife[438]

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435 Plucknett (n 26) 549-550.

436 BRACTON f. 22. Here, the condition to be implied in *maritagia* is the right of reversion to the donor.

437 Bracton's first example makes no specific mention of a marriage ceremony at all. This was despite an earlier statement in BRACTON f. 2, that only '... land given propter nupias … is called a maritagium.'

438 BRACTON f. 18.

In this instance, there appear to be two conditions attached to this gift. The Bracton authors claimed the grant to A passed only a life estate (that is, he received only a freehold interest, not a fee simple) unless and until it was enlarged to a full fee when the donee produced an heir. In other words, a heritable fee arose only when the *first* condition of *procreation* was satisfied. Nevertheless, the donor's original purpose of founding a new family dynasty remained as a conditional fetter upon the gift. Thus, if A's heir died before his father, the fee would then shrink back to a mere freehold,[439] with a corresponding right of reversion to the donor by operation of a tacit condition that it should do so. Although the Bracton authors did not *expressly* say so, it may reasonably be supposed this was because the *second* implicit condition of *actual succession*, rather than just producing issue, had not been satisfied.

When applied to the question whether an estate of *conveyance* had been passed to A, the logical conclusion of the Bractonian treatment of gift (15) was that: *(a)* The donor had a reversionary interest in the gift only while A remained childless; and *(b)* that A possessed an alienable estate only while he had a living heir.[440] From this, the propinquity of A's life to an *alienable* interest depended entirely upon whether or he had actually produced issue; which in turn, might then allow him to destroy the donor's Damoclesian threat of reversion, and thus any possibility of creating a perpetuity. Thus, whether under point *(a)* or *(b)* immediately above, the production of heirs then became central to the gift's validity. However, whilst that may seem somewhat short of bridging the gap between living persons and the gift's final

439 ibid f. 18.

440 Simpson (n 27) 65-66.

destiny, it is highly significant that the possibility of procreation must necessarily happen, or fail to happen, during A's own lifetime.

Regrettably, the Bracton authors also embarked upon a contradictory path by stating that the conditionality of any such gift would continue long after the first child was born. Indeed, since the donor's right of reversion was theoretically exercisable against any alienee,[441] it was only when entry by the third successive heir lifted the bar on alienability by performing homage and becoming lord of the fee that the donor's interest *qua* reversioner was finally annulled.[442] Thus, there are now two alternative solutions to gift (15). On the one hand, there is the claim that A's production of issue extinguished the donor's reversion, with the consequential result of reducing any tendency towards creating a perpetuity. On the other hand, the donor's continuing possibility of reversion until the third heir had entered suggested that a donor also enjoyed a lengthy period of conditional control. Yet, how can these conclusions both be true? Here, the author submits that Roman learning provides a useful insight into resolving the eccentric argument which thereby results. Consider the following argument:

A useful starting point is to define a reversion in English common law as an interest expectant upon the ending of a particular estate, that is to say, an estate less than a fee simple.[443] Thus, to apply this principle to gift (15), that requirement would have been satisfied when A took only a freehold (that is, held an interest which might potentially revert to the donor) in the gifted land; at least until he produced issue. At this point, the current thesis contends that Roman jurisprudence had understood fully how the conditionality of the gift

441 Holdsworth (n 348) Vol. III, 122.

442 Milsom (n 408) 171.

443 Megarry and Wade (n 101) 179.

was changed significantly once A's child was born; and that learning may now be applied to help analyse gift (15):

Firstly, the Romanic 'imputed lifetime control' test discussed in Chapter II above explains what conditions governed the gift *before* A produced children. Here, ignoring the required assistance of a named third party (A's wife), and bearing in mind that she had no interest in frustrating performance of the gift's terms,[444] the production of issue was an event which must happen, if at all, during A's own lifetime. Obviously, A must either produce (or fail to produce) a child before his own death, and it is precisely this degree of personal control which would allow the appointed condition of procreation to be treated as *dies certa*. Moreover, in direct parallel with Roman law, once it can be established that the donor's reversionary interest depended upon the *non-occurrence* of precisely the *same* deemed certainty, his reversionary claim would have been treated as a vested right from the very outset. Thus, the donee (in this case, A) remained in peril of the gift returning to the donor. Indeed, this is likely to be what the Bracton authors meant when they suggested those reversionary rights could be enforced against any alienee since the continuing possibility of reversion denied the heirs any estate of conveyance.

Secondly, a different conclusion must be reached when A produces children and one of them survives to enter the estate. Here, the possibility of continued succession by A's descendants (which is the very scenario expressly contemplated by a *maritagium*) now becomes dependent upon the further contingency that A's children must also produce issue

444 A's wife would not gain personally if the gift failed; indeed, given the obvious benefit to her husband and issue, quite the opposite. See sub-section *(iv) The Use of Donor-Appointed Conditions in Ancient Rome* beginning on page 94 above.

if the gift was to proceed according to its stated terms. However, if Roman law and strict logic are now applied to this situation, it is evident that A could no longer exercise direct control over the production of *grandchildren* because that was entirely a matter for his heir, not A himself. The same is true of A's grandchild subsequently producing *great-grandchildren*. Accordingly, the implied condition of *future* procreation must then be treated only as dies *incerta* which, by virtue of the Romanic strategy of accelerating uncertain interests to estates of absolute ownership, would then annul the donor's reversion. In other words, once the first heir had entered, the donor's reversionary interest was fundamentally transformed into a purely hypothetical claim based upon a chain of future uncertainties which Roman law extinguished immediately. The heir was bound to take a full, unconditional fee because the rival reversionary claim no longer existed.

Those matters were further complicated when the Bracton authors did not apply Roman learning accurately to gifts by way of *maritagium*. Indeed, whilst their solution to gift (15) was based upon the donor's right of reversion, it will be recalled that no such general right existed in ancient Rome. There, the doctrine *semel heres semper heres* meant that a gift once given is gone forever. The explanation for this misapplication may be that the Bracton authors knew surprisingly little about ancient Rome law.[445] Indeed, Vinogradoff has argued they may only

[445] Coke argued most strenuously that English law was unique to England and did not depend upon any foreign law; C. LITT, ii, Cap. 9, at 98. Indeed, it is evident the roots of that prejudice have been long-lasting. See generally: Charles Sherman, The Romanization of English Law (1914) 23 The Yale Law Journal 318, 328; George Mousourakis, *Roman Law and the Origins of the Civil Law Tradition* (Switzerland: Springer, 2015) 273; Fred H. Blume, 'Bracton and His Time' (1948) 2 Wyo LJ 43, 52- 53; Seipp (n 343) ; Seipp (n 24) 176, 179=183; Heinrich Brunner, 'The Sources of English Law' in *Select Essays in Anglo-American Legal History* (Boston:

have seen Vacarius' shortened student notebook, the *Liber Pauperum*, and not the Digest at all.[446] This would certainly help explain why numerous errors appear throughout the Bracton treatise. Their overriding purpose was to establish a new English law which was not simply a bastardised vision of Roman jurisprudence, and departures from smaller details of the Romanic scheme would not have been unhelpful. Indeed, it may even have fostered, a long-standing "… traditionally consecrated ignorance of French and German law …" which was claimed to lie at the heart of English jurisprudence.[447]

The second gift scenario was that of a disposition to A: -

16. To hold to him and his heirs if he has heirs of his body[448]

In this instance, the Bracton treatise asserted that A's freehold was enlarged to a fee immediately upon the birth of issue and would never shrink back again, even if his heirs subsequently predeceased him.[449] Yet, why was this? The Bracton authors' most likely reply would have been that the tacit condition of reversion governing gift (15) no longer applied to gift (16) because the donor's imprecision about what was to happen if no heirs were produced (in conjunction with the common law's apparent preference for unconditional gifts[450]) meant

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Little, Brown & Co, 1909) 42; McSweeney (n 23); McSweeney (n 37); Plucknett (n 26); Turner (n 31) ; Frederick W Maitland, *Why the history of English law is not written; An Inaugural Lecture,* (Cambridge, CUP, 1888; Paul Vinogradoff, Roman Elements in Bracton's Treatise' (1923) 32 Yale LJ 751.

446 Vinogradoff ibid 785.

447 Maitland (n 445) 4.

448 BRACTON f. 18.

449 ibid.

450 ibid f. 18 and f. 19.

the gift was governed only by a condition that A must produce issue. In that event, A would take a fully alienable estate immediately upon performing the base condition of *procreation*. From this, and in contrast to the situation in gift (15), an *absolute* estate arose from a seemingly conditional grant, but that its conditionality (and thus any tendency towards creating a perpetuity) would necessarily end during the first donee's lifetime. Plainly, under gift (16), someone[451] would take an absolute interest in the land either at, or before, A's death; thereby establishing the propinquity of A's life as a long-stop limitation upon its potentially excessive endurance.

Interestingly, gift (16) above provides a more direct parallel between English and ancient Roman law. There, the Romanic view that the condition of A producing a child must, by operation of the rule stated in Digest 35.1.61, also include any *posthumous* issue. Accordingly, the conditional event of producing an heir must, therefore, be treated as occurring *during* A's own lifetime. Moreover, since no specific mother had been prescribed, the performance of this condition then lay entirely within A's own control, and the *dies* must then be treated as *certa*. Thus, the Roman view favoured A receiving immediate ownership of the gift, which is largely what the Bracton authors described when asserting that A should take a fully alienable estate, even if his own issue had predeceased him.

At this point, the Bracton authors' arguably limited knowledge of Roman law is revealed since they seemed unaware that gift (16) above was based upon a resolutive condition. Thus, the disposition would have been invalid unless the donee also provided security for its

451 That is, either to the donee if issue were produced, or, to the donor upon reversion if they were not.

subsequent performance under the Cautio Murcania.[452] However, since no such saving provision was available in English law, the Bractonian solution (and thus, the common law upon which it was supposedly based) seems, again, to have been based upon either a false analogy or ignorance of Roman law as discussed above.

Parenthetically, those matters may also be applied to the question of whether any direct connection existed between the Bracton treatise and the common law's emerging policy against perpetuities. However, given the difficulties outlined on page 147 above, that is probably to set the bar of proving conclusively the influence exerted by perpetuities in ancient Rome at an unattainably high notch. Instead, perhaps a more indirect connection can be detected through the Bracton authors' assertion that heirs took nothing by way of purchase, but only by limitation. This same principle probably led to "… one of the classic pitfalls of old conveyancing.",[453] the rule in *Shelley's Case* (1581).[454] There, a remainder made contingent upon the grantee producing heirs merged automatically with his freehold life interest, thereby investing him with a full fee simple as at the time of grant.

When looking at its overall effect, the rule in *Shelley's Case* seems strikingly similar in purpose to that of the 'modern' Rule. Both had the effect of shortening successive remainders to just one lifetime. Both thereby set the outer limits of permissible perpetuity to events within the sphere of a life in being. That said, two fundamental distinctions must be raised

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452 A resolutive condition is one which attempts to revoke a legacy dependent upon an uncertain future event. See further sub-section *(iv) The Use of Donor-Appointed Conditions in Ancient Rome* beginning on page 94 above; BUCKLAND B 210.

453 Megarry and Wade (n 101) 60.

454 *Shelley's Case* (1581) 1 Co Rep 88b.

between them: *Shelley's Case* had a more restrictive scope since it concerned only dispositions by deed or will. Furthermore, *Shelley's Case* relied upon much more purely English principles; that is to say, a distinction between words of *limitation* and words of *purchase* which was unknown in Roman jurisprudence. Thus, England's emerging perpetuity policy represented in *Shelley's Case* was founded upon separate antecedents which did not depend directly upon Romanic notions of conditional uncertainty.

The Bracton authors would probably have been delighted that, at least insofar as land law was concerned, they had finally succeeded in their efforts to install a uniquely *English* solutions to a legal problem. Perhaps that was the greatest strength of *Shelley's Case* since it was conceived without any need for inheriting the same distortion of Romanic theory seen elsewhere in the Bracton treatise. Indeed, although many might argue to the contrary,[455] this thesis contends that *Shelley's Case* represents a masterpiece of judicial problem-solving. There, the judges had succeeded in uniting the Bracton authors' notionally separate ideas that: *(a)* A life tenant's interest should, wherever possible, be enlarged to a fee; and *(b)* any heirs' claims must be disregarded, into one supremely logical conclusion. Instead of relying upon *two* arguments to vest a fee in the life tenant, the whole matter could now be settled by only *one* rule. At this point, therefore, it became apparent that, whether a grant was to 'A and the heirs of his body' or to 'B for life with remainder to his heirs', the outcome would be the same, and grants of seemingly restricted life interests then operated to pass a fully

455 See the judgment of Douglas J in *Stamper v Stamper* (1897) N.C. 251 at 254. ""The Rule in Shelley's Case, the Don Quixote of the law which, like the last knight errant of chivalry, has long survived every cause that gave it birth and now wanders aimlessly through the law reports, still vigorous, but equally useless and dangerous."

alienable fee at common law. By doing so, efforts to fetter the fee with a perpetuity extending beyond one life were annulled from the very beginning. If that is right, the 'smoking gun' which connects perpetuities and living persons might then be placed in the Bracton authors' own hands; albeit only after some 300 years had passed since they fired their shot.

The Bracton authors' presumed delight might have been misplaced. A suspicious scent of Romanic jurisprudence may be detected from the observation that, like ancient Roman law,[456] England had thereby begun to *accelerate* otherwise repugnant interests to a full fee.

(b) Annexing conditional terms to the modus

The critical reader may have already spotted how gifts (15) and (16) both appear to be conditional dispositions of a strikingly similar kind.[457] However, since neither example makes any express mention of a right of reversion to the donor, Plucknett's explanation that gift (15) is distinguishable because, as a *maritagium*, a reversion on failure of issue is implicit in the parties' agreement[458] seems to be more akin to that of an unhelpful self-fulfilling prophesy. In effect, Plucknett's position was simply that a reversion to the donor is implied simply because it is *supposed* to be implied. In reply, the Bracton authors would say that it is the annexation of a condition to the *modus* which clearly distinguishes those two gifts.[459] There,

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456 See further sub-section *(iv) The Use of Donor-Appointed Conditions in Ancient Rome* beginning on page 94 above.

457 Clearly, gift (15) is conditional because there would be no possibility of reversion were if it was an absolute disposition. Gift (16) is conditional because, following BRACTON at f. 18b, the word 'if'' implies a *conditional* grant.

458 Plucknett (n 26) 550.

459 BRACTON f. 17.

relying on gages of land[460] and *forma doni,*[461] the annexation of a condition which both restricted heirship and returned that gift to the donor if no new dynasty was produced bound the donor and donee to the consequences of their agreement.[462] Whilst that may be contrary to what the law otherwise provides, their own private law must prevail.[463]

The author submits the rise in that 'private' law now makes it much easier to see how elements of perpetuity were introduced into conditional gifts. There, in direct parallel with both the principle stated in *Pakenham's Case* (1369)[464] and the rules relating to warranties,[465] the annexation of those conditions to the grant created a right of inheritance which ran with the land as a perpetual (and thus potentially remote) restriction that prevented parents from alienating their estates to third parties.[466]

However, as elsewhere in the treatise, the Bracton authors undermine their position by introducing contradictory solutions which, in the present case, depend equally upon their *implied* annexation. Immediately, the argument that it is only the express wish of the parties[467] which determines those rights is weakened when, as with the *maritagium*, a condition of reversion is introduced by legal *implication*. As noted above, the link between the condition and the legal effect of their agreement then becomes almost completely

460 Ibid f. 20.

461 "By a declaration of his will expressed at the moment of alienation – in other words, by the forma doni – he can make that land descend in his way", POLLOCK & MAITLAND, Vol. II at 11.

462 BRACTON f. 17b and f. 18.

463 ibid f. 18.

464 *Pakenham's Case* (1369) YB 42 Edw. III Hil. pl. 14, f. 3.

465 CO LITT 365a.

466 Simpson (n 27) 117.

467 BRACTON f. 18b.

circular, which is presumably why Roman law forbade the use of implied conditions when seeking to control a gift's devolution.[468] Furthermore, the fact that a legal reversion was already recognised at common law[469] means gift (15) provides a very poor illustration of annexed conditions creating a *private* law between the parties since the *public* law of that time would have achieved exactly the same result. Accordingly, it is only a general proposition which then remains; that is, what is overridden in the common law is simply the law itself. Indeed, as Bereford CJ remarked, "You shape the law as you would like it."[470]

The validating effect of annexed conditions may be rather better illustrated by gift (16), where performance of the term requiring procreation was said to defeat any right of reversion. Here, even though he makes no reference to Bracton at this point,[471] Challis argued:

> ... the condition annexed to this kind of limitation is an express condition properly so called; and (unlike the quasi-condition supposed to be implied in the limitation of a conditional fee proper)[472] it is fulfilled, once and for all, and to all intents and purposes, by the birth of the prescribed issue, whereby the estate becomes ipso facto a fee simple absolute.[473]

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468 DIGEST 35.1.99.

469 Plucknett (n 26) at 550.

470 From: "*Vous taillez la lei auxicom vous le volez…"* per Sir William Bereford CJ in FitzWarin's Case (1311) Mich 5 Edw II 28.

471 Henry W. Challis, *Law of Real Property* [Revised by C Sweet] (London: Butterworths, 3rd ed, 1911) at Chapter XXI.

472 That is, in the gift (15) situation.

473 Challis (n 471) 267-268.

To examine this proposition from the Romanic perspective, the production of an heir in gift (16) thereby placed all further contingencies beyond A's personal control; and thus, then became an invalid future possibility or *dies incertae*. This has the immediate result that the donor's fetter of future conditionality then became founded upon a presumed *uncertainty*. In that event, the reversion upon which that fetter depended was *ipso facto* ended by that apparent lack of control. Thus, having then removed that element of future uncertainty from the disposition, there was no longer any impediment to the heir taking a full fee since the donor's reversion had thereby evaporated to nothing.

The reason why the presence of an annexed condition defeated the law had long since been made redundant when entails under the statute De Donis 1285 replaced the *maritagium* and conditional fees were absorbed into English common law. Thus, the author contends that the annexed conditions upon which those estates were founded no longer required any explanation in terms of the common law being *defeated* by them, and the connection linking them with this deep-rooted common law theory was lost entirely.

Nevertheless, whether express or implied, this thesis argues the question of annexation remains crucial. As already demonstrated by Challis,[474] the question then becomes, upon which critical condition, chosen from all the conditional circumstances then prevailing, does the limitation logically depend? In conveyancing jargon, that is a condition *annexed* to the limitation which, upon its occurrence, *ipso facto* creates a full fee from a conditional estate. Challis is not alone in this view. Indeed, Preston provides a much lengthier, but rather less

474 ibid.

succinctly quotable, discussion on the matter which merits close reading.[475] From this, it is submitted that the propinquity of living persons relevant to the disposition is determined, either expressly or impliedly, by annexing that life to the limitation to become a necessary and vital part of the dispositive scheme. This notion of 'necessity' will be developed much further in sub-section *(b) Avicennian modality 1: Conditionality – Causality v Necessity* on page 255 below and sub-section *(c) That E is alive at the date of gift* beginning on page 333 below. In the interim, it suffices at this juncture to observe that whether by 'annexation' or by 'necessity', the result was to place living persons at the very heart of the common law of property. Their eventual demise must, *ipso facto*, determine the gifted interest - whether in interest or reversion - within the permissible period of perpetuity defined by their lifetimes for the interest to be valid.

The reverse is equally true. The *absence* of a valid 'measuring life in being' connotes the failure of a specific living person to become *necessary* to the limitation, a construction which now becomes more convincing when viewed in context with the idea of that life not being *annexed* to the granted estate. Thus, the author submits that only where a living person was *annexed* to the gift would he or she become a *necessary* part of that interest's existence as a valid contingent future possibility. The importance of this introductory proposition for understanding the future development of English common law cannot be overstated and will be developed in Chapter 4 Section (2) beginning on page 246 below and Propositional Statement VI on page 319 below.

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475 Richard Preston, *An Elementary Treatise on Estates*, (London: J and W T Clarke, 1827) Chapter VII and particularly 310.

(c) What was the impact upon the propinquity of living persons?

This discussion now leads us to revisit matters often deemed settled by modern theorists:

Firstly, it is implicit in the Bracton thesis that valid gifts were founded upon *certain*, conditional future events occurring within the *first* donee's own lifetime, and therefore within his or her deemed control. Thus, the role of preventing conditional future uncertainty was assigned only to the *first* life. From this, it seems probable that the Bracton authors had thereby taken the first step towards re-drawing the permissible boundaries of uncertain future possibilities to just *one* lifetime; a position which later reappeared in Lord Nottingham's proposed 'single life' rationale in the *Duke of Norfolk's Case* (1681).[476] If that is right, the subsequent extension to include *multiple* lives, considered in subsection (iv) below, represents a significant change in methodology, and thus, policy rationale.

Secondly, whilst it is evident that donors used the *maritagium* purposefully to establish a scheme of continued *succession*, the conceptual peg upon which the Bracton authors hung the gift to A depended only upon ending the donor's right of reversion, rather than establishing a proprietary right in favour of any subsequent heirs. Thus, the final destiny of the land still rested upon a straightforward balancing of ownership interests between the *donor* and *A*, and not between A and his subsequent heirs as Professor Simes later suggested.[477] However, the attempted balancing of ownership rights between the living and the dead may miss the point entirely. Once it became established that heirship implies an uncertainty, those unascertained persons were incapable of possessing any interest against which the law could exercise balance. Moreover, as Professor Milsom claimed, "… we are too

476 *Howard v The Duke of Norfolk* (1681) 3 Chan Cas 14.

477 Simes (n 47) at 723.

simple minded if we view the matter [of barring entails] as just a struggle between the living and the dead…." because the question of barring arose *before* entails had become fully established.[478] Thus, the antecedents of barring an entail was first established as a matter between the *son* and his father's *alienees*, not as between *father* and *his* son.

The author suggests the arguments thus far indicate a hitherto unknown propinquity of a life to valid future gifts by way of impressing actual or deemed *certainty* upon the disposition. However, two more pieces of the perpetuity jigsaw are needed. First, we begin with Lord Nottingham's *dissenting* judgment in the Chancery court in *The Duke of Norfolk's Case* (1681).[479] The second impact of Neoplatonism and Classical Islamic scholarship is assessed later in sub-section (2) beginning on page 246 below.

(iv) Possible Eighteenth-Century Views of Measuring Lives at Common Law

(a) Early judicial voices on the propinquity of living persons

(α) The Duke of Norfolk's Case (1681)

By 1620, the common law's attempts to stay, what was perceived to be, a rising tide of dynasticism lay in ruins[480] - and it was not until the landmark decision of the *Duke of Norfolk's Case* (1681)[481] that any means existed to curtail those dynastic tendencies – but even then, only by permitting limited perpetuities for the first time in English common law. As correctly

478 Milsom (n 408) 178.

479 *Howard v The Duke of Norfolk* (1681) 3 Chan Cas 14.

480 *Pells v Brown,* (1620) 79 Eng Rep 504.

481 *Howard v The Duke of Norfolk* (1681) 3 Chan Cas 14.

observed by the Law Commission, "the rule did not reduce the ability of property owners to tie up their property for the future, but actually increased it"[482].

As noted earlier,[483] Lord Nottingham in the *Duke of Norfolk's Case* (1681)[484] declared that terms, trusts of terms, remainders, future, springing, or executory devises to a *living* donee created valid estates at common law. From this, the propinquity of living persons then became a very straightforward matter. If valid dispositions depended upon whether there was a designated beneficiary living at the date of grant, the propinquity of that person to the vesting contingency was supplied simply by him or her being alive. Yet, there must have been an *additional* rationale afoot since the logical argument which connects a living beneficiary to a valid disposition has not yet been specified. Thus, attention now turns to Lord Nottingham's judgment to help deduce that purpose.

> … future Interests, springing Trusts, or Trusts executory, Remainders that are to emerge and arise upon Contingencies, are quite out of the Rules and Reasons of Perpetuities, may, out of the Reason upon which the Policy of the Law is founded in those Cases, especially, if they be not of remote or long Consideration: but such as by a natural and easy Interpretation will speedily wear out, and so Things come to their right Chanel again ...[485]

Whilst his lordship did not expressly explain how living persons speedily wore out conditional interests, there can be little doubt that they did so by exhausting the gift's conditionality *at* or *before* their own demise. However, that still leaves us with the question,

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482 Law Comm at para 2.8.

483 See sub-section (3) Viewing Perpetuities Comparatively beginning on page 29 above.

484 *Howard v The Duke of Norfolk* (1681) 3 Chan Cas 14, the facts of which can also be found in sub-section *(3) Viewing Perpetuities Comparatively* beginning on page 29 above.

485 ibid 31.

'By precisely what logical process does the demise of a life *in esse* extinguish those contingencies? Here, if our argument that the Bracton authors received Roman jurisprudence surreptitiously is correct, they must, therefore, have supplied the rationale for saying that control over a vesting contingency thereby expired at the end of one lifetime. The natural conclusion of this deduction then seems to be that *lawful* conditionality must also end at the very moment of their demise. From this, the policy boundary of 'remoteness or long consideration' was then set *immediately* after that person's death.[486] Of course, it is precisely at this point that we begin to fall into a theoretical quagmire. If Avicenna is correct, that conclusion can only be reached by relying upon the confluence of two conditional occurrences – the conditional measuring life and the conditional vesting contingency. Little wonder that the emergent Rule soon became tarnished with incoherence.

In *The Duke of Norfolk's Case* (1681), it seems clear that Charles enjoyed an enforceable executory interest in the Barony of Grostock because the conditional events upon which his interest depended could only occur, if at all, during the lifetime of his eldest brother, Henry. At this point, therefore, the nascent Rule then appeared to stand on coherent theoretical foundations: It is clear that Henry's life saved the gift, and this may be surmised to be because he provided an acceptably short-lived period within which the contingent interest must wear itself out; that is, during his own lifetime.

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[486] Here, it should be remembered that the 21-year period in gross was not established until rather later. *Cadell v Palmer* (1833) 1 Cl. & F. 372. This decision settled that the previously allowed period of a minority (*Stephens v Stephens* (1736) Ca.t. Talb. 228) was a gross period allowable for all gifts - whether involving a period of minority or not.

(B) Lord Nottingham and the propinquity of living persons

Returning to the problem first raised in *(3) Ruminating Upon the Potentially Unifying Role of Seisin* beginning on page 135 above, the reader is reminded that Bractonian theory introduced the complicating possibility of *two* categories of lives in being. To recap, these are *(i)* living persons invested with seisin and *(ii)* all the other lives *in esse*.

Under Lord Nottingham, the propinquity of living persons in English perpetuity law embarked upon a relatively straightforward path: If *one* living person restricted the maximum endurance of a conditional future grant to within his or her own lifetime, that life validated the contingent gift at common law. Nevertheless, it is possible to go further by speculating upon whether Lord Nottingham's *one life* doctrine of perpetuities demonstrated his foresight into the problems of recognising a *group* of lives in being. Indeed, it is by no means unlikely that his lordship had spotted how the seeds of potential confusion had already been planted by Twisden J in *Love v Wyndham* (1669).[487] There, the possibility that a number of measuring lives could be introduced simultaneously was raised by his famous remark that 'all the candles were lit at once'. Under that view, every life *in esse* might then become a potential measuring life in being. However, that raises a considerable difficulty. Precisely which life from that extended group validated the devise? Lawyers did not have to wait too long before that difficulty materialised. In *Low v Burron* (1734)[488] Lord Talbot LC provided an answer which introduced a subtle, but critical, adaptation to Twisden's dictum:

> So, if instead of three, there had been twenty lives, all spending at the same time, all the candles lighted up at once, it would have been good; for, in

487 *Love v Wyndham* (1699) 1 Mod. 50.

488 *Low v Burron* (1734) 24 Eng. Rep. 1055 (Ch.).

> effect, it is only for one life, viz. that which shall happen to be the *survivor*.[489] [*italic emphasis added*.]

The implications of Talbot LC's adaptation were far-reaching, not least because the idea that a survivor of a group of living persons becomes the *sole* measuring life in being became embedded in common law theory.[490] Indeed, as just one illustration of this, the Saskatchewan court in *Re Moore Estate* (2013),[491] at para 17, adopted Cheshire's definition of the Rule as:

> At common law, the vesting of an interest may be postponed during the lives of persons in being at the time when the instrument of creation takes effect, plus a further period of twenty-one years *after the extinction of the last life*.[492] *[italic emphasis added]*

For both political and procedural reasons, the common law judges had remained almost deafeningly silent as to the role and purpose of those lives in being.[493] Yet, rare exceptions can be found. In *Pownall v Graham* (1863), the court took the unusual step of identifying the measuring life in being, although Romilly MR's choice of the survivor seems to have depended

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489 Ibid 1056.

490 *Scattergood v Edge* (1699) 1 Salk. 229, per Treby CJ at 229: "… for let the lives be never so many, there must be a survivor, arid so it is but the length of that life ; [for Twisden used to say, the candles were all lighted at once,] but they were not for going one step Farther, because these limitations make estates unalienable, every executory devise being a perpetuity as far as it goes, that is to say, an estate unalienable, though all mankind join in the conveyance."

491 *Re Moore Estate* (2013) SKQB 410.

492 Cheshire (n 68) 240.

493 Maudsley (n 67) 360; Jones (n 67) 57.

upon the gift's exact terms rather than upon legal principle per se.[494] Nevertheless, that case has subsequently been followed widely,[495] perhaps because it combined Lord Nottingham's *one* life model with Lord Talbot's *multi*-life proposition. For better or for worse, perpetuity theory was then able to distinguish between the sole surviving 'measuring life in being' and the wider group of 'lives in being' at the date of grant. The present author submits that step provides the root cause of the 'measuring lives' problem.

(b) Two hypothetical models of perpetuity theory

It is submitted the problems created by Lord Talbot can be better understood by imagining two hypotheses which jurists in the early eighteenth century *might* have had in their minds at that time. Unfortunately, since neither withstands scrutiny, we can now begin to visualise the emerging fog:

(α) 'Known' lives

Our eighteenth-century jurists may have noted how the question of disinheritance raises interesting questions for perpetuity policy. Whilst there may be justifiable reasons to by-pass a known wayward or insane heir,[496] no such reasons exist where the attempted disinheritance affects an, as yet, unborn heir. From this, a separate policy boundary might then be discerned which prohibits disinheritance of unknown heirs with unknowable personal

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494 *Pownall v Graham* (1863) 33 Beav 242, Per Romilly MR at 246 to 247: "I am of the opinion, therefore, … that the period from which the twenty-one years must begin to be calculated is the date of the last surviving brother. In no other way can effect be given to this trust, … The general scope and object of the will itself gives the explanation."

495 For example, *Fitchie v Brown*, 211 U. S. 321 (1908); *Gale v Gale*, 85 N.H. 358 (1932).

496 Which was precisely the problem at hand in *Howard v The Duke of Norfolk* (1681) 3 Chan Cas 14.

proclivities. Although they would not have known this, weighty modern evidence supports that possibility. Professor Leach drew attention to the lives the donor actually knew;[497] whilst Professor Dukeminier remarked:

> The father could realistically and perhaps wisely assess the capabilities of living members of his family, … But the head of the family could know nothing of unborn persons. Hence, the father was permitted control only so long as his judgment was informed with an understanding of the capabilities and needs of persons alive when the judgment was made.[498]

It is disappointing that *The Duke of Norfolk's Case* (1681) provides no direct opinion on the significance of knowability; although Lord Nottingham's sympathy for Charles demonstrates his understanding of the problems raised by known wayward or unsuitable heirs. Indeed, those generation-skipping settlements seem to have been predicated upon those very difficulties. If not, it seems reasonable to suggest that their only other purpose would simply have been capriciousness.

Nevertheless, whilst knowledge of the beneficiary might be a relevant factor, the author contends that notions of familiarity are far too inexact to justify any kind of testable propinquity between the donor and the gift. Indeed, its vagueness would also fail Kevin Gray and Susan Gray's 'conceptual vigilance' test.[499] In any event, imposing a 'familiarity' requirement would effectively prohibit making gifts to strangers. However, since that has never been the policy of English common law, the 'Known Lives' hypothesis must also fail for that very reason.

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497 Leach (n 75) § 24.16.

498 Jesse Dukeminier, et al *Property* (USA: Wolters Kluwer, Concise Ed., 2020) 241.

499 See n 625 below and the text to which it relates.

(B) 'Umbrella' lives

Our hypothetical eighteenth century jurists might also have returned to the *Duke of Norfolk's Case* (1681) and re-examined Lord Nottingham's judgment on the assumption that *Thomas* was the actual survivor:

Since Charles' claim to the Grostock barony was a valid common law interest, it matters nothing that Thomas (the presumed survivor) was regarded as the only measuring life in being. The outcome would have been the same since all the persons involved in that disposition were alive at the date of grant. Furthermore, it is of no concern if an *irrelevant* surviving life saved the limitation since strict logic maintains that any such extraneous person must necessarily outlive all the others. This is because the survivor's lifetime must necessarily span the lives of all those predeceasing him or her.[500] Furthermore, if that is true of the *duration* of those non-surviving lives, the same must be true of the *events* which took place (or could have taken place) within their own lifetimes. For clarity, this is because whatever may or may not happen during the non-surviving lives must, by logical necessity, also happen within the lifetime of the one final survivor of them all. Thus, all events deemed controllable by non-survivors must also be deemed to have been notionally controllable by the survivor.

The same argument may also be applied equally to void dispositions. Again, if the representative survivor of a group of lives cannot validate an unduly prolonged devise, all lives predeceasing the survivor must, *a fortiori*, be even less able to prevent its invalidity. Thus, where there is no life in being certain to live to within 21 years of the vesting event, the disposition must be void at common law irrespective of whichever life survives the others.

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500 See further Figure M on page 311 below to see a similar methodology at work utilising a *matryoshka*.

The natural conclusion of the preceding argument is that the survivor becomes a *representative* life in being regardless of whether that person was factually or causatively related to the vesting contingency. In short, it does not matter if any one of them could have been the actual 'measuring life in being' so long as there is a survivor who acts as a practical 'longstop' in the process.

Parenthetically, the preceding difficulty now takes us to the point at which unrepentant "causal lives" theorists might claim that identifying a specific measuring life in being is an entirely secondary consideration. This is presumably because whoever proves to be the actual measuring life then serves as an 'umbrella' under which all the lives then *in esse* at the date of grant necessarily shelter; and the choice between them became simply a matter of *degrees* of causality or relevance. Indeed, it has even been argued that the Rule is not initially concerned with validity at all.[501]

Our hypothetical eighteenth century jurists might have distilled the preceding arguments into a proposition provisionally called the 'Umbrella Lives' theory, which postulates that the survivor of a group of lives *in esse* represents all the persons within that group and the actions they could take during their own lifetimes. Nevertheless, whilst an initial view of this theory seems promising, there is a fatal flaw revealed by an even more convincing counter argument:

The only definite proposition which the 'Umbrella Lives' theory can make is that *some* life in being will either survive, or fail to survive, to within 21 years of vesting. From this, it may reasonably be proposed the actual constraining lifetime, that is, the one life *in esse* within 21 years of whose demise the gift must necessarily vest, if at all, is thereby substituted by a fiction called 'the sole survivor'. However, since it is not known in advance precisely which life

501 MORRIS & WADE 501.

saves the disposition, that leaves the Rule without a formula by its initial certainty requirement can be used to void any repugnant interest *ab initio*. Self-evidently, the Rule cannot insist upon initial certainty that vesting must occur within 21 years of X's death if it has no means to identify X until after his or her own demise. In any event, there is no 'wait and see' provision at common law which would allow the question of validity to be postponed for so long, or even at all.

From this unhappy situation, a compelling explanation is then provided for why the Rule's *modus operandi* has remained shrouded in mystery for so long: Arguably, our eighteenth-century jurists misunderstood the Rule's underlying foundations, and perhaps contented themselves with an entirely *fictional* relationship between lives in being and the final vesting event which avoided any need to delve any further into the matter. Indeed, English common law is riddled with convenient fictions to avoid inconvenient law.

(γ) Proving the falsity of Umbrella Lives

In many respects, the falsity of the *Umbrella Lives* fiction has already been revealed by the rejection of the 'any lives' hypothesis discussed in sub-section (i) The 'Any Lives' Theory beginning on page 43 above. However, a more detailed argument is revealed by the following example gift:

> 17. To the first legitimate issue subsequently produced by one of the babies born at the Charing Cross Hospital London on the day of my death.

Here, even the most basic hospital recording system in eighteenth century London would have made it easy to identify all the babies born on the day T died; say A, B, C and D. Thus, there can be no complaint that those lives could not be identified with certainty. Let it further

be presumed that, 18 years later, B was the first member of that group to produce a child, say E, who then claimed T's gift. This is because E has met the gift's contingent terms by being the first-born child of A, B, C or D. Now suppose that B died during childbirth and, over the next 10 years, A and C also died. This would then leave D as the sole survivor. However, applying the decision in *Norfolk's Case*, which of A, B, C or D is the *one* 'measuring life in being' of concern to the Rule? The chief problem was no formula existed eighteenth century jurisprudence to help identify that person. It is highly likely that Nottingham LC did not see any such need. He would probably have addressed his mind to only one life, almost certainly B's, and ignored all the others. Thus, *Norfolk's Case* provides us with little guidance on the matter, and the author suggests how that failure to specify any such formula was the root cause of the problems which followed.

It is submitted that Lord Talbot would have experienced little difficulty identifying the relevant life in being. For him, D was the sole survivor and must, therefore, be considered as the only measuring life in being at common law. However, that cannot be right. There is no logical connection between D (or even A and C) and the conditional gift to the person now known to be E. Here, it can reasonably be supposed they have never met, let alone exercised any determining influence over either B or E's life. Therefore, it is submitted that choosing D as the measuring life in being now seems to be entirely bogus. Indeed, this also helps explain why the example cases given by Morris and Wade were all invalid at common law.[502] The *Umbrella Lives* hypothesis must, therefore, be discarded.

It is, however, a worthwhile digression to contemplate how D's apparent lack of control would have led him or her to being rejected under both the law of ancient Rome and the

502 MORRIS & WADE 498 to 500.

Bracton treatise. Indeed, there is some flavour of those ideas to be found within the decision in the *Duke of Norfolk's Case* (1681). There, Lord Nottingham revealed his methodology at point (2) on page 36 of that case report, which the author now re-states into the following, more modern, terms:

> 'It was always uncertain that Thomas would die without issue. Thus, the matter of whether or not Thomas subsequently produced children had no bearing on the executory devise of the Grostock barony to Charles. However, it was morally certain that Henry would die without children, thereby making him the sole precipitator of events leading to Charles' subsequent inheritance'.

From that reinterpretation, the author now offers the following propositional statement which accurately and consistently re-synthesises Lord Nottingham's original words:[503]

> **Statement I** - 'The assertion that Henry had imputed lifetime control over the executory devise identified him as the sole measuring live in being at common law. The same reasoning also eliminates Thomas' life from consideration since he lacked any control over relevant events.'

From this, the author proposes that the reintroduction of Roman thinking now provides a useful step forward in understanding how the Rule may be presumed to work. Indeed, there is now a candidate *explanation*, rather than simply a *description*, of the propinquity which a 'measuring life in being' enjoys with the vesting contingency. That said, and as a reminder of

503 The original reads: 'Though it was always uncertain, whether Thomas would die without issue, living Henry, yet it was morally certain that he would die without Issue, and so the Estate and Honour come to the younger Son: …" per Nottingham LC, *Howard v The Duke of Norfolk* (1681) 3 Chan Cas 14, at 36.

the caveat mentioned at the very beginning of this Section, the very idea of any such logical connection is disputed in Chapter 4 below.

(c) Concluding observations

Returning to the twenty-first century, the preceding discussion raises an important question; namely, what purpose is served by clinging to the fiction of using a survivor? It has already been demonstrated how being the survivor of a group does not guarantee any causative or logical connection with the limitation. Indeed, the common law has long since disregarded the lives of extant heirs as an uncertainty,[504] which demonstrates a clear policy of restricting the range and propinquity of living persons to the limitation. For these reasons, it is submitted that the so-called 'Umbrella Lives' theory now lies dead in the water, and with it any suggestion that the Rule is a self-contained principle capable of explaining itself. All the evidence suggests that it cannot, at least whilst its likely roots in Roman law remain invisible. Furthermore, quite apart from any possible Romanic influence, the gap between the Rule's use of lives in being and a final vesting contingency has been filled only with the unconvincing fiction of the surviving life. The *Known Lives* theory fares no better – and is condemned equally by the foregoing rule that (known) living heirs were too uncertain to fall within contemplation. The question then becomes, has modern theory achieved more satisfactory results?

Since the present purpose is entirely to explore the Rule's founding principles, there is little need to chart developments beyond this point. The author submits the nascent Rule had suffered a dreadful injury at the hands of Lord Talbot *et alia* within only a few years of leaving its nursery; and there has been little remedial action to correct that unhappy situation. Thus,

504 See further pages 23 and 124 above.

it may reasonably be suggested that the common law Rule hobbled along over the following centuries without any coherent explanation for its benchmark measure of lives in being. Indeed, the closest attempt to resolve that situation risked selecting the *wrong* life for entirely *incorrect* reasons. From this, it is hardly surprising that perpetuity scholarship fell into turmoil when its seemingly rickety structure was first touched by questions of legislative reform.

(E) A Brief Overall Conclusion On Living Persons Thus Far

It is a great pity that the preceding proposals, if correct, were lost over time as English common law moved ever-further from its Romanic foundations. Indeed, whilst the Rule appeared during the late eighteenth century with a coherent role for measuring lives in being, it was quickly discarded; and a fog descended upon the property and perpetuity landscape. In this regard, it is unsurprising that modern common law scholarship was left wondering precisely why a life in being advanced the Rule's policy objectives. Although the protagonists involved in the 'Measuring Lives' debate from 1948 onwards did not grasp the Neoplatonic nettle, the author argues the explanation was hidden in plain sight. A rule supposedly constructed as an instrument to constrain excessive conditionality would never supply a convincing policy framework in which the fundamental problem was entirely one of future *uncertainty*.

The Pennsylvania Supreme Court in *Pearson Estate* (1971)[505] had an ideal opportunity to clarify the law, but lamentably failed to do so. Whilst seeming to follow a roughly causality-based justification, it did not specify which lives could be used to measure the permissible period of wait and see. Indeed, it proposed the arguably circular solution that the choice of

505 *Pearson Estate*, 442 Pa. 172 (Pa. 1971).

measuring lives will become apparent at the end of that period.[506] Frankly, with respect to the justices concerned, that was simply not good enough. Practitioners were entitled to receive proper guidance, and any judgment which amounts to little more than fudging the issues does not meet those legitimate expectations.

At this point, therefore, an impasse has been reached which remains to this day. Precisely what theoretical relationship connects living persons to how the common law Rule operates? In short, what propinquity do persons in being have to valid contingent future gifts at common law? As previously discussed, Roman and civilian jurisprudence enjoyed much greater success than England in placing living persons within a coherent framework of anti-perpetuity law. The reasons why have already been considered, but that provides little comfort to the English common law Rule. That said, whilst Pandora's box had been opened and was busily expelling challenging questions about perpetuity law, scholarship has benefitted from gaining new insight into the common law's doctrine of estates. Almost beyond doubt, exploring the mysteries of *seisin* and *annexation* offer important new understanding of the common law's policy, particularly when set alongside the seemingly parallel ideas of an *annexed* and *necessary* life in Neoplatonic theory developed in Chapter 4 below.

506 ibid 189, where Justice Jones observed "Since which of the three situations [of possible groups of measuring lives] will eventuate is unpredictable, it is necessary that the "wait and see" rule be applied."

CHAPTER 3 – PROPERTY OWNERSHIP AND PERPETUITIES

Nutshell

The conceptual relationship between mankind and objects of property helps inform policy debates about whether perpetuities can, or should, be created by private owners. By doing so, this chapter provides a wider theoretical vocabulary, based mainly upon 'thingness' theory, for helping construct a new theory of perpetuities under English common law.

(A) INTRODUCTION AND OUTLINE

This chapter places perpetuities in context with the literature on property ownership theory. The reasons are clear: If we are to accept that perpetuity law and policy are intended to *limit* dispositive freedoms, these are matters which directly concern where society chooses to place its boundaries on what it means to own something. Indeed, many societies have restricted their citizen's power to do whatever they like with the property they own; and many prohibit certain objects from being owned at all. Here, boundaries have been established by a consensus that, for example, human beings or chemical weapons should not be owned privately.

For the purposes of this thesis, and because of its restricted focus on perpetuities, the question then arises, 'to what extent does English perpetuity law and policy influence the scope for enjoying the expectations individuals have of private property ownership?'. As demonstrated in Chapter 1 above, one of those expectations - the freedom of disposition - is valid only if its final vesting is limited to occur within 'a life in-being plus twenty-one years thereafter'. However, the clear restriction on dispositive freedom, and thus the boundary of ownership authority over property, seems ambiguous. Is any such conditional gift valid because it obeys the Rule, or is it valid because the common law treats that gift as an object

of property which is capable of being owned? These are not the same; one depends upon the Rule, the other does not.

The author argues that much can be learned from comparing those two possible scenarios; particularly because the 'strangeness' of perpetuity law may then be addressed without reliance upon the Rule itself. Accordingly, this thesis will attempt to rationalise the Rule's peculiar *modus operandi* by approaching the problem from an entirely new direction. It is this: 'Is a contingent future interest an object of 'property' capable of being owned privately?' By doing so, the chief benefit of this innovative approach will be to consider an alternative benchmark of validity which is disentangled from the Rule's eccentricities.

Accordingly, this chapter explores whether, and if so how, perpetuities can be positioned within a newly hypothesised 'property ownership landscape' and then asks what features they should have to do so. Accordingly, this chapter sets out to apply ancient Roman jurisprudence and property ownership theory – together with concepts of 'thingness' and 'authority' drawn from New Essentialism in property - to help assess the extent to which contingent future gifts may subsist as valid and enforceable *property* interests in law. Thus, what follows is not a *general* survey of property ownership theory *per se*. Instead, *portions* of that theoretical framework are applied where relevant to the question of perpetuities.

(B) BROAD OVERVIEW OF PROPERTY OWNERSHIP THEORY

This sub-section begins with a thumbnail sketch of property ownership theory which scholars should hopefully recognise as a useful starting point. Accordingly, to identify the

most elemental features, the author suggests that 'property' is commonly regarded as an external[507] object which is susceptible to capture, containment,[508] severability and storage[509].

Those notions need to be distinguished from the term 'ownership', which typically refers to the sovereignty, or *dominium*, exercised over any such property. Here, many might suggest that authority implies expectations of holding, using, and disposing of that object according to one's personal choice. Most usefully, a number of those expectancies have already been detailed by scholars - such as Honoré of the *instrumentalist* school - whose eleven standard incidents of ownership have identified some rudimentary features of what it means to 'own' property. These are:[510] (1) The right of exclusive possession or control; (2) the freedom to exercise discretion over a thing; (3) the right to manage its use and who may use it; (4) the right to income and profits; (5) the right to alienate, consume, commit waste or destroy; (6) the right of continuing ownership unless consent is given; (7) the right to make an infinite number of transmissions; (8) the owner's interest is capable of lasting forever; (9) the right of a mature society to prohibit its harmful use; (10) the right of others to levy execution against the thing; and, (11) the owner's right to the residue after lesser interests have expired. the author suggests that notions of *consensus* should be added to accommodate situations of

507 The idea that property can exist only outside the possessor's body is reflected in a long-standing tradition since at least Kant's time, if not beforehand; c.f. Descartes who claimed objects can have no 'substance', whether external or internal, because they all depend upon the one substance of God: Descartes, *Principia Philosophiae*, (1644) i. 51.

508 Which may also include the ability to exclude others from enjoyment.

509 Perhaps by way of written evidence, such as a deed granting of a temporary right of occupancy, or even simply storage in human memory. By those means, therefore, incorporeal rights, such as intellectual property, may then exist an as object capable of private ownership.

510 Honoré (n 48) 113-123.

joint ownership. That said, as will be seen in sub-section *(ii) The 'Bundle of Rights'* beginning on page 196 below, the alleged rights of *disposition*, *exclusion* and *use* have been persuasively disputed.

(C) APPLYING IDEAS OF PROPERTY OWNERSHIP IN THE LITERATURE

The lessons of history reveal that wealthy property owners have often attempted to exercise prolonged control over their lifetime accumulations, usually extending well beyond the grave. Some may have had perfectly sound reasons for doing so, such as to prevent a wayward or insane son from inheriting[511] or, like Andrew Carnegie, to establish public libraries across Britain. However, there are likely to be many others with much less altruistic ambitions such as the pursuit of civil immortality,[512] self-aggrandisement, or even plain spite. Either way, the possibility of achieving those ambitions depended crucially upon the purposes which objects of property served in those societies, and furthermore, what opportunities existed to impose long-lasting ownership controls over privately held assets. At this point, therefore, it appears that mankind's relationship with property, and the extent to which something can be owned into the distant future, reveals itself as a critical starting point.

Since ancient times, significant differences of opinion have emerged over the nature of property and the degree of ownership control which may be lawfully exercised over them. Indeed, the first schism appeared when Plato's belief in communal property as something held for the *common good* stood full square against Aristotle's argument that non-excessive

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511 This is exactly the problem considered in *Howard v The Duke of Norfolk* (1681) 3 Chan Cas 14.

512 Johnston (n 5) 2 to 3.

private ownership was necessary to provide for the *good life*[513]. Indeed, through to modern times, we find that political science is riddled with similar arguments. However, those opposing perspectives are also suggestive of what may now be called the foundations of *perpetuity policy*, much of which has also continued into modern-day scholarship.

On the one hand, Plato's notion of *community property* seems at odds with the creation of private dynastic settlements. Indeed, it would be difficult to imagine how purely personal objectives could be pursued in a society where property allocations were made by Guardians acting in pursuit of the *common* interest. In those circumstances, an individual's personal ambitions would have likely counted for little or nothing.

On the other hand, societies built upon an *Aristotelian* belief in private ownership might be more sympathetic to the idea that individuals should be free to do whatever they liked with the property they own. This might even include making lengthy conditional endowments to others. Yet, caution is needed. Later writers have argued that a so-called 'Lockean Proviso' insists any allocations of property into private ownership should also leave sufficient assets remaining for others.[514] Accordingly, this 'proviso' contains the seed germ of an argument which could be used to justify a policy against stockpiling wealth; perhaps particularly so when that stockpile is taken out of general circulation and held for the benefit of a narrowly defined group. It might also be ventured that the *proviso* supports Professor Simes' view[515] that anti-perpetuity law serves as a policy instrument to correct a potential imbalance of ownership control between current and future generations. In that regard, it seems reasonable to

513 Erin A. Berry, 'Property: Past and Present - From Plato and Aristotle to Today' E-LOGOS/2006 (ISSN 1121-0442, 2006) 5.

514 See further n 535 below and the text to which it relates.

515 Simes (n 47) 723.

suggest that a policy concerned with ensuring there is sufficient left for others is virtually indistinguishable from one that seeks to establish balanced access to assets. These matters have already been introduced in *(ii) Balancing Ownership Rights* beginning on page 23 above and will be explored further in sub-section *(b) Property and self-interest* beginning on page 182 below. In the interim, consideration is now given to the two main strands of ownership theory; that is, *conceptualism* and *instrumentalism*:

(1) Conceptualist Theory and Perpetuities

Nutshell

Conceptualist theory treats property as something destined to be owned by mankind for his or her own benefit. These 'natural' rights of ownership are manifested in the 'essence' or properties each such object offers its owner in terms of 'self-expression' and 'self-fulfilment'. Moreover, we find the intimacy of that relationship often appears as an occupancy or possession of an object by a living person which quickly resurfaced in English notions of both seisin and the transmission of property to heirs.

Broadly speaking, conceptualist theory itself falls into two main groups: *(a) Natural law conceptualism*, which is based upon a natural, inevitable, spiritual, or moral justification for taking objects into private ownership. Indeed, from Aristotle's time, there has been a long-standing intellectual tradition which viewed property as a gift of nature, and subsequent distributions of those objects into private ownership depended upon the labour individuals expended in its nurture or acquisition. *(b)* In contrast, *positive law conceptualism* focuses upon the laws which exist to provide security and protection for the natural right to own objects privately.

The broadness of the Conceptualist church raises difficulties for identifying a clear centrality. However, the author submits there are two leading candidates: *Firstly*, the

numerus clausus principle establishes that the number of permissible interests in property under English common law is now fixed. Indeed, even if a new legal interest does succeed in slipping through the net, as it did in *The Duke of Norfolk's Case* (1681),[516] the common law judges have shown no appetite for creating any more. This principle was confirmed in *Keppell v Bailey* (1834),[517] where, on appeal from the Vice Chancellor, an attempt to enforce a *contractual* covenant in a partnership deed was held *not* to run with the land. By doing so, the defendants avoided a potentially perpetual obligation to pay double rates on the plaintiff's railway. This possibility of extortion was not unhelpful to the defendant's case, and so too was the suggestion that, in other circumstances, a more direct scheme would have been held void for perpetuity. Nevertheless, Lord Brougham LC's *obiter* is most informative. In language reminiscent of Nottingham LC in *The Duke of Norfolk's Case* (1681), Brougham LC went further to reaffirm[518] the *numerus clausus* as a principle which prevented any such attempts to circumvent law by designing those 'fanciful' new interests:

> But it must not therefore he supposed that incidents of a novel kind can be devised and attached to property at the fancy or caprice of any owner. It is clearly inconvenient both to the science of the law, and to the public weal that such a latitude should be given.[519]

In terms of economics theory, the *numerus clausus* also helps create stable property markets by eliminating the *supply* of all non-standard, idiosyncratic interests.[520] From this,

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516 *Howard v The Duke of Norfolk* (1681) 3 Chan Cas 14.

517 *Keppell v Bailey* (1834) 39 Eng Rep 1042.

518 The historical antecedents of the *numerus clausus* principle can be traced through 1 BLK COMM 69.

519 *Keppell v Bailey* (1834) 39 Eng Rep 1042 per Brougham LC at 1049.

520 Meredith M. Render, 'The Concept of Property' (2017) 785 Pitt LR 437, 444.

the author submits the net effect of the *numerus clausus* is to create an outermost boundary of certainty in the available 'catalogue' of permissible property interests; and through which their economic value is maintained by *scarcity*. Indeed, this very idea of stabilising markets, and preventing their failure through the appearance of eternal costs, has recently returned to the fore in Merrill and Smith's highly influential contribution to New Essentialism in property.[521]

A *second* unifying feature of conceptualist theory can also be found in the view that external objects *have* properties which are fashioned by the individual *uses* to which they are put.[522] Here, for example, a cup may have a combination of decorative, functional, spiritual or nostalgic features which is unique to any one specific owner. As discussed in sub-section (2) beginning on page 191 below, this is the polar opposite of *instrumentalism* and its so-called 'bundle' theory which defines objects of property in terms of the rights and obligations associated with them, not the 'thing' itself.

The idea of impressing property with *purposes* has significant implications for perpetuity theory. Indeed, there are two sub-branches within conceptualism of relevance to helping explain why individuals might wish to assert dynastic control over the objects they own. These are the 'natural rights' and 'occupancy' theories. A third branch, the so-called 'thingness' theory, will be considered separately in sub-section (B) beginning on page 227 below after further preparatory steps have been taken.

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521 Thomas Merrill and Henry Smith, *The Architecture of Property, Research Handbook On Private Law Theories*, Dagan H & Zipursky, Eds., (Edward Elgar Publishing, 2019) 26-34; See also n 585 below and the text to which it relates.

522 See, for example, Martin Heidegger, *What is a thing?,* (Chicago: Henry Regnery Co, 1967).

(i) Natural Rights Theory and Perpetuities

(a) Property and self-expression

Natural rights theory views objects of property as a gift of nature, and not as the product of positive rights created by human law-making. However, 'nature' has an extended meaning and includes the essential character of mankind acting through a desire to express ourselves through the external objects we claim as our own. Here, following the work of Locke, and further developed by scholars including Hegel and Nozick,[523] property ownership then becomes an outward manifestation of human personality. This was described by Emile de Laveleye as follows:

> Property is the *sine qua non* of man's individual development and of his liberty. He must have a domain over which he can act as master; otherwise he is slave. Property is the external sphere of liberty and it is therefore a natural right.[524]

Hegel's adaptation of conceptualist theory treated property ownership as labour's reward for the creation or acquisition of objects, and through which one could thereby achieve *self-actualisation* and freedom.[525] Accordingly, objects might then become invested with the owner's soul by being endowed with a purpose they would not otherwise have

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523 John Locke, *Two Treaties of Government*, (1683) I, Chapter 5 'Property'; Georg W. F. Hegel G W F, *Philosophy of Right*, (1820) [trans by T Knox 1942] (Oxford: Clarendon Press 1952); Robert Nozick, *Anarchy, State, and Utopia*, [reprint 1980] (Oxford: Blackwell, 1974).

524 Emile de Laveleye, *Luxury*. (1891) 51.

525 Locke (n 523) II §41-70.

possessed,[526] or, by being alienated in ways which expressed the owner's personal will.[527] Furthermore, Hegel's argument that self-expression also depends upon recognition by others[528] now takes us into the more familiar territory of property becoming both aspirational and motivational, both for their owners and others. Here, particular note may be made of Veblen's theory of *conspicuous consumption,* which suggests that goods might even be consumed for the purpose of provoking envy in others.[529] In that way, it is understandable how and why objects of property thereby became an instrument of self-expression fed by the appetites of an enviously approving audience.

Those ideas may help provide a conceptual justification for the wealthy elite to use perpetuities as instruments which asserted their power, status and even godliness. Indeed, beginning with the entombment of wealth in ancient Egypt, the use of *fideicommissa* in ancient Rome to help achieve virtual civil immortality[530] together with the flaunting of family *substitutions* by the aspiring nobility in early modern Italy,[531] 'old' money has often glistened particularly brightly. Interestingly, it was only the French nobility who sought to keep their

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526 "This is made manifest when I endow the thing with some purpose not directly its own. When the living thing becomes my property, I give to it a soul other than the one it had before, I give to it my soul." Locke (n 523) II, § 44.

527 This point might seem troublesome since alienating the object implies separating it from the owner's will. Hegel's solution seems to come from §71R, ibid, where 'reason' makes it necessary to make contracts for gifting, exchanging or trading in objects. Thus, it seems they are thereby driven to mediate, will-to-will, with others in expression of their own personalities.

528 Locke (n 523) II, § 51.

529 Thorstein B. Veblen, *The Theory of the Leisure Class: An Economic Study in the Evolution of Institutions*, (New York, Macmillan, 1899) Chapter 4.

530 Johnston (n 5) 2 to 3.

531 Calisse (n 619) 632.

family entails secret; but that was largely to help obtain credit under the false pretence that they were perfectly solvent.[532]

(b) Property and self-interest

Quite independently of using perpetuities for *public* self-aggrandisement, Nagel's rebuttal of Rawls' "Distributive Justice" hypothesis reveals the pervasive influence of selfishness in the human psyche.[533] There, contrary to Rawls' view, Nagel observed that acquisitive rivalries and envy have often resulted in unjust distributions of property. From this, Nagel conjectured that individuals exercised their choices with mutual disinterest in the welfare of others, and largely with concern only for themselves.[534] If this is right, the distribution of property throughout human history may then have taken place behind a veil of *self-interest*, rather than the veil of *ignorance* posited by Rawls.

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532 Brissaud (n 46) 731-732.

533 John Rawls, *A Theory of Justice*, (Oxford: OUP, 1973) in which Rawls hypothesised that the first allocations of economic assets were based upon fair inter-party agreements reached through a process of Distributive Justice. However, in order to nullify the potentially unjust effects of envy as society moved from this so-called 'original position', Rawls posited that individuals made their choices behind a 'veil of ignorance' in which "no-one knows his place in society, his class position or social status; nor does he know his fortune in the distribution of natural assets or abilities." (ibid 136) Nevertheless, this presumed state of ignorance did not mean that individuals were also blind to the principles of justice. Indeed, Rawls stated that "... the only particular facts which the parties know is that their society is subject to the circumstances of justice and whatever this implies." (ibid at 138) By those means therefore, distributional inequalities could be rationalised by shared notions of justice which demanded that compensating economic or social benefits must be given to those who had gained less.

534 Thomas Nagel, 'Rawls on Justice' (1973) 82 Phil Rev 220.

Once issues of self-interest rise to the fore, the author submits the situation is not appreciably different even if endowments are used for purely charitable purposes. Indeed, what other purpose is served by creating *named* foundations, such as those established by Carnegie, Rockefeller, or Bill Gates, unless there were personal motives to secure long-lasting recognition? In those instances, fabulous fortunes purchase something arguably more enduring than capital wealth, eternal fame.

It is, however, noteworthy that any such hypothesised advance in self-interest has not been without its critics over the ages. Here, to consider Nozick's more recent exposition of a '*Lockean proviso'* introduced earlier,[535] individuals have been cautioned to take only a moderate amount into private ownership; thereby leaving a sufficiency for others to appropriate for themselves.[536] Lamentably, there is little evidence of any such abstinence throughout history, with the result that dynasticism has proceeded despite those cautionary words. The ambivalence of the Christian church towards wealth may not have helped. Somewhat remarkably, it was not until 1961 that the Roman Catholic church gave clear recognition of the need for "justice and charity" in the distribution of material goods;[537] although recent pronouncements have taken a much more proactive view of the need to reduce inequality and reduce poverty.[538]

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535 See further n 514 above and the text to which it relates.

536 Locke (n 523) II, Chapter 5 *Property* §33; Nozick (n 523) 174-180.

537 *Mater et magistra*, Encyclical of Pope John xxiii on Christianity and social progress, 1961, 43.

538 For example; Fr Joseph Galea-Curmi, *Catholic Social Teaching on Finance and the Common Good* (2015) <http://www.centesimusannus.org/media/2hczr1458298987.pdf[>[online]].

(c) Notions of the 'self' - sub-optimality and perpetuities

The author contends that Natural Law theory now seems to offer a compelling connection with perpetuities, and particularly so where property is treated as the embodiment of an owner's desire for self-actualisation, self-expression and even self-interest. Once viewed in that light, an object of property might then become a facilitator for achieving an owner's individual intentions by being impregnated with those purposes, perhaps even into perpetuity. At this point, therefore, perpetuities appear to be an ideal device by which owners might attach their dynastic ambitions to the object(s) in question.

Following the prefatory comments made on page 28 above, is it not evident that the first, original owner has now seised *monopoly* control over that object to serve *only* his or her purposes? Any subsequent users of that property do so on the basis that *their* purposes are irrelevant, with the result that no 'balance' of access or enjoyment can then be struck between succeeding generations. This is a point of keen interest to perpetuity theorists;[539] but one could go further to suggest how accumulations of wealth *per se* might offend against Nozick's *proviso*. If economically useful assets have are thereby *withdrawn* from the so-called 'circular flow' of money, society at large is worse off because everyone *could* otherwise have enjoyed *more* of everything. Economists call this Pareto sub-optimality,[540] or market failure,

539 Simes (n 47) 723; Jesse Dukeminier et al, *Property*, (USA: Wolters Kluwer, 2017) 382.

540 Pareto efficiency occurs at the marginal limit where it is impossible to make anyone better off without also making someone else worse off: Vifredo Pareto, *Manual of Political Economy,* (1906). In other words, imagine an outermost 'boundary' which represents the absolute limit of what that society can produce. On any point of that boundary, any one individual can only enjoy more economic value by reducing someone else's consumption. Thus,

since fewer resources are thereby made available for use and consumption by other economic agents, the economy then performs inefficiently.

Although that technical argument will resonate strongly with economists and policy makers, it is most likely to fall on deaf *Nozickean* ears. There is little opportunity for policy corrections of distributional injustice in Nozick's *weltanschauung*. He does not condemn *justified* inequality, including ownership as the result of justly transferred property.[541] Instead, immediate remedial action is needed only to correct 'unjust transfers' – which are narrowly defined as those made either by coercion, fraud or theft. Indeed, Nozick never suggested that any *excessively* (but justly) transferred property should be returned. Instead, the question simply becomes one of providing compensation to those who can prove they have suffered harm due to being left with an *insufficiency*.[542] Thus, when applied to the creation of perpetuities, Nozick's theory suggests that stock-piled wealth and donors' dynastic ambitions might be acceptable, but only if compensating payments are made for any *proven* economic losses suffered elsewhere. However, more intermediate steps based upon individual circumstances, rather than upon strict legal principle, must then be taken before we can begin to fashion policy boundaries for the problem of *inequality*.

(ii) Occupancy Theory, Inheritance and Perpetuities

Occupancy theory examines the right to own property from the perspective of its possession or occupation by someone. Here, founded upon the maxim of Roman law *res nullis*

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when those utility-reducing transfers are seen to be taking place, it may be presumed that society has reached the limits of economic efficiency.

541 Nozick (n 523) 223-236.

542 ibid 174-182.

cedit primo occupanti (that which belongs to no-one becomes the property of him that takes it), this view considers that man subjects external objects not claimed by others to his own will and makes them his personal property. However, it is clear from Blackstone's remarks quoted below, that the quantum of such acquisitions was limited to "immediate necessities", and not for creating extravagant wealth. Thus, it seems it is the (reasonable) occupation or possession of a 'thing' which authorises its ownership by an individual:[543]

> The earth, therefore, and all things therein, are the general property of all mankind, exclusive of other beings, from the immediate gift of the Creator. And, while the earth continued bare of inhabitants, it is reasonable to suppose that all was in common among them, and that every one took from the public stock to his own use such things as his *immediate necessities* required.[544] *[italics emphasis added]*

Blackstone also applied notions of occupation to questions of inheritance insofar that a:

> … man's children or nearest relations are usually about him on his death-bed, and are the earliest witnesses of his decease. They become therefore generally the next immediate occupants, til at length in process of time this frequent usage ripened into general law.[545]

From this, a practical explanation is thereby proposed for inheritance or succession practices as a simple transfer of *occupation* from one generation to the next.

An initial view suggests that occupancy theory offers little room for creating perpetuities. Indeed, to follow Blackstone, the purpose of inheritance was founded upon the immediate

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543 See further Francis Lieber, *A Manual of Political Ethics*, 2 vols (Boston: 2nd ed,1838) Vol. 1 generally and 112 in particular.

544 2 BLK COMM para 1.

545 ibid Vol. 2, Ch. 1, 11-12.

transfer of property to heirs in the decedent's actual *presence*. Plainly, that is counter to the creation of dynastic schemes which, most often, depend upon the entirely antithetical proposition of *postponing* enjoyment, and thus *denying* immediate beneficial occupation. However, that may prove to be a misleading line of enquiry since taking a step backward in time and theory reveals a different picture.

How can we describe the touchstone concept of 'ownership' in England? Certainly, it is not owning title to land itself since that would offend against the tenurial antecedents of real property in post-Conquest England. Instead, the defining concept of landholdings had resolved itself into questions of 'seisin' and 'right'. Here, it is commonly recognised that seisin connotes being invested with possession or occupation. Indeed, it is evident from the two chief assizes governing land claims in medieval England – *Novel Disseisin* and *Mort D'Ancestor* – that any grant of lawful possession depended entirely upon seisin. 'Title' was irrelevant, probably because that was always in the monarch's hands alone. In this regard, the primacy of seisin in English land law helps explain how its search for that lawful possession or occupation supplies the core concepts upon which occupancy theory is built. Yet, as Rostill has identified,[546] the relationship between the fabric of title and the instrumentality of possession is complex and surprisingly contentious – and a detailed logical proof was needed to identify a reliable model. However, these important, but collateral, matters are beyond the scope of this enquiry.

The author submits that occupancy theory has as much to say about *disinheritance* as it does *inheritance*. Consider this argument: If a landholder chose an alternative succession of

546 Rostill (n 425) 288.

his land to a newly appointed lineage, the new heir's claim to lawful occupation would be enforceable under *Mort d'Ancestor*. There was little discretion in the matter. Indeed, the assize was *bound* to grant occupation if the disinheriting heirs proved the person from whom their claim originated held seisin in the land under dispute. In that event, therefore, the estate would still devolve according to principles of occupancy and would only experience a technical lapse in legal (as opposed to physical) occupation whilst the assize sat to consider the claim at hand.

(iii) Reflecting Upon Conceptualism, Nozick and Perpetuities

The idea of impressing property with *individual* purposes suggests how conceptualism has considerable potential to embrace the creation of perpetuities. There, owners might then pursue their personal dynastic ambitions quite lawfully. Supporting evidence for that conclusion can be found in twenty-first century America. Here, laissez-faire economic policy and 'minimal state' politics seem to thrive,[547] and it is not unlikely that similarly *Nozickean* sentiments could also help explain the observed rise in perpetual, or dynastic, trusts across modern-day USA.[548] Indeed, Dobris has argued convincingly that few citizens care about the Rule anymore.[549]

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547 Nozick (n 523) 169: "Taxation of earnings from labor is on a par with forced labor. Seizing the results of someone's labor is equivalent to seizing hours from him and directing him to carry on various activities."

548 See further n 611 below and the references and text to which it relates.

549 Joel C. Dobris, 'The Death Of The Rule Against Perpetuities, Or The Rap Has No Friends—An Essay' (2000) 35 *Real Property, Probate and Trust Journal*, 601, 603-604.

Perhaps the chief weakness of Nozick's theory as an instrument of socio-economic policy is its reactive nature which responds only when the corrosive effects of perpetuities have already materialised. Thus, whilst the 'Lockean Proviso' may anticipate constraints upon perpetuities, the author suggests the following reasons why Nozick's theory falls short of providing an *effective* anti-perpetuity policy framework:

(a) The resolution of 'historical injustice' is achieved only by balancing (or more accurately, by adjudicating upon) the dispositive freedoms expected by a donor against the *verifiable* economic loss suffered by *then-living* persons. Accordingly, this formula takes no account of any anticipated losses suffered by *future* generations. That proposition is quite at odds with Professor Simes' claim that perpetuity policy balances the needs of the dead, the living and those yet to be born. Accordingly, unlike Nozick's theory, Simes' thesis benefits from an *inter-temporal* approach where actions and their predicted *future* consequences can be tested against public policy standards to help accomplish desired ends.

(b) A chief difficulty is how would any such claims be funded? It is axiomatic that such grievances will be suffered only by those claiming economic disadvantage; and thus, impoverishment. This is particularly relevant in context with Nozick's 'minimal state' theory which implies that public funding or support may be either limited or non-existent. In this event, it seems unlikely that the disadvantaged would have sufficient spare resources to prove a causative connection between their loss and someone else's gain – assuming the courts were prepared to even consider such claims.[550] Thus, it may reasonably be surmised

[550] Per Lord Denning in *Spartan Steel & Alloys Ltd v Martin & Co* [1972] 3 WLR. 502: "if claims for economic loss were permitted for this particular hazard, there would be no end of claims. Some might be genuine, but many might be inflated, or even false."

that denial of justice in Utopia might then descend into the uncontrolled dynasticism which Weber, Getzler and Tawney suggested England experienced during its mercantile period.[551]

(c) As a corollary of the preceding point, claimants might then be confronted with almost unsurmountable problems negating a defence of 'remote' damage. This involves at least two 'floodgates' arguments against encouraging indeterminate claims: *Firstly*, any such claim would likely fall within the general exclusionary rule preventing recovery of 'pure economic loss' since there is no 'property' interest in any damage suffered, and even purely contractual rights were held to be insufficient.[552] Whilst the Canadian Supreme Court has enlarged third party 'dependence' upon another's property to meet that requirement,[553] that is still a long way short of admitting a much less proximate 'moral' claim to have a more equitable share in property held lawfully by others. *Secondly*, in the absence of strict liability, how could a duty be owed to those unconnected and unknown claimants where the 'ripple' effects are likely to be so unpredictable? Here, the author contends the indeterminacy of these claims seems almost pre-destined to fail and would take a seismic shift in policy to achieve.

(d) Problems also arise from introducing an entirely inconsistent methodology into English common law. The retrospective action anticipated by Nozick's theory contrasts starkly with the Rule's declared *modus operandi* of tackling potential problems at their *inception*, not

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551 See further n 606 below and the text to which it relates.

552 Per Lord Brandon in *Leigh & Sillavan Ltd v Aliakmon Shipping Co Ltd* [1986] AC 785 at 809.

553 *Canadian National Railway Co v Norsk Pacific Steamship Co Ltd (*1992) 91 DLR (4th) 289, Can SC.

when the damage has already been done. Thus, Nozick looks only backward - which implies an *ex post facto,* firefighting framework that invites description in terms of Whittier's adage:

> For all sad words of tongue and pen,
> The saddest are these: 'It might have been'.[554]

There, the story of a dream rendered impossible by differences in wealth and status is quite apt for our present concern with matters of social policy. Indeed, his lament could easily be adapted to read: 'But for the absence of perpetuity policy, economic loss might have been avoided' – which is largely the same argument first voiced by England's medieval judiciary.

(2) Instrumentalist Theory and Perpetuities

<u>Nutshell</u>

The instrumentalist approach treats objects of property as having no 'properties' but are represented only by a 'bundle' of the rights and obligations which attach to them. Perhaps most importantly of all, instrumentalism allows us to articulate a new model based upon a conflict between an owner and third parties. This proves helpful in identifying new ways to express a 'balance between the living and the dead. However, instrumentalism also implies an increasingly malleable definition of *ownable* property interests. In turn, this flexibility may have aided perpetuity reformers' ambitions to dismantle the common law Rule and increase an owner's autonomy over the destiny of their wealth.

Instrumentalist theory argues that property exists only as an amalgam of rights under contract and tort law. Thus, unlike the conceptualist Aristotelian approach which conceived of objects as *having* properties, Hume's[555] rebuttal of Aristotle's philosophy began a

554 John Greenleaf Whittier, *Maud Muller* (1856).

555 David A. Hume, *A Treatise of Human Nature*, [1739] Selby–Bigge and Nidditch (eds.) (Oxford: Clarendon Press, 1978).

reclassification of property as a 'bundle' of the properties, or 'normative modalities',[556] or the *Benthamite* legal rights[557] they exhibited and not the object itself. Accordingly, that revolutionary new approach stripped away any attempt to *personalise* (or perhaps, to *individualise*) objects in stark contrast to the approach expounded by conceptualism considered below. Thus, the full impact of this new approach was not felt until Hohfeld widened the 'bundle of rights' to include both duties *and* obligations.

(i) An Expanded 'Bundle of Rights and Duties' in a Feudal Context

Hohfeld proposed an expanded set of relationships between persons and objects in which duties, rights, privileges and powers each formed individual 'sticks' in the posited bundle.[558] From this, the recognition of both rights and their corresponding obligations allowed 'bundle' theory to reflect the increasing complexities of property ownership in the twentieth century.

However, the author submits that Hohfeld's expanded propositions benefit from being perfectly compatible with the tenurial origins of English landholdings. There, William I's post-Conquest command and control system depended upon making land grants in return for

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556 Stephen Munzer, 'A Bundle Theorist Holds on to His Collection of Sticks' (2011) 8 *Econ Journal Watch* 265, 266.

557 Jeremy Bentham, *The Theory of Legislation,* (Boston: Weeks Jordan & Co, 1840) 137: "… there is no such thing as natural property, and that it is entirely the work of law. Property is nothing but a basis of expectation; the expectation of deriving certain advantages from a thing which we are said to possess, in consequence of the relation in which we stand towards it."

558 Wesley N. Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 Yale LJ 16; Wesley N. Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 Yale LJ 710.

feudal services, most usually military service. Thus, by means of those tenurial obligations and possessory rights,[559] land was occupied by subordinate tenants in a system which denied them any possibility of individual ownership. All English land was owned exclusively by William alone. Nevertheless, the author submits there must have been some 'substance' to the tenants' landholdings apart from their simple possession of the land itself. Indeed, to apply the highly persuasive arguments of Professor Hudson and others, the author argues a critical 'substance' may be found in the feudal tenants' rising expectancies, or even their enforceable rights under *Mort d'Ancestor*, to hold land *heritably*.[560]

Whilst it seems questionable whether a single right of heritability was enough to constitute a *bundle* of rights, it should be remembered that more specific rights and responsibilities were attached selectively to individual tracts of land by means of sub-infeudation. The overall result was to create a hierarchy of landholdings in which each intermediate landlord demanded tenurial services according to their own needs. Thus, through a somewhat piecemeal approach, the English doctrine of tenure was fashioned by "almost endless disaggregations of title through grants of series of differentially graded estates in land."[561] The author suggests the concept of those *intermediate* rights and obligations probably evolved to form the constituent 'sticks' that 'bundle' theorists would eventually need to separate those 'rights' from the physical object of the land itself. That was

559 Note, however, that the ever-present risk of forfeiture meant landholdings during the early Anglo-Norman period amounted to little more than "precarious tenure": POLLOCK & MAITLAND, Vol I, 67-68.

560 Hudson (n 362) 178, 198-199, 206; Simpson (n 27) 49; Duby (n 404). See also Holt (n 404) 83 to 104; Douglas (n 405) 115-120

561 Kevin Gray and Susan Gray, 'The Idea of Property in Land' in Susan Bright and John K Dewar (eds) *Land Law: Themes and Perspective,* (Oxford: Oxford University Press 1998) 15.

by no means unlikely. Indeed, the precedent for separating land *per se* from the benefits and burdens of occupation was begun by the Conqueror himself when he first started to devolve possessory rights over land subject to the incidence of feudal service. There could scarcely have been a more persuasive precedent to follow.

The imposition of feudalism created a chasm between the purely tenurial nature of landholdings and the allodial ownership of other property. Unlike goods and chattels, land could only be enjoyed through rights as an incidence of possession, such that there was no 'property' interest at all. In short, that possession of land connoted only rights *over* property, not property rights *per se*. Here, as Seipp has persuasively demonstrated, this explains why reference to 'property' disappeared from the Year Books during the late thirteenth century and was replaced by the term 'right';[562] although the term later reappeared in around 1450.[563] Unfortunately for the Bracton authors, their bogus insistence that the English *feodum* and the Roman *dominium* were effectively the same[564] soon led the tide of juristic opinion to turn against their efforts to insinuate Romanic ideas of *proprietas* into England.[565]

McSweeney explains how this problem began in the Glanvill treatise where the purely Roman notion of 'property' and 'possession' had been "morphed" into the different concepts of 'seisin' and 'right' by Book VIII.[566] The Bracton authors knew that equating English seisin

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562 Seipp (n 343) 37-38.

563 ibid 62.

564 Karl Güterbock, *Bracton And His Relation to The Roman Law. A Contribution to The History of The Roman Law in The Middle Ages*, Translated by Brinton Coxe (Philadelphia: J. B. Lippincott & Co, 1866) 87.

565 See sub-section *(i) The Surreptitious Reception of Roman law into England* beginning on page 11 above.

566 McSweeney (n 23) 1170.

and right with the Romanic concepts of ownership and possession would not work, but nevertheless continued to devise "… increasingly contradictory and absurdly complex…" schemes to prove otherwise and to establish a similarly unified system of 'property' law.[567] Yet, these eccentric solutions were not a purely English obsession. The same efforts were replicated in the *Très Ancien Coutumier* of Normandy.[568] Thus, the age of obfuscation with which this thesis is concerned had finally dawned on English common law.

The author argues the foregoing conceptual switch to 'right' from 'property' in the Year Books is entirely consistent with Milsom's contention that the common law increasingly regulated feudal tenure as a *contractual* obligation, and *not* by the transfer of judicial authority to the king's court as previously suggested by Maitland.[569] Indeed, this would also help explain why, within the feudal hierarchy, litigation tended to involve claims of right either vertically *upwards* by the tenant against his lord through the writ of right patent, the Assizes of *Novel Disseisin* and *Mort d'Ancestor*, or vertically *downwards* claims emanating from the lord by way of writ of entry. Indeed, they had all the appearance of breach-of-agreement style actions brought between inferior and superior parties in a contractual dispute. In this way, English landholdings then became imbued with relativistic notions as inter-party claims between *unequals* came to depend upon who had the better right. Horizontal litigation between *equals*, as one might expect in modern property disputes, simply did not occur.[570]

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567 ibid 1171 to 1172.

568 Thomas J. McSweeney, *Between England and France: A Cross-Channel Legal Culture in the Late Thirteenth Century, in* Law Governance and Justice, Richard W. Kaeuper (ed.) 73 (Brill, 2013) 84- 89.

569 Milsom (n 332) 164-166; Milsom (n 408) 137-139.

570 Milsom (n 408) 119-124.

When viewed in the foregoing context, the chief attraction of 'bundle theory' is how feudalistic landholdings in England created a *vertical* hierarchy of rights and obligations. There, everyone from the king downwards was bound by those inter-party duties, but all without 'owning' the land. The separation of land and its 'properties' was complete.

(ii) The 'Bundle of Rights' in More Recent Times

In principle, one might imagine how the ending of feudalism, and thus the end of landholdings having highly *particularised* contractual obligations and purposes, suggests that the roots of modern 'bundle' theory might possibly lie elsewhere. However, it must be remembered that, by this time, many of those rights and obligations persisted into English common law as a 'list' of rules which the author suggests later become the so-called 'bundle of rights' which formed the incidents of estate ownership. However, that transformational process was likely to have been influenced by a tendency towards genericism and the idealisation of rights which fitted very poorly into the common law scheme. This is particularly evident in three of Honoré's previously mentioned eleven *incidents of ownership,*[571] the rights of *exclusion*, *use* and *disposition,* which many might regard as perhaps one of the most fundamental expectations of ownership. Here, this sub-section begins with the alleged right of *exclusion* since the author contends these have often been entangled with the *acquisition* of land. In that regard, they might thereby represent one of the most immediate and important rewards of ownership. Accordingly, whilst what follows might more properly be regarded as a conceptualist criticism of instrumentalism, the author suggests the following points will be more understandable if considered side-by-side, rather than separately.

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571 See further n 510 above and the text to which it relates.

(a) Rights of exclusion

In broad outline, the right to exclude others from enjoying or using one's property seems to be an almost axiomatic principle underpinning the question of owning something. Indeed, the notion of something being either 'mine' or 'yours' relies upon distinguishing oneself and one's property ownership from those of others. In ancient Rome, we have already seen how the absence of any claim that a thing is 'yours' justified the private acquisition of property deemed to be unowned.[572] However, notwithstanding that instrumentalism and its associated 'bundle' theory would have been entirely alien to Romanic thinking, the author argues Roman law still has much to teach about the transmission of ownership, and thus, what it means to 'own' something in law.

Roman law provided the foundation for making a clear distinction between 'mine' and 'yours' by permitting the purchase of *permitted* property through *mancipatio*. There, the public ritual of 'bronze and scales' made the distinction between *mine* and *yours* direct, explicit and justiciable. Indeed, a transferor was thereby obliged to warrant the transferee against eviction and would suffer a penalty of twice the sale price if he did not keep the transferee in possession for the required period of *usucaption*. The transferee would acquire rights over the transferred property, and also against the transferor - by claiming something roughly equivalent to adverse possession under English land law. Accordingly, we can see that the exclusionary character of *dominium* was acquired instantaneously by the purchaser by

572 See further sub-section *(ii) Occupancy Theory, Inheritance and Perpetuities* beginning on page 170 above.

making the transferor responsible for defending the property against interference; thereby suffering a heavy financial penalty if he or she did not honour that obligation.[573]

In stark contrast, the common law has never expected *physical* protection of a transferred ownership interest; although it must be noted that warranties of *title* were commonplace. However, it is evident from Hudson's work that the pursuit of 'consent' for transfers was probably intended to implicate as many potential claimants as possible in the transfer, thereby making it very difficult to mount a challenge later on.[574] Moreover, the medieval obsession with garnering evidence from witnesses, particularly from public perambulations held each year during Rogation week to reinforce memory of where the land boundaries lay, was intended to provide continuing security for the transfer.[575] This, together with the one-off 'turf and twig' ceremony of *enfeoffment* or 'livery of seisin by deed' performed on first entry to the land, might also be viewed as laying down an open challenge to others; effectively saying, 'This is mine, or do you say that it is yours?' In this regard, the witnesses to the perambulation, or to the livery of seisin, might almost be described as the 'jury' in an *ad hoc* field-court, whose evidence that no challenge was made to the beaten boundaries, or that the transfer of land had been completed validly by livery of seisin. Again, we see the *evidential* context of possession in modern times through notions of control and

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573 Two years for land and one year for other objects. *Mancipatio* also functioned like a transaction in market overt by transferring good title to the transferee, even if the transferor had no title to pass: Herbert F. Jolowicz and Barry Nicholas, *A Historical Introduction to the Study of Roman Law,* (Cambridge: CUP, 3rd ed, 1972) 143-146.

574 See further n 362 above.

575 See, for example, Bonaventura (n 403); Maureen E. Brady, 'The Forgotten History of Metes and Bounds' (2019) *128 Yale Law Journal* 872 -arguing that the 'standardisation' of land boundaries helped develop local property markets.

intention in Rostill.[576] Plainly, the 'field court' model would obviate any need for judicial interpretation. Actual control and intention to possess would be self-evident.

That same notion of a 'field-court' is found in *Vis Civilis* where the claimants would attend the land and one would eject the other before witnesses. A clod of earth was treated as the entire property which, when taken back to the Magistrate, proved the victor held possession of the whole property in his hand.[577] A further example of the condemned-by-silence approach in ancient Rome where property might be transferred by the alternative method of a claim *in jure cessio* - or surrender in court. There, before a magistrate, the *cessionary* (the plaintiff acquiror) would assert his right as a Roman citizen to the thing being assigned; and the silence or affirmation of the *cedent* (the defendant person who was assigning or surrendering the thing) would then allow the court to declare that thing to be the *cessionary's* because the *cedent* had not said it was his. Thus, ownership of a thing arose in the *absence* of a claim by another who had, thereby, implicitly agreed not to interfere.

In contrast to ancient Rome, the English courts were never needed to transfer land unless there was a dispute. Thus, it was to customary law, perhaps made necessary by widespread illiteracy, that most would have turned. There, the custom of *enfeoffment* or *livery* provided the transmission mechanism which did not depend upon writing. Instead, the author suggests this may have been founded upon an implicit *quid pro quo,* or social contract. The likelihood was that a witness to one person's boundary or transfer might easily need witnesses to prove his or her own boundaries or land acquisitions elsewhere in the parish. Thus, the benefits of

576 Rostill (n 425) 28-39.

577 Gellius, *Attic Nights*, XX, 9.

fair reciprocity must have seemed overwhelming. If that is right, the author submits the preceding discussion points to a mutually respected personal territoriality in England where the right *to exclude* any interferer is matched by an equal and corresponding third-party *duty of non-interference*. By those means, whether by silence or express affirmation, third parties thereby consented to the proprietor's exclusive, and therefore *exclusionary*, claim over the land. In short, the notion of excluding others was regarded as an essential part of the process of acquiring or keeping land in England since the earliest times.

The author contends the duties of non-interference were not so clearly attached (annexed) to the ownership of real property interests in England as they were in ancient Rome.[578] Instead, property held under English common law might more properly be regarded as being constrained by *external* obligations imposed upon others arising from either; *(a)* the previously mentioned social contract or assumed reciprocity, or *(b)* through the law of tort, contract or crime, such as nuisance, trespass or landlord and tenant law. In the latter case, any expected *right* of exclusion could, for example, be constrained by a corresponding right of *abatement,* an easement of necessity, lawful entry by the police for the purposes of search or arrest or a landlord's right of entry to effect repairs. However, Merrill and Smith discount the importance of those exceptions in the following terms:

> Nor does the importance of the right to exclude mean that the right to exclude is absolute or unqualified. The law has long recognized exceptional circumstances in which the right to exclude gives way to some kind of privilege of entry, whether it be the defense of necessity to trespass or the implied license given to firefighters to enter a burning building. Modern antidiscrimination and public accommodation laws provide other examples.

578 See n 573 above and the text to which it relates regarding the Roman transferor's parallel obligation to defend the land for two years after the transfer.

> *The critical point is that property requires that some designated person be given enough exclusion right that it can be said that this person exercises significant discretionary control over the use of the thing*. [579] *[italics emphasis added]*

Here, the author argues this explanation stands or falls upon the degree to which the terms 'enough' and 'significant' are capable of being stretched. That is an unsatisfactory situation, not least because we find slippery elements now being re-introduced into boundaries which should be stated rigidly. Moreover, Merrill and Smith's proposition seems to have incorporated elastic notions which are completely at odds with the core conceptualist principle of the *numerus clausus* and the 'thingness' framework upon which their thesis is built. There, both the 'thingness' theory discussed in Chapter 4 below, and the *numerus clausus* demand an absolute precision which now seems to be missing from Merrill and Smith's work.[580]

The author submits that a more convincing view of instances of permissible third-party interference is provided by Bentham. There, he termed those rights as 'handling' or 'contrectational' powers, but these had a significance which went far beyond simply providing exceptions to an imaginary general rule which prohibiting meddling by others. Instead, those powers were argued to set conditional boundaries or limitations upon a more narrowly defined principle forbidding interference with an another's property.[581] In short, the 'shape' of property ownership is now hypothesised to be *defined* by those contrectational powers.

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579 Merrill & Smith (n 521) at 10.

580 Heidegger (n 522).

581 Herbert L. A. Hart, 'Bentham on Legal Powers' (1971) 81 Yale LJ 779 (1971) 80805.

Considering the foregoing arguments, the author proposes how that picture of intrusion into an individual's otherwise sovereign ownership boundary might be visualised in terms of it having irregular, 'jagged' definitional edges. There, the size and depth of each 'serration' represents the varying quantum of interference permitted by law in the precise factual circumstances faced by that specific object of property.[582] Indeed, this helps explain why otherwise identical objects might become susceptible to much more extensive third-party interference than the others. In that event, it would then become virtually impossible to generalise about where those suggested exclusionary rights might arise. Here, the reader may wish to jump briefly ahead to the example of an oak tree discussed on page 205 below which illustrates the point at hand.

The foregoing discussion raises considerable difficulties for critics of instrumentalism, and particularly whether the right of *exclusion* is capable of forming one of the 'sticks' in its so-called 'bundle'. If Bentham's thesis of contrectational powers is well-founded, legal rights of interference are already *subtracted* from the lawful boundaries of owning that property. In this event, all that remains are the residual, *inviolable* rights to exclude or prevent interference with that *single* object of property, which is now depicted by the jagged boundary in Figure B below. In short, an original condition represented by a perfectly circular exclusionary boundary where Hohfeld's *eleven*[583] incidents are subject to any corresponding

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582 See further Figure B below regarding a proposed model of how each 'serration' is formed.

583 The critical reader will note the eleventh of Hohfeld's rights and obligations (the right to residue after lesser interests are taken) implies a duplication with the central zone of "residual ownership rights". In part, that is quite right, although Hohfeld's eleventh incident also relates to the residue after, for example, time-limited grants such as leases. Note that incident eight

third-party duties or obligations. However, once we contemplate individual situations affecting either the land and its owner, or a neighbour's land, those third-party interests may justify legal interference, but differentially so depending upon each right. Plainly, Hohfeld's right to prevent the land's harmful use is likely to intrude rather more upon an owner's dominium of the property than, for example, the owner's right of reversion. Thus, the author contends that the original perfectly circular boundary of *total dominium* now becomes *unevenly* serrated by those effects.

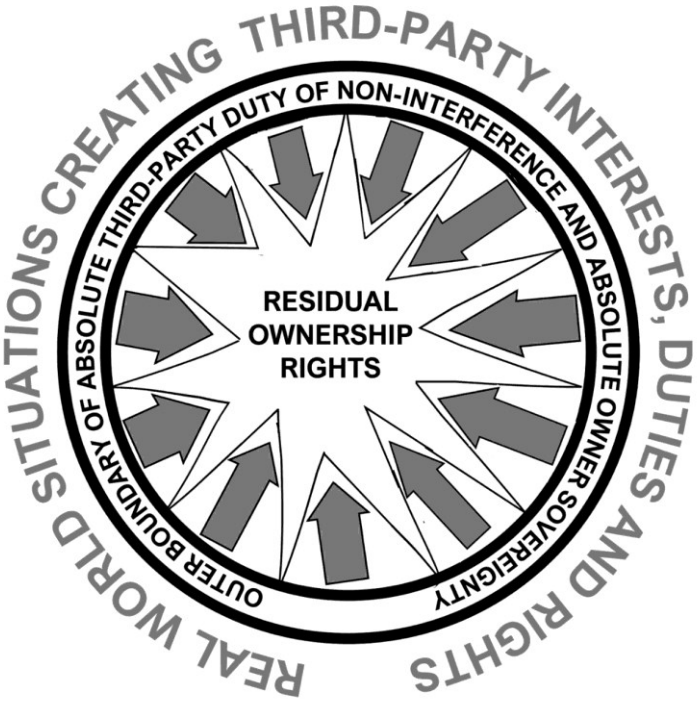

Figure B: The hypothesised jaggedness of private ownership boundaries

The author acknowledges this suggestion of 'jagged' ownership boundaries raises at least two difficulties: *Firstly*, the jagged boundary appears to be framed in terms of excludability, yet that is only one of Hohfeld's eleven incidents. Here, there is the obvious criticism that this proposal is built upon the questionable argument that all eleven incidents can be measured

(the right to prevent harmful use) is expressly one given to third parties, although it also benefits an owner against the misuse of neighbouring land.

by *single* right of excludability. For this reason, the jagged boundary on Figure B above is to be regarded as the outer limits of *sovereign enforceability*, rather than excludability. *Secondly*, a Herculean effort would be needed to identify the shape of that boundary for every individual object of property with any reasonable accuracy, and even more so when consideration is given to 'thingness' theory and its desire for absolute and total specificity. There, one must ask, 'What are the characteristics of this one piece of property which distinguishes it from every other'?[584] Thus, under this model, to provide a complete map of the lawful powers of exclusion of *all* property suggests a task of such enormity that even Hercules would fail in its completion. Accordingly, the present author disagrees with Merrill and Smith's conclusions on how the duty of non-interference arises from its 'thingness':

> The centrality of things is also responsible for a core feature of the rights and obligations associated with property, namely that they apply to "all the world" without regard to whether anyone has personally agreed to be bound. Tellingly, this feature is often identified as the "in rem" nature of property. "In rem" literally means with respect to a thing. *Rights and obligations are of course rights and obligations of persons… But when they concern property, the existence of these rights and obligations is transmitted in and through the thing. The identification of a thing as property communicates to perfect strangers that they have a duty not to take, intrude upon, or otherwise interfere with the thing. It is unnecessary to know who owns the thing or what the status of their ownership might be*.[585] *[italics emphasis added]*

Here, the author contends this argument is founded upon the self-contradictory notion of what can be called a *generalised* specificity. Here, is it not evident that Merrill and Smith

584 Heidegger (n 522) 24-26.

585 Merrill & Smith (n 521) 8.

have particularised rights and obligations in specific circumstances which they have then applied unselectively to the entire world? If so, their argument mistakenly takes the 'jagged edges' of *one* specific property ownership situation and then imagined how they must, therefore, apply universally to *all* such property without regard to whether or not those circumstances exist in *general*. Moreover, with great respect to the learned authors, the claim that "It is unnecessary to know who owns the thing or what the status of their ownership might be" must be wrong. Instead, the rights and obligations to which 'perfect strangers' (presumably, 'the world') are bound will often be shaped by a multitude of circumstances. These include who owns the property and what is their ownership status. Here, for example, the duty not to commit waste can only bind a *tenant* and must be brought by the holder of a *vested legal estate* in the land concerned.[586] Clearly, in those circumstances and contrary to Merrill and Smith's assertion, it is crucially important to identify the owner and establish his or her status *qua* landlord.

The preceding argument may be further illustrated by the hypothetical situation of an old and structurally unstable oak tree in the centre of a *four*-acre field. We know the neighbour could not enter the land to remedy that, potentially dangerous, situation since the tree poses no threat of trespass or injury to anyone outside that field. However, the duty of non-interference (and thus, absolute right of exclusion) in this precise situation cannot be extrapolated to all cases of decrepit trees. If any such tree overhung a neighbour's land, the duty to 'keep out' or 'keep away' may no longer apply. Thus, it would be quite mistaken to

586 Chapter 23 Statute of Marlborough 1267 (52 Hen III), also known as the Waste Act 1267. Indeed, Rostill, (n 425) 282 argues that unavoidable obligations, such as waste, explain the distinction between superior and inferior title.

suppose that a general, 'against all the world', right existed to exclude everyone from all land on which there was a dangerous tree.

Munzer also believed[587] that Merrill and Smith[588] had become overly reliant upon those rights when attempting to establish their duty of non-interference. That said, the argument seems more evenly balanced if one considers how the law's protection of exclusionary rights (through registration, notification and priority) has now become embedded in the *institutional* structure of modern land law. By those means, the 'perfect stranger' might then be imputed to have knowledge of his or her personal obligations, or even rights, when they appear in a public register. In that event, it is submitted that Merrill and Smith have reached an arguably sound conclusion, but by means of an unsound route.

In conclusion, therefore, whilst there is sound evidence to demonstrate how impressing rights of exclusion formed an inherent part of early property transfers, the complex relationships extant in modern-day times have intruded greatly upon notions of absolute ownership. Thus, we may reasonably conclude that the 'jaggedness' of ownership boundaries imply that rights of interference are no longer exceptional in the manner suggested by Merrill and Smith. Indeed, when we consider how there are equally extensive intrusions into the *uses* to which property may be put, such as not driving a car above the designated speed limit, third-party interference now seems to be the expected price of 'owning' something.

587 Stephen Munzer (n 556) 270-271.

588 Thomas W. Merrill and Henry E. Smith, 'Optimal Standardization in the Law of Property: The Numerus Clausus Principle' (2000) 110 *Yale Law Journal* 1; Merrill & Smith (n 521). Available at: https://scholarship.law.columbia.edu/faculty_scholarship/257

(b) Rights of use

Contrary to lay expectations, there is no general right to *use* one's property under English law. Indeed, Douglas and McFarlane have demonstrated convincingly that the courts have refused consistently to recognise any such right.[589] Indeed, whether by interfering with the circulation of air around chimneys,[590] blocking the reception of TV signals[591] or by preventing quarantined pigs from being sent to the abattoir,[592] an unlawful interference with the use of land arises only where *something* actually passes from the defendant's land.[593] That is a long way short of establishing a *right of use* under English common law, with the result that bundle theory may be weakened when such an important expectancy cannot be included within its definitional boundaries. That said, as discussed further in sub-section *(iii) Hypothesising Boundaries of Exclusion, Use and Disposition* beginning on page 210 below, the vast majority of ownership experiences, such as buying everyday goods and groceries, offers a clear right to use them either personally or to sell or give them to others. If not, why would anyone buy them at all?

(c) Rights of disposition

Perhaps most relevantly to a thesis exploring perpetuities, the instrumentalist 'bundle' also includes a claimed right of *disposition*. Again, this right touches upon the other two rights

589 Simon Douglas and Ben McFarlane, 'Defining Property Rights' in J Penner and H E Smith (eds), *Philosophical Foundations of Property Law*, (Oxford: OUP, 2013).

590 *Bryant v Lefever* (1879) 4 CPD 172.

591 *Hunter v Canary Wharf* (1997) AC 655,

592 *D Pride & Partners (a firm) v Institute for Animal Health* (2009) EWHC 685 (QB).

593 *Hunter v Canary Wharf* (1997) AC 655 per Goff at 686.

already discussed since something may also be disposed of in such a way that it is thereby 'used' to achieve the owner's personal objectives.

A useful example arises where I purchase and eat a cheeseburger. By doing so, I have thereby excluded everyone else from enjoying that meal because my use of the burger means it no longer exists in a consumable form. However, there are compelling reasons to suggest why exclusion should also be viewed as a counterpart of *dispositive freedom*. Is it not true to say that the freedom to sell or give something to one person absolutely connotes the freedom to forever deny that thing to someone else? Here, if I purchased another cheeseburger and gave it to a friend, their consumption of that burger denies me - and everyone else – of any chance to eat it. Yet, that was my very purpose in giving it away. Thus, I have effectively used the burger to make a gift to a friend, with the result that my disposition has thereby both fulfilled the use to which I wanted it putting whilst also simultaneously excluding everyone else.

Perpetuities also provide an ideal example of how a *disposition* amounts to *using* property. Here, is it not axiomatic that the valid disposition of property upon lengthy conditional terms amounts to the owner *using* that object to achieve his or her dynastic purposes? Moreover, like the gifted cheeseburger example given above, this creates a barrier of exclusion which denies access to all others. Interestingly, to reconsider Nozick's 'Lockean Proviso' discussed in sub-section *(c) Notions of the 'self' - sub-optimality and perpetuities* beginning on page 184 above, compensation could only be made by way of a money payment, not by a physical reallocation of the property concerned. Successful claimants would, therefore, be excluded permanently from exercising any rights *in rem* over the gift corpus.

Nevertheless, the author questions whether a right of disposal is a valid component in the concept of property ownership. This can be explored by asking whether the *absence* of a right of disposal means there is no recognisable 'property' interest which is capable of private ownership? This question can be tackled if we journey back to a time when dispositional rights either did not exist at all, or where their existence was disputed:

Radin has questioned that since the right of testamentary disposition of land did not exist before the Statute of Wills 1540, does that mean realty could not have been regarded as 'property' before that time?[594] This is a potentially interesting argument, although Radin overlooks how the records of wills enrolled in London demonstrated that citizens could dispose of their tenements by will long before the Statute of Wills 1540[595]. Furthermore, similarly extensive rights of testamentary disposition were permitted both by the Kentish custom of *gavelkind* and by *burgage* tenure in Sussex and Surrey[596]. Thus, Radin's question should have been directed more appropriately to the time before *Randolph's Case* (1225),[597] when heirs enjoyed a right to compulsorily redeem their ancestor's *lifetime* alienations, sometimes even at a discount. Clearly, if those alienations could be challenged by the heirs, we have convincing evidence that the landholder thereby lacked a disposable *property* interest in the land. However, since *Randolph's Case* (1225) ended that redemptive right only eight years after the first reported decisions in 1217, Radin's main question is no longer

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594 Paraphrasing Margaret J. Radin, 'The Consequences of Conceptualism' (1986) 41 U Miami LR 239, 241.

595 (1225) 12 Curia Regis Rolls, 47.

596 Megarry and Wade (n 101) at pages 20-22.

597 *Randolph's Case* (1225) 12 Curia Regis Rolls, 47.

relevant to a suggestedly great swathe of English legal history, but only to the briefest of moments at its inception. Thus, this question appears to be largely hypothetical.

The author suggests that a rather more important point arises from the law prior to 1530. Rather than questioning whether the concept of real 'property' existed before that time, it seems more likely how the preceding law simply reflected the persistent idea that real property could only be alienated by *living* persons. In short, that the *quantum* of property interest held by its owner was still tied inexorably to the idea that a life should be available to control the land.

(iii) Hypothesising Boundaries of Exclusion, Use and Disposition

Notwithstanding the preceding discussion, there is something intuitively unconvincing about an argument which seeks to question the three posited rights of exclusion, disposition, and use. Here, the problem is that whilst any such argument may work reasonably well *in theory*, it does not fit comfortably with many peoples' real-world expectations of being able to exclude, dispose and use their property at will. Furthermore, the inter-connectedness of those rights of exclusion, use and disposition means the edges between them have become somewhat blurred. Thus, for example, any restrictions upon personal rights of *use* may be remedied by alternative opportunities for the use of the property by *disposition*. Equally, any 'jaggedness' in *exclusionary* boundaries would then need to be re-drawn by a disposition which created a *new* use for that property. Here, for example, dispositions that disinherited customary heirs thereby serve the *new* purpose of creating an *alternative* lineage of users.

From the preceding discussion, the author argues the influence of exclusionary, usage and dispositional rights are seldom truly separable; leading to the reasonable proposition that, in many such situations, the bounds of one right intrude upon others such that they

persist *collectively*. In that event, it may be mistaken to conceive of those individual 'sticks' of right, duty or obligation forming an overall 'bundle'. Instead, each bundle may exist as just *one* 'snapshot' of the *situation-specific* conflict between owners' sovereignty and third-party interests. Those re-drawn boundaries are illustrated in Figure C below where owners' rights and expectations (black line A) may be depicted in conjunction with *one* static *situation-specific* possibility curve (dashed line B) which represents legitimate third-party intrusion:

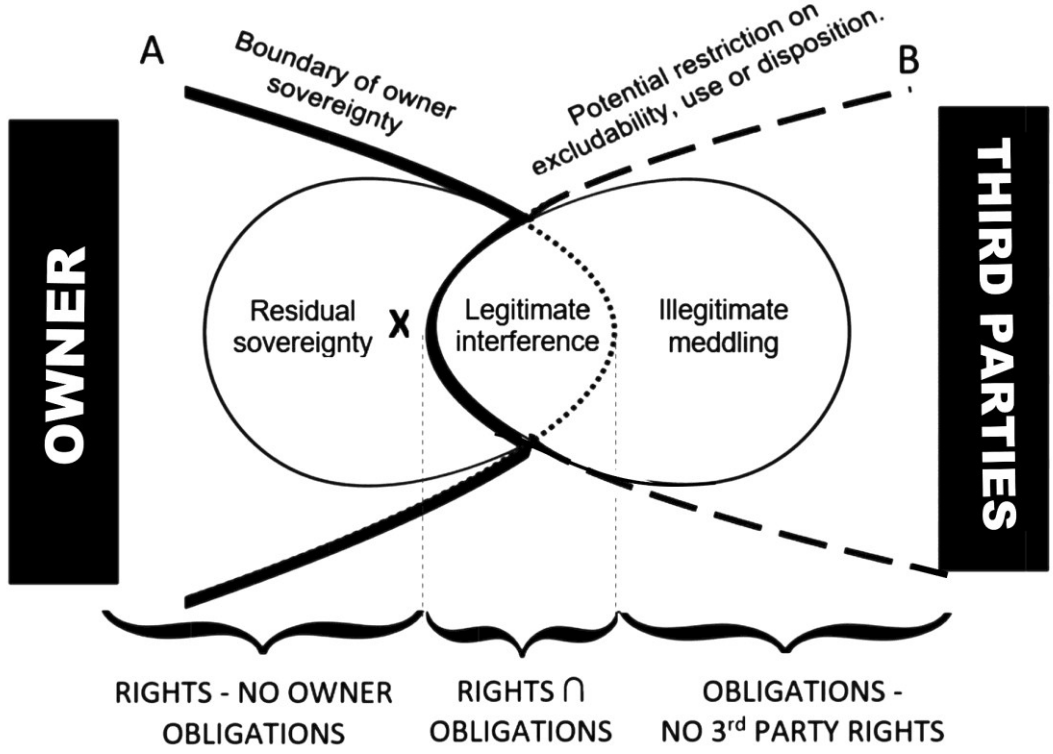

Figure C: The boundaries of disposition, excludability and use over private property

There, a new *variable* boundary of rights and obligations appears in the zone of conjunction between them marked "Legitimate interference". However, the author submits the position, shape and size of that zone exists only at *one* point of space and time. Clearly, if the use, excludability, or disposition of that property changes over time, the conjunction zone must also be re-formulated to reflect the new situation. By doing so, the variable 'serration' depicted by the indentation at point "X" means Figure C is simply a redrawn version of Figure

B on page 203 above, the only difference being that the main three of Hohfeld's eleven posited rights have now been amalgamated into one line.

The chief advantage of this proposal is that we can now use Hohfeld's suggested rights, duties and obligations to identify the range of possible outcomes: *(a)* The owner's sovereignty as a zone of residual rights, but without any obligation to others; *(b)* Third-party duties of non-interference as a zone of obligations, but no rights; *(c)* A zone where rights and obligations are balanced between the owners and third parties. By doing so, we are no longer required to identify and rely upon, potentially questionable, individual rights and obligations. This is helpful since there is no need to throw 'bundle' theory's baby out with Hohfeld's bathwater.

(iv) Reflecting Upon Instrumentalism and Bundle Theory

Whilst the author argues that 'bundle' theory resonates almost perfectly with the structure of post-Conquest landholdings in England, difficulties abound when applied to property ownership in more modern times. At least three anticipated rights of ownership fit very poorly into the 'bundle' which seems, intuitively, to thereby rob that theory of its presumed *raison d'être*. However, the question of malleability and expansion of the *numerus clausus* facilitated by instrumentalism is evidenced by the slow redefinition of property and perpetuities seen in England from the seventeenth century onwards. Accordingly, it is to these matters that attention now turns:

(3) Instrumentalism, Malleability and Perpetuities

(i) An Expanding Universe of 'Property' Definitions

The classification of property rights has become even more complex in modern times. Here, the influence of modern economics, particularly through Adam Smith and David

Ricardo, has led to the articulation of satisfaction-maximising behaviour and defining economic objects in terms their value and utility. Indeed, the 'marginal' revolution begun by Jevons, Menger and Walras in the late nineteenth century helped establish quantitative models of property and ownership which included few, if any, *qualitative* considerations. Indeed, when taken to its obvious conclusion, property may exist simply as "… a device for capturing and retaining certain kinds of value …";[598] indeed, Roman jurisprudence held that an essential feature of property was that it had an economic value.[599]

However, whilst re-defining property as a purely *economic* phenomenon has considerable merits, significant dangers arise from the possible addition of new rights to meet emerging market situations. Indeed, instrumentalism has adopted a much more elastic definition of property and embraces the idea that the character of legal interests enjoys a malleability unknown to constructivism.

(ii) Malleability and the Economic Elite

The late seventeenth-century provided one of the most famous collisions between the *numerus clausus* and the modern pragmatism of permitting malleability in defining what might be regarded as a *legal* interest. Indeed, the history of perpetuity law reveals how pressures exerted by the sixteenth and seventeenth century economic elite succeeded in enhancing estate planning freedoms and extended ownership controls. There, the quiet expansion of contingent remainders authorised under *Colthirst v Bejushin* (1550)[600]

598 Abraham Bell and Gideon Parchomovsky, 'A Theory of Property' (2005) 90 Cornell LR 531, 536.

599 See n 649 below and the text to which it relates.

600 *Colthirst v Bejushin* (1550) Plowd 21.

eventually gained real substance with the creation of an inalienable, indestructible entail established in *Pells v Brown* (1620).[601] Those pressures continued until famously concluded in the *Duke of Norfolk's Case* (1681) [602] when the political machinations which saw its later reversal by the House of Lords[603] meant their lordships had effectively added a new species of legal interest into English common law.[604] From this, it may reasonably be concluded that valid legal perpetuities and estate planning matters are the progeny of malleability. Yet, to reflect on how English jurisprudence reached that point, a core element of England's property law had effectively been re-written at the insistence of the privileged, leaving the common law judges to lament the "chopped hay" on which they had then been left to chew.[605]

This account of how land interests became increasingly malleable is supported both by Weber and by Getzler. In brief summary, class *conflict,* the high cost of land transactions, together with the expenses and delays of court proceedings, amounted to a virtual denial of justice to the under-classes in England.[606] Thus, the wealthy elite during the mercantile period

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601 *Pells v Brown* (1620) 79 Eng Rep 504.

602 *Howard v The Duke of Norfolk* (1681) 3 Chan Cas 14.

603 Barry (n 62).

604 *cf* Render (n 520) 490 who suggests that *numerus clausus* is unaffected by legislative intervention. Although he properly cites the repeal of perpetuity law in many US states, Render does not deal with the situation in *The Duke of Norfolk's Case* (1681) where a new legal interest was created by the common law judges, not Parliament itself. This makes it impossible to treat that extension of the 'closed number' in the same way as, for example, the legal entail created under De Donis 1285.

605 *Scattergood v Edge* (1699) 12 Mod 278 at 281.

606 To economise on space, extensive references can be found in Joshua Getzler, 'Theories of Property and Economic Development' (1996) 26 *The Journal of Interdisciplinary History* 639, 645.

were then able to ride 'rough-shod' over all potential counter interests to create a capitalistic system which was both uncontested and incontestable. These views were echoed by Professor Tawney,[607] but more recent analyses suggest the exact opposite may have been true. Indeed, Professor Stone has demonstrated how the upheavals of those times meant the "…landed aristocracy has rarely had it so bad."[608] In that regard, their influence may only have been slight and probably quite short-lived.

Nevertheless, we can detect two distinct forces which, in retrospect, appear to have fashioned a policy framework which suited the economic elite's ambitions; albeit these may increasingly have been those of the mercantile classes. *Firstly*, the Rule constraining a new species of property now called 'valid contingent future interests at common law' was never intended to be a rule *against* perpetuities at all. Indeed, perhaps to reflect its permissive nature, the Rule was originally described only as the *Doctrine* of Perpetuities which, for the first time since De Donis 1285, finally re-introduced lawful dynastic settlements into England. *Secondly*, the author suggests the subsequent period of further restrictions by imposing the 'initial certainty'[609] and 'all or nothing' class-closing[610] principles were undone by stronger pressures for increasing malleability and the expansion of perpetuities. In fact, so much so that we find the Rule suffering a slow demise during the twentieth century. In this regard, it seems fair to conclude that England's anti-perpetuity laws presided over ever-more *dynastic* interpretations of dispositive freedom as even lengthier perpetuities became recognised

607 Richard H. Tawney 'The Rise of the Gentry, 1558-1640' (1941) 11 Econ Hist Rev 1.

608 Lawrence Stone, *The Crisis of The Aristocracy, 1558-1641,* (USA: OUP, 1967) 94.

609 *Jee v Audley* (1787) 1 Cox 324, 29 E.R. 1186.

610 *Goldberg v Erich* 142 Md. 544, 121 A. 365 (Maryland 1923); *Bowerman v Taylor*, 126 Md. 203, 94 A. 652 (Maryland 1915); *Leake v Robinson* (1817) 2 Mer. 363.

property interests. That public pressure for liberalisation is nowhere better evidence than by the twenty-nine 'perpetual trust' or 'dynasty' states in the USA where genuinely dynastic trusts now flourish.[611] Yet, as Render has correctly observed, those reforms all occurred through the action of *state legislatures*, not private individuals. This means the *numerus clausus* principle had no bearing whatsoever on those developments.[612]

(iii) Reflecting Upon Malleability

In conclusion, it may reasonably be proposed that valid legal perpetuities and estate planning matters are the progeny of malleability. This is evident from the modern financial services industry suppling ever-more convoluted schemes to exploit tax loopholes that satisfy their clients' demands. Indeed, multi-billionaire Warren Buffet famously declared he paid tax at a lower rate than did his secretary.[613] It may also be noted how, prior to the financial crisis

611 Major contributors include: - Robert H. Sitkoff and Max M. Schanzenbach, 'Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes' (2005) 115 Yale LJ 356; Stephen J. Horowitz and Robert H. Sitkoff, 'Unconstitutional Perpetual Trusts' (2014) 67 Vand LR 1769; James E. Krier and Jesse Dukeminier, 'The Rise of the Perpetual Trust' (2003) 50 UCLA LR 1303; Vallario (n 84); Laurence Waggoner, 'Congress Promotes Perpetual Trusts: Why?' (2014) *Law & Economics Working Papers*, University of Michigan, Paper 80; Laurence Waggoner, '"From Here to Eternity: The Folly of Perpetual Trusts' (2016) *Law & Economics Working Papers*, University of Michigan, Paper 76.

612 Render (n 520) 456.

613 <https://www.nytimes.com/2011/08/15/opinion/stop-coddling-the-super-rich.html?_r=0.> [online].

of 2008, new financial derivatives brought sub-prime mortgages to the marketplace as a response to those same pressures to make (and keep) more money.[614]

That leaves us to contemplate a cruel irony. A law originally tarnished with allegations of inflexibility and obscurity has come to treat contingent future interests under the common law of property with almost unprecedented flexibility. By doing so, perhaps the most malleable feature of perpetuities may prove to be society's attitudes to the wealth they were designed to protect. Indeed, those jurisdictions which have abolished the Rule would then seem to have abandoned any propinquity between their heirs and the dynastic treasures they wish to keep from their grasp. Immediately, the *intra* and *inter*-generational context of inheritance within families has been expunged in the name of sovereign ownership.

(D) METHODOLOGICAL IMPLICATIONS

The author submits the propositions introduced above provide compelling methodological reasons for building this thesis upon property ownership theory. That said, the methodological background remains incomplete in two material ways. Firstly, the author contends that a useful understanding of property ownership theory and methodology is supplied by the *conceptualist* and *instrumentalist* schools, although due recognition must be given to there being more suggested categories and that property interests also be classified

614 Jonathan Michiea and Linda Lobaob, 'Ownership, control and economic outcomes' (2012) 5 *Cambridge Journal of Regions, Economy and Society*, 307 at 314: doi:10.1093/cjres/rss015.

in completely different ways:[615] Indeed, Grey argued controversially that the terms 'property' and 'ownership' should be removed from modern legal discourse altogether.[616]

Those challenges are not aided by the present objective to analyse only *portions* of the *main* categories of property ownership theories in context with *perpetuities*, rather by comparing them with each other. Therefore, what follows is not to be regarded as a comprehensive survey of property ownership theory; but rather, as a considered selection of issues most closely relevant to perpetuities. Nevertheless, it is submitted this approach also offers considerable *practical* benefits since it supplies the valuable economics, inheritance, ownership, and possessory vocabulary needed to help explain perpetuities in *interdisciplinary* terms. Furthermore, given that perpetuities can be found in a variety of different juristic traditions, the suggested use of a common vocabulary will also help identify any false comparisons or where chalk has been confused with cheese.

615 Getzler (n 606); Morris R. Cohen 'Property and Sovereignty' (1927) 13 Cornell LQ 8 who distinguished property for use from property for power. Other theories based upon value, rather than rights, include Bell and Parchomovsky (n 598).

616 Thomas C. Grey, The Disintegration of Property' in J R Pennock and J W Chapman (eds.) Nomos XXII: *Property* (New York: New York University Press, 1980) 21.

CHAPTER 4 – TACKLING PERPETUITY THEORY AFRESH

(A) INTRODUCTION, OUTLINE ARGUMENT AND METHODOLOGY

Nutshell

Ancient Greek and Roman philosophy - together with Neoplatonic, Classical Islamic and Avicennian theory – helps explain how notions of necessity and certainty cast new light on the function performed by a living person. This may have been through Romanic notions of *lifetime control*, but a more convincing approach is to be found in Aristotelian notions of causality. There, Avicennian theory reveals how notions of *necessity* supply a 'splint' which binds the potential breaks in causal connection between inception and final effect. That *necessitation* is particularly important to perpetuity scholarship since it also explains why a 'measuring life in being' validates perpetuities at common law.

(1) Introduction

The preceding chapter considered how perpetuities *might* gain recognition as permissible interests within the conceptualist and instrumentalist schools. However, that exploration is not yet complete since a coherent explanation of how the Rule operates still evades us. Accordingly, the task now falls to consider alternative perspectives, particularly the 'thingness' theory supplied by Neoplatonic thinking, Classical Islamic philosophy and New Essentialist (or Architecture) theory. The author argues this approach will then allow us to: *(a)* Take a much more precise view of where contingent property interests exist in a universe composed of *infinite conditionality*; *(b)* provide a new formula for describing how valid donor-appointed conditionality borrows greatly from notions of Neoplatonic *necessity* and Aristotelian *causality*; and *(c)* consider the extent to which parallel rules regarding determinable fees help support the conclusions reached, *(d)* establish a new centrality in property ownership theory under which 'umbrella' perpetuities may properly be classified, *(e)* offer a clearer insight into how real-world events settle contingent future possibilities by

necessity, not chance, *(f)* understand how the Rule's true policy purposes are thereby directed against *uncertainty* rather than unreasonably protracted conditionality.

(2) Rationale and the Overall Direction of Travel

This chapter argues that ancient Greek scholarship has supplied an important distinction between the 'efficient' (i.e. a sequence of causalities acting through at least one intermediate agent) and the 'necessary' (i.e. that which acts entirely automatically without need for further intervention).[617] Once combined with Avicenna's later theory of an infinitely conditional universe, it then becomes possible to distinguish between two species of purported dispositions made to depend upon contingent future events; these are, *(i)* possibilities constrained by *necessity*, or *(ii)* possibilities determined by accidental chance. It is argued the latter of these can never create a valid common law interest because there is no longer any *necessary* connection between cause and posited effect. Accordingly, the so-called 'difference maker'[618] could act, if at all, only by means of (uncertain) pure chance – and this lack of certainty then causes the interest to fail for that very reason. Furthermore, the author argues possibility (i) above creates a valid common law interest because the Rule anchors the 'measuring life in being' to the contingent possibility by a plurality of *necessitated* causes which lead to the *ipso facto* determination (whether beneficially or in reversion) of the

617 These concepts were introduced in *point (l)* on page 77 above and will be developed further in n 676 below, the re-analysis of gift (1) beginning on page 240 and sub-section *(ii) The Concept of 'Remote' Causation* beginning on page 260 below.

618 That is, the decision-maker between future possible outcomes. In theory, this is the entity capable of 'weighing down' one side of the scale of future possibilities, and thereby resolves whether something does or does not happen in fact. See further n 696 and n 697 below.

contingent interest. From this, the present thesis is argued to provide a robust explanation of how the Rule works - with the additional benefits of *(a)* not placing any reliance upon its own definitional terms, *(b)* not offending against Aristotelian notions of causality and, *(c)* formulating an explanation which is entirely compatible with the feudal context of medieval English landholdings, the notion of annexation and also the character of determinable fees.

Whilst the preceding propositions might initially appear to support the arguments of modern 'causality' theorists, the present thesis leads in exactly the opposite direction of precision and discipline offered by ancient Greek, Neoplatonic and Avicennian theory. From this, the author will propose a new definition of perpetuities and an improved understanding of the policy purposes which the Rule presumably serves.[619]

(3) Refining The Methodology To Be Used

Chapter 3 above concluded that property ownership theory supplies an important conceptual sphere within which the problem of perpetuities in England can be examined. Now, by applying notions of ownership freedoms and the right of exclusion discussed in context with Figure C on page 211 above, we can imagine how perpetuity laws also involve placing restrictions upon owner sovereignty. Clearly, the owner is prevented from making dispositions which exceed the Rule's permitted limits. From this, the author proposes that legal limitations upon donor-imposed conditionality might then be mapped onto a 'permissibility' scale, or landscape, between valid and invalid donor control. For clarity, these

619 See further sub-section *(2) Introducing Policy Objections Against Perpetuities* beginning on page 22 above.

issues are now represented on the Venn diagram in Figure D below where solid line 'B' provides the 'frontier' of valid dispositional control which an owner may not pass:

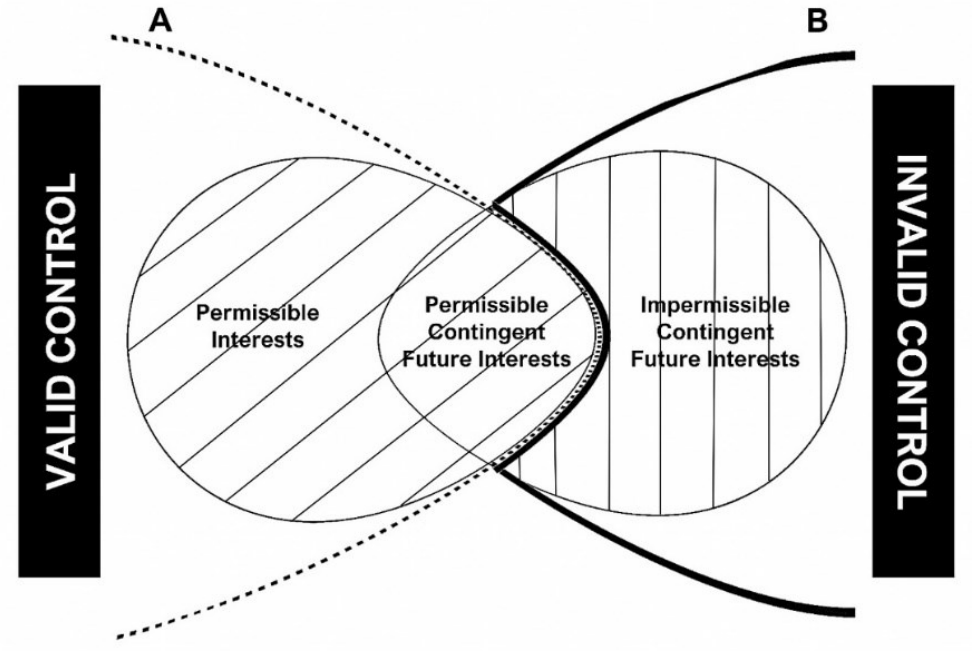

Figure D: The boundaries of permissible ownership control

Here, dotted line 'A' depicts both the legal boundary of dispositive freedom and the point at which society has set its policy compromise between the rival interests of the living and the dead. The author reasonably presumes these to be the same – which is why dotted line 'A' indents solid line 'B' in that region of policy compromise.

The foregoing boundary 'A'/'B' may now be explored further by considering Penelope's hypothetical *testamentary* gift of Greenacre:

> 18. To whichever of my grandchildren is the first to reach twenty-one.

Assuming the appointed vesting condition is not yet satisfied, Penelope has succeeded in making a valid *partial* disposal of Greenacre within the *diagonal* hatched area shown in Figure

D above. Clearly, under the common law Rule, Penelope enjoys lawful ownership control because the maximum possible postponement is constrained to within twenty-one years following her own demise. On that day, all the children she will ever produce in her lifetime are fixed in a *finite* list of the possible candidate 'measuring lives in being'. As a matter of strict logic, any subsequently born grandchildren must necessarily attain twenty-one within the following 21 years - if they ever do so at all. Gift (18) is valid for that very reason. Moreover, Penelope can exercise those rights to the exclusion of all others, and without any need to obtain third party consents. In Romanic terms, she enjoys absolute *dominium* over Greenacre, but only while her ownership actions stay within the diagonally hatched area to the left of dotted line 'A'.

Nevertheless, important questions arise when attempting to identify what ownership interest Penelope enjoys over Greenacre if she purports to exercise a dispositional power which crosses beyond line 'B' into the *vertically* hatched area; say by substituting the age condition of twenty-one years in gift (18) above with a new qualifying age of *seventy-five* years. Now, there is no certainty that any of Penelope's grandchildren will reach seventy-five within 21 years of their respective parents' deaths, and the gift is thereby rendered void *ab initio*. In terms of her property ownership, Penelope's sway over the land beyond the permitted limit of 'a life in being plus 21 years thereafter' has now fallen to zero. By doing so, her purported disposition now offends against both the Rule and Honoré's second and third incidents of ownership. Accordingly, the author submits that Penelope enjoys no *dominium* over Greenacre within that *vertically* hatched region.[620]

620 Honoré (n 48) 113-123. These are: (1) The right of exclusive possession or control; and (2) the freedom to exercise discretion over a 'thing'.

Regrettably, Romanic jurisprudence is of limited assistance in helping understand the boundaries of Penelope's dispositional authority – and thus her ownership control over Greenacre. *Firstly*, ancient Roman law would entirely dispute the landscape of proprietary control depicted in Figure D above. There, the Romanic notion of *dominium* was suffused with ideas of absoluteness such that, subject only to minimal external governance, Roman law recognised no *degrees* of proprietary control. Instead, the Romanic solution was to assign absolute ownership to a 'thing' which modern common lawyers might consider to be merely fractional or restricted. Here, for example, a Roman citizen could own land over which another also *owned* a right of way. Yet, both interests were treated as 'absolute' within their own terms of existence.

Secondly, the author will demonstrate how Avicennian theory implies that any treatment of the contingent beneficiary exercising control over the gift is based upon the following *non sequitur*: The only entity capable of resolving an uncertain future event is one which must exist both *absolutely* and *necessarily*.[621] Were it otherwise, there would be no assurance that there will ever be a 'difference maker' in existence to resolve a contingent future possibility. However, since a human beneficiary is a simply a conditional 'thing', he or she is logically incapable of acting as a 'decision maker' in worldly events. This apparent *non sequitur* may also be explained in terms of Neoplatonic theory. If causality is an 'accident', it is logically impossible that an accidental entity (that is, *any* living person whether as donor or as contingent beneficiary) can be guaranteed to determine a conditional occurrence by 'accident'. In other words, two accidents combined do not create a certainty.

621 See further sub-section *(b) Avicennian modality 1: Conditionality – Causality v Necessity* beginning on page 234 below.

Notwithstanding the preceding argument, there remains a compelling attraction to the Romanic idea that contingent possibilities which fall under the control of a *living* person are thereby imbued with a flavour of certainty.[622] Whilst the final effect is still rooted in certainty, the causal link between inception and final vesting is not based upon an individual's personal *control* over future events. Instead, it is due entirely to that person acting as an instrument of *necessity*. Accordingly, there is still much that can be salvaged from Roman jurisprudence since it is only the supposed *modality* which is in error, not the overall effect.[623]

It seems fitting to begin by proposing the benchmark standards which the chosen methodology must satisfy if it is to provide a convincing explanation. Here, it appears almost unthinkable that anyone familiar with perpetuities in England would not immediately associate the subject with notions of *certainty*, *necessity*, *precision,* and *finite* boundaries since these are the cards which English perpetuity law appears to have dealt us. Accordingly, the author believes that any methodology which steps outside those criteria must surely be doomed to the same failure already demonstrated by Morris and Wade's 'causal relationship' hypothesis.[624]

For similar reasons, the so-called 'bundle of rights' approach must also be eliminated from candidacy as an appropriate methodology. It anticipates a malleability to the concept of property ownership which the author argues is diametrically opposed to the demand for

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622 See further sub-section *(iv) The Use of Donor-Appointed Conditions in Ancient Rome* beginning on page 94 above.

623 In short, it is the same *non-sequitur* as discussed on the preceding page.

624 See sub-section *(b) Relevant lives* beginning at page 57 above.

"conceptual vigilance" in England's property laws so admirably stated by Kevin Gray and Susan Gray:

> Each discrete block of entitlement – each estate or interest in land – must have cleanly hewn, crystalline edges, since mathematical precision is perceived to be essential to the rational organisation and operation of the law. Definitional brightlines give each entitlement a hard-edged integrity which makes possible the Euclidean geometry of land law…[625]

The author argues how those 'definitional brightlines' are particularly relevant when viewed in context with the Rule's search for certainty and precision - and which is entirely at odds with 'bundle' theorists' flexible approach to owner-autonomy and property ownership as a broad "…umbrella for a set of institutions…".[626] Here, the author submits this flexibility allows proprietors to take a pick' n' mix approach by shopping around for the ownership package which suits them best.[627] Worryingly, there is growing evidence of the dangers of taking such a laissez faire approach. Over the past 20 years, twenty-nine so-called 'perpetual' or 'dynastic' trust states in the USA have, perhaps "ill-advisedly",[628] abolished or liberalised their perpetuity laws; with the result that mounting concern is now expressed by the academic community.[629]

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625 Kevin Gray and Susan Gray, 'The Rhetoric of Realty' in Joshua Getzler (ed), Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn (London: Butterworths, 2003) 204, at Section (2) (b).

626 Hanoch Dagan, *Property: Values and Institutions*, (Oxford, (2011) 40-42.

627 Stewart E. Sterk, 'Jurisdictional Competition to Abolish the Rule Against Perpetuities: R.I.P. for the R.A.P.' (2003) 24 Cardozo L R, 2097.

628 National Conference of Commissioners on Uniform State Laws, Press Release (January 2000).

629 See n 611 above.

Having considered the preceding argument, the author submits that only the *conceptualist* school offers a solution which complements this thesis' objectives. Indeed, a similar methodological concern to reveal 'centrality' within the property ownership landscape *doubly* reinforces the present need to focus attention on elements of New Essentialism (or Architecture theory) in property. Accordingly, what follows is an ancient Greek, Neoplatonic and *Classical* Islamic conceptual superstructure. From this, the author will argue that a dual reliance upon 'thingness' and 'authority' helps provide a useful framework whose aims are entirely opposite to the potentially much more open-ended consequences of 'bundle' theory. However, New Essentialism does not provide an 'all embracing' solution. Like the Romanic theory which preceded it, too much emphasis has been placed upon notions of 'control' per se for it to offer a convincing explanation of 'measuring lives in being' under the Rule.

(B) EXPLORING THE FOUNDING IDEAS OF 'THINGNESS'

(1) What is a 'Thing'?

Nutshell

Conceptualist theory invites us to conceive of the universe composed of entities or elements which have an 'essence' or 'quiddity'. From this, the nature of all existence may then be imagined as highly particularised 'things' in space, time, form and context.

Whilst Aristotle provided an innovative theoretical exposition of 'thingness', a *cohesive* ancient Greek philosophy of 'things' did not emerge until much later when the Neoplatonists began to harmonise Aristotelean and Platonic thinking. There, Plotinus (204 to 270 CE) introduced Platonic notions of 'emanation'[630] which, when combined with the earlier

630 Imagined as illumination cast by the sun's radiation of light - Plato, *Republic* at 508a.

cosmological work of Ptolemy (100 to 170 CE) and the later steps taken by Alexander of Aphrodisias (fl. 200 CE), Simplicius (circa 490 to 560 CE),[631] al-Kindī (circa 805 to 873 CE) and al-Fārābī (circa 872 to 950 CE),[632] then allowed Avicenna (Ibn Sīnā) (980 to 1037 CE) to construct a new *creationist* philosophy from ancient Greek writing. Accordingly, it is through Avicenna that an innovative approach emerged about how 'things' were created and what 'essence', 'quiddity' or 'thingness' they possessed. Moreover, the author submits this re-interpretation of ancient philosophy has much to teach modern scholarship about perpetuities specifically, but also how the notion of conditionality influenced the boundaries of *property ownership* in general.

The orderly process by which 'things' are created under Avicennian theory is of crucial importance to this study since the steps taken therein also provide a template for understanding the *causality* which connects a beginning to its posited end. This is particularly relevant to the study of perpetuities since it will be explained later[633] how subsequent reinterpretations of the ancient Greek distinction between 'efficient' and 'necessary' causation can also be used to help explain the process by which a *valid* contingent future interests can be created under the common law Rule. Nevertheless, it is crucial to begin by establishing the definitional boundaries of 'thingness' in the material world. That said, since the theoretical arguments which support the following overview depend upon matters in sub-

631 Simplicius, *In Aristotelis Physicorum,* at 8.10: 1360 to 8.10: 1363.

632 Al-Fārābī, *The Political Regime,* 41.6-9 and 53.8-10.

633 See further sub-section (*b) Avicennian modality 1: Conditionality – Causality v Necessity* beginning at page 234 below.

section *(ii) Avicenna's Emanationist Model of 'Thingness'* beginning on page 247 below, the reader will be directed to those references as appropriate.

(i) 'Things' as a Centrality in Property Ownership Theory

The idea that the 'essence', or 'quiddity' of an entity provides the foundation upon which an existent 'thing' is constructed has recently regained momentum under the broad category of New Essentialism, or 'Architecture' theory. However, the modern context is entirely different since, unlike *Classical* Islamic scholarship, New Essentialism deals with the secular, not spiritual, world. Thus, the creation of 'things' is now removed from God's hands and placed into mankind's, although the same *process* elements remain relevant to *both*.

New Essentialism treats property as something which has a 'core', a definable centrality which particularises 'things' in a way that 'bundle' theory cannot.[634] Indeed, the 'bundle' theorists' insistence that property has no fixed content, but is entirely a package of associated rights, allows those rights to be regulated in a way that might result in the underlying property being *under*-protected. This is because the malleability of those rights then becomes a policy objective for regulators, leaving the concept of property adrift in a policy 'sea' to be carried in the direction of the strongest current at any given time.[635]

In response, New Essentialist theory searches for that centrality by means of two benchmark concepts; that is, owner 'authority' (or control) and 'thingness'. However, it must be emphasised that this thesis *applies* only a portion of New Essentialism to the selection of

634 See further sub-section *(2) Instrumentalist Theory and Perpetuities* beginning on page 175 above.

635 See sub-section *(3) Instrumentalism, Malleability and Perpetuities* beginning on page 195 above.

'measuring lives in being' under the Rule. Due to its newness, the author is not aware of any literature to connect New Essentialism and perpetuity law other than as an additional bolster to protect against excessive fragmentation of property interests supplied by the *numerus clausus* principle.[636]

(ii) 'Things' as a Particularity in Spacetime

A modern approach to 'thingness' has been adopted by the *conceptualist* school where an entity is invested with a degree of particularisation in both form and time that it offers the high level of 'individualisation' anticipated from its ownership. Here, now stripped of its original theological apparel, modern day metaphysics may begin at the same point of asking "What is a thing?", but the answers are phrased quite differently. Heidegger's answer, for example, injects humour into the blindingly obvious: 'a thing is a something that is not nothing; and the simple asking of which will cause housemaids to laugh'. Yet, Heidegger's view of *thingness* is by no means a poor joke. Instead, he argued it is a question to be asked over and again since philosophy stands upon shifting sands of standpoint and level.[637] From this, the author argues that reappraisal becomes all the more necessary when changes in time-space challenge our perception of seemingly concrete, familiar objects.

At first blush, the very idea of *thingness* seems counter-intuitive to a theoretical framework intended to represent high levels of particularity and specificity.[638] Indeed, it is noteworthy how the term *thing* is commonly used as a substitute for clarity and precision;

636 Merrill & Smith (n 588) 53.

637 Heidegger (n 522) 1-2.

638 ibid 24-26.

witness expressions such as 'thingamabob'.[639] Furthermore, to the novice, *thingness* theory might appear to have done little to raise expectations of seriousness when its modern proponents use notions of speaking sofas, laughing housemaids and quantum weirdness.[640] However, the author argues these first impressions are mistaken because modern 'thingness' theory has employed notions of *specificity* of essence, place and context to counteract those potential criticisms of imprecision. We see the same tensions identified by Rostill,[641] where possession of 'things' may have the outward appearances of ambiguity, vagueness and variation while there is also an underlying – if not unifying - sense of *contextualisation* or *particularisation.*

Consider, for example, our common understanding that an elephant is a biological *thing* constructed from empirical scientific evidence which proves why this must be so. However, to a poacher in Africa, an elephant's *thingness* is supplied chiefly by its $350,000 tusks, with the residual animal being regarded as little more than vulture food. The context would be quite different in India. Accordingly, it becomes apparent how, in different space-time circumstances, the elephant's *thingness* may be defined by its value, its biology, its religious significance to Hindus, and more recently as an important asset to be protected. In this way, we see how the elephants' perceived essence varies according to the varying standpoints previously noted by Heidegger.

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639 John Plotz, 'Can the Sofa Speak? A Look at Thing Theory' (2005) 47(1) *Criticism*, Article 5, 110.

640 Gabriela B. Lemos and Kathryn Schaffer, *Obliterating Thingness: An Introduction to the "What" and the "So What" of Quantum Physics* (2018) retrieved from: <http:Kathrynschaffer.com/documents/obliterating-thingness.pdf>.

641 Rostill (n 425) 14-26.

At this point, substantial support for the foregoing metaphysical propositions may be drawn from 'quantum theory' in the physical sciences. There, matter exists in two alternative states (as both a particle and as a wave) and must, therefore, exist conditionally dependent upon whichever state of existence prevails at any given moment in time. Famously, Einstein refuted this hypothesis with his much-quoted remark, 'God does not play dice with the universe'. However, empirical evidence proving the correctness of Niels Bohr and Werner Heisenberg's 'Copenhagen interpretation' now suggests the material universe is riddled with conditionality and uncertainty.[642] Indeed, although Schrodinger's famous 'cat' experiment was originally intended to de-bunk quantum theory, the results of that investigation are now widely accepted as *proof* of the 'Copenhagen Interpretation'. Clearly, a theory which demonstrated how the cat could be alive and dead simultaneously also proved the *duality* of quantum existence. The same is true of our elephant. It does not have just one 'thingness'. Instead, it has a *plurality* of 'thingnesses' such that it enjoys a complex, *multiple* particularities or specificities. Indeed, it is precisely that multiplicity which resonates so strongly with the conditionality of perpetuities. The permutation of potential factual outcomes is so broad that the need then arises to impose order upon the *chaos* of future possibilities.

Avicenna's proposition that everything exists as a conditional possibility takes us directly into other aspects of the physicist's 'quantum universe'. Here, we now find ourselves being taken into even more astonishing territory where contingent future interests would then cease to be a rarefied concept known only to property, perpetuity, and trust lawyers. Instead,

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642 The predominance of opinion favouring this view is recognised by Howard Wiseman, 'Explainer: Heisenberg's Uncertainty Principle'*, The Conversation* (13th June 2012) https://theconversation.com/explainer-heisenbergs-uncertainty-principle512?gclid=EAIaIQobChMIgs2zvIm45wIVSrDtCh32zguYEAMYAyAAEgLK.

conditionality then becomes the essential feature of 'thingness', and thus of all materiality. Clearly, if everything is contingent, and nothing is certain, all 'things' in the universe might then need to be re-classified as possibilities on a variable scale of probability from zero to a figure less than one; that is, below absolute certainty. Indeed, this idea is equally represented in Figure F on page 242 below.

Aristotle's notion of 'potency' also helps identify an even more remarkable consequence of quantum theory. If 'potency' is irrepressible and eternal, as Everett has contended,[643] that force of nature requires *all* possibilities will eventually enter materiality because every chance event will be played out in in its own parallel world located somewhere across the universe.[644] This hypothesis later became known as the 'Many Worlds Interpretation' (hereafter "MWI").

The multiplicity of outcomes predicted by the MWI is particularly evident in 'entanglement theory' (or to use Einstein's scathing comment, "spooky action at a distance") where the transmission of actions in one world to its counterpart(s) elsewhere occurs simultaneously. Einstein had little room for saying otherwise. The MWI and entanglement theory strike at the very heart of Einstein's earlier criticism that God has no need to 'play dice' with the universe. Indeed, the MWI defeats that objection by ensuring every possible permutation of outcomes will eventually be thrown. Yet, as will be explained in sub-section *(ii) Avicenna's Emanationist Model of 'Thingness'* beginning on page 247 below, this has serious implications for Avicenna's theory of universal conditionality. Clearly, if every

643 This is because the 'waveform' function of the quantum state never collapses - meaning that everything exists perpetually as both a particle and a wave.

644 Hugh Everett, 'Relative State Formulation of Quantum Mechanics' (1957) 29 *Reviews of Modern Physics,* 454; Bryce DeWitt, 'Quantum mechanics and reality' (1970) 23 *Physics Today*, 30.

contingent possibility is actualised somewhere, every condition will be realised – leading to the conclusion that every contingent possibility is cancelled out by the necessity of its eventual occurrence elsewhere in the universe. However, the author submits that would be a serious misinterpretation of theory. Again, the answer is to be found by applying existing notions of relativity. Given that everyone in *this* universe is constrained by only *one* possible outcome of every contingency, the fact that a different outcome might happen elsewhere then becomes a red herring. In the absence of any 'spillage' of outcomes between those different worlds, conditional events in one part of the universe cannot offset each other in the *same* region.[645] In any event, whilst the *properties* of objects can be experienced at multiple locations and times across the universe, the objects themselves cannot.

Nevertheless, the author urges the reader to resist all incredulity regarding the foregoing arguments. As Nils Bohr famously remarked: "Anyone not shocked by quantum mechanics has not yet understood it."[646] - and the same astonishment seems appropriate response for mankind's attempt to understand 'thingness' outside the realm of modern physical science.

(iii) 'Things' as Objects of Value

Notwithstanding that ancient Greece existed as a federation of independent city states, broad generalisations may be made about how 'things' were treated as property in those early times. There, respect for the family, private ownership of property and mercantilism

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645 A very accessible guide to 'multiverse' theory can be found in Obert L. Kuhn, 'Confronting the Multiverse: What 'Infinite Universes' Would Mean' (Space.com, 23rd December 2015) https://www.space.com/31465-is-our-universe-just-one-of-many-in-a-multiverse.html [Online] accessed 4/2/20.

646 Reported in Werner Heisenberg, *Physics and Beyond*, (New York: Harper and Row, 1971) and elsewhere with small variations.

provided the centrality to which ancient Greek society bound itself. Indeed, those values were espoused by Homer and Hesiod, both of whose writings were the standard readers in ancient Greek schools. From this, F A Hayek contended that our present free market economics system owes a great deal to the rising mercantile classes in ancient Greece.[647]

The dissemination of those commercial ideas into ancient Roman society may be traced with little difficulty. Indeed, the Romanic conception of property as 'things'[648] was founded explicitly upon the idea that their 'thingness' arose only if they also enjoyed a *pecuniary* value. Personal rights which could not be monetised did not create property interests and were then assigned to the Roman law of *persons*. In this regard, the conceptual origins of property being a 'store of value' would then seem to be much older than claimed by Bell and Parchomovsky (2005).[649] Interestingly, a similar distinction appears in Merrill and Smith's analysis of the *numerus clausus* considered earlier.[650] However, whilst some might argue their failure to incorporate *human* capital into New Essentialism is a weakness,[651] the author argues their position helps avoid the disagreeable possibility of justifying human slavery. Clearly, if human beings are perceived to be 'things' of pecuniary value, they might then be traded like any other commodity.

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647 Friedrich A. Hayek, *The Constitution of Liberty*, (Chicago: University of Chicago Press, 1960) 164.

648 Contained within the Romanic concept of *res*.

649 See further n 598 on page 144 above.

650 See further sub-section *(1) Conceptualist Theory and Perpetuities* beginning on page 119 above.

651 Robert C. Ellickson, 'Two Cheers for the Bundle-of-Sticks Metaphor, Three Cheers for Merrill and Smith' (2011) 8 *Econ Journal Watch*, 215, 219.

The author submits the connection between perpetuities and wealth has become unarguably clear in modern times. Placing charitable trusts on one side, perpetuities now exist almost entirely as instruments of dynastic control over stockpiled wealth. Indeed, 'generation skipping trusts' have become such an everyday part of the tax-efficient management of valuable assets that perpetuities now provide their very *raison d'être*.

(iv) 'Things' as a Representational Device

'Things' have also been used throughout legal history as a representation of something else. In Roman land disputes, for example, a clod of soil taken during actions under *Vis Civilis* would be treated by the Magistrate as the entire property;[652] thereby evidencing occupation of the whole. Thus, an unexpectedly 'fictional' element was thereby introduced to Romanic jurisprudence which otherwise dealt entirely with the certain and concrete absolutes.

Interestingly, Pollock and Maitland suggested that sods or twigs exchanged during livery of seisin in medieval England could also represent "the land in miniature". [653] However, there was some recognition of the purely evidential purposes served by those tokens in a largely illiterate age - including exchanges of commonplace objects like knives or gauntlets. Accordingly, we must then confront the difficulty that any such tokens may have had an entirely different substance or essence from the 'things' they supposedly represented. For example, the knife may have been used to cut the twig, but a knife was not a twig and made no representation of it being such. In any event, the logically *pre-existing* knife helped *create* the severed twig by later releasing it from the mother tree - which then offers an arguably better proof of the already *existent* knife than of the land upon which that tree stood.

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652 See further n 577 above and the text to which it relates.

653 POLLOCK & MAITLAND, Vol 2 at 85.

Interestingly, those same notions of representation can be found in the evolution of perpetuities. In English common law, for example, the existence of a 'life in being' under the Rule (which is, itself, a distinct 'thing' under the Avicennian theory to be explored in sub-section *(ii) Avicenna's Emanationist Model of 'Thingness'* beginning on page 247 below) can also be used to represent or connote something else; namely, the existence of a valid contingent future interest. However, as in the twig example above, a living person is not a contingent future interest in property. Instead, he or she is simply an instrument used to determine that interest's validity at law. Thus, an explicit connection between a life in esse as one 'thing' and a valid conditional property interest as another 'thing' seems tenuous, but perhaps less so than first appears:

If the matter is approached from a Neoplatonic perspective, the connection between any such life and the realisation of a future vesting contingency may depend upon a sequence of *necessary* (albeit conditional) events which includes notions of both representative 'thingness'[654] and Aristotelian causality.[655] Indeed, the *necessary* existence of one 'thing' may *demand* that the posited effect of the other must also exist. When applied to perpetuities under English common law, the proposition may then be modified such that the necessary existence of a 'life in being' simultaneously necessitates the existence of a valid perpetuity. Effectively, the arguments are identical.

(v) 'Things' in Time

In broad principle, the role of 'time' is well established in common law theory. Whether by being mandated by the doctrines of precedent and *stare decisis* to look *backwards* in time,

654 See sub-section (*iv) 'Things' as a Representational Device* beginning on page 217 above.

655 See further sub-section *(α) The necessity of causes* beginning on page 234 below.

or to recognise how property rights may be 'time' limited, the creation, restriction and termination of property interests is "in time" is well established - and has even become a benchmark of priority ("The first in time") or of defensibility ("being time-barred").[656] Other aspects of the common law attest to constancy such that it also embraces the notion of being "out of time". Thus, authenticity (contained within notions of "time immemorial") and the potentially unending fee simple will fall into this category.[657]

The foregoing places temporality as a centrality in the common law property system - whether by being "in" or "out" of time. However, the author submits that as 'time' passes, there are often significant impacts upon an object's *essence*, or 'thingness', rather than just its position within a *temporal* system of jurisprudence.

Returning to the elephant example developed from sub-section (ii) above, its dependent *embryonic* form after conception develops into an *independent* life-form after birth to become a *non-living* form at death - eventually to take on a *fossilised* form many eons later. None of these manifestations are like each other in terms of form or function - although they are connected by a predictable transformational process along a *single* linear timeline. In

656 See Carol J. Greenhouse, 'Just in Time: Temporality and the Cultural Legitimation of Law' (1989) 98 Yale LJ, 1631, 1640.

657 ibid. See also Sarah K. Harding, 'Perpetual Property' (2009) 58 Florida LR, 285.

broad measure, this is to adopt Aristotle's notion of 'potency'[658] – albeit subject to the occurrence or non-occurrence of crucial contingent events along that causal pathway.[659]

Nevertheless, it may reasonably be concluded that the metamorphosis of an elephant's 'thingness' occurs at key positions in time. Here, the author submits that - in close similarity with the Classical Islamic school[660] - the 'motion' implied by those transformations conjoins the 'thingness' and *temporality* of entities into the similar notion of 'spacetime' employed by Heidegger.[661] Accordingly, it is further submitted that any attempt to separate 'thingness' and 'temporality' would thereby tend to diminish our understanding of that 'thing' rather than improve upon it.

The preceding arguments were easily be illustrated by our elephant analogy. However, there is greater difficulty where the entity at issue is non-corporeal such that its only 'motion' (if at all) is to either 'be', or not to 'be', at certain points of time. In that event, the temporal tail would then seem to wag the 'motionless' dog – since the intervening lack of motion now means the Nestorian view can be used to argue there is no conceptual need for 'time' at all:[662] There is no 'movement' to measure.

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658 Aristotle, *Physics*, VIII Chapter 10. Essentially this is the force leading 'things' into the future. There, by way of practical illustration, 'things' such as acorns have the potential to become oak trees.

659 That said, it is acknowledged that whilst an embryo's potential to achieve its mature form is highly probable, it is by no means certain. In almost exactly the same way as depicted in the footpath example on page 173 above, the chain(s) of causality are by no means certain. The foetus may die; a drought might kill the herd.

660 See further sub-section *(2) Creation and 'Thingness' in Greek and Islamic Scholarship* beginning on page 226 below.

661 See further *(ii) 'Things' as a Particularity in Spacetime* beginning on page 211 above.

662 See further page 245 above.

Consider binary code switching between 0 to 1 as depicted graphically in Figure E below. There, the 'vacuum' of time which exists during a motionless 'steady state' of '0' is punctuated only briefly by the temporally measurable motion of switching to '1' – which then remains in a new motionless 'steady state' of '1'. However, where does that measurable temporal event sit in *objective* time? The problem is that It is now sandwiched between two temporal *voids*. Unfortunately, even Einstein's relativity would not help resolve this problem since there is no external perspective of time to which that fleeting temporal existence can be anchored. Plainly, Einstein's temporal 'relativity' demanded comparison between *two* clocks. In this instance, there is only one clock, which ticks only momentarily until the 'motion' has passed, Thus, if there is no other clock, the author suggests it cannot then be located at any point in *objective* time at all. If that is correct, is it not true that the switching event can never be an existent at all? However, this fascinating possibility will be explored further in context with 'necessity' in sub-section *(α) The problem that no 'thingness' implies regions in space where time may not exist* beginning at page 267 below.

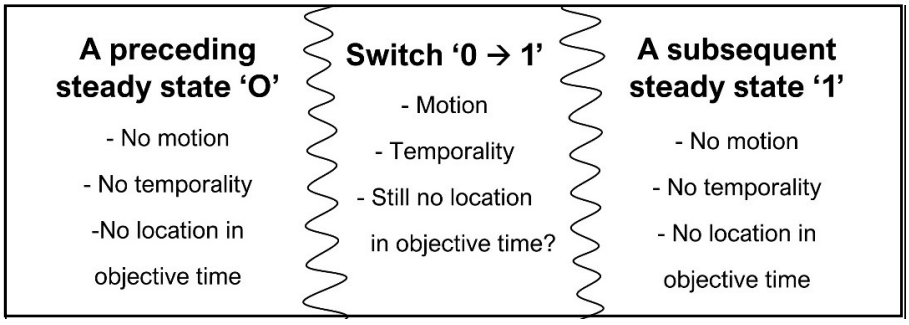

Figure E: Problems locating motion and temporality in regions where time may not exist

If those ideas are now applied to perpetuities, the possible occurrence of a future contingent event seems equally difficult to locate in objective time. If that is so, how it be justified for modern scholarship to treat the *temporal* 'thingness' of perpetuities as a useful

determinant of whether a conditional gift is either valid or void? Yet, the author submits this is precisely the methodology implicit in any hypothesis which asserts that valid contingent future interests (and thus entities having 'thingness' in law) must occupy a sufficiently constrained 'slice' in *time* within the Rule's supposed public policy limits.[663] However, that model must be wrong because it misses the one key element upon which Avicennian theory is predicated. Existence depends upon a *necessary* cause which brings it into being. If that *necessity* is absent, the result is a lack of all certainty.[664]

With great respect, the author contends that much of modern scholarship in general, and Morris and Wade in particular,[665] have seriously misinterpreted the temporal context of contingent future interests by proposing that every such disposition has its own perpetuity period.[666] This is because it erroneously supposes that a time-measurable, individual, perpetuity period does, in fact, exist. Indeed, we have seen how the mythology of time in perpetuities keeps being resurrected. Instead, the author follows Jones' excellent work that the Rule provides no more than a permissible 'projection of future possibilities'[667] from which any mention of time *per se* is conspicuously absent. Yet, it is easy to see how this confusion occurred:

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663 See further sub-section *(2) Introducing Policy Objections Against Perpetuities* beginning on page 22 above.

664 This argument will be explained fully in sub-section *(b) Avicennian modality 1: Conditionality – Causality v Necessity* beginning on page 234 below.

665 See further sub-section *(iv) The 'Causal Connection' Hypotheses* beginning on page 56 above and in Chapter 5 below.

666 MORRIS & WADE 500.

667 See further Jones (n 67) 55.

The Rule is not concerned with time, but only with the *effect* of time on the chance that a posited event *might* happen in the future. That is a question of uncertainty, not of time, per se. However, whilst time and future uncertainty appear to play out on the *same* linear plane, the units of measurement are entirely different. 'Time' is simply the continuum along which future *possibilities* either happen or not happen. Here, the 'clock' moves relentlessly onward and simply provides a 'pin-point' to mark and record any such occurrence or non-occurrence. If we took regular 'snapshots' of circumstances prevailing, shall we say, every twenty-four hours, we would then be able to locate events either according to the passage of conventional 'time', or in terms of the *number* of pictures taken. However, the Rule is unconcerned with simply locating occurrences as they happen. Its sole purpose is to predict what might happen in the future and to apply a *probabilistic* projection of future possibilities looking forward from the starting point. At that point, it is no longer 'time' per se that matters, but only as a measure of confidence about whether possible events might occur. Thus, the horizontal scale now becomes one of uncertainty extrapolated from the expected probability of that event occurring: Here, a diagrammatic comparison of this distinction is provided in Figure F below where each 'continuum' of time, probability and uncertainty has a *separate* measure:

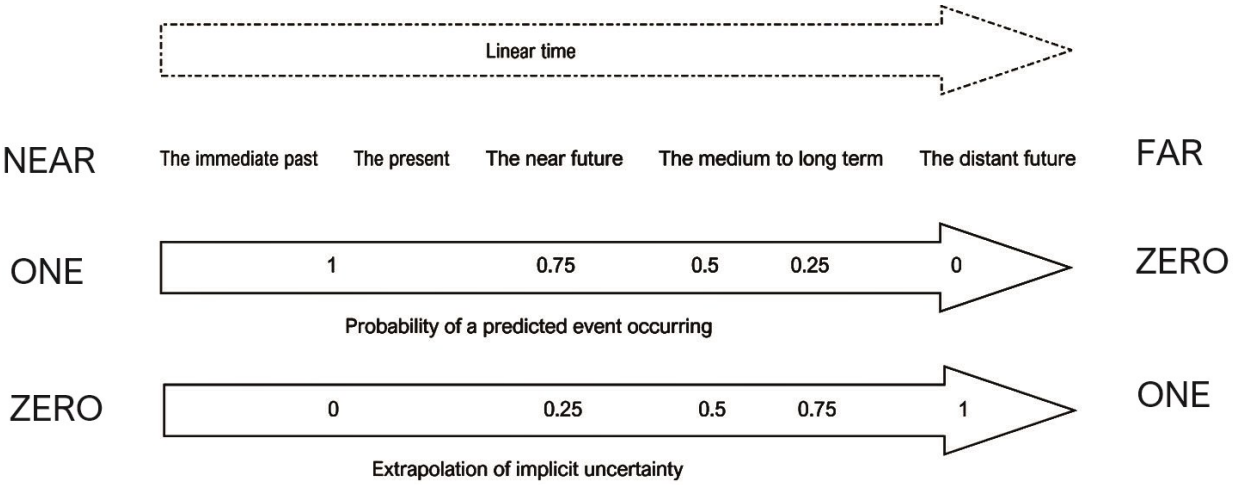

Figure F: Time, probability and uncertainty

At this point, we have gained a clearer sight of the destination ahead; that is, how the concept of 'thingness' intrudes upon, if not actually *defines*, valid contingent future interests. Here, the author argues that once all 'things' are treated as arising from a procession of possibilities which 'happen' over a spectrum that many people call objective 'time', perpetuities then begin to take on every appearance of them being a consistent part of that *one* universality. Here, for clarity, the 'thingness' enjoyed by contingent future interests arises from what may or may not happen over time as a result of the 'motion' which either brought them into being or which brought them to an end. An equally valid conclusion would be to say that perpetuities are transitory 'things' because they can, but not *must*, end as time passes – and the sole point at issue is whether that posited end-point (or effect) is certain or uncertain. Yet, the real point of the matter is that whilst that 'end point' may exist measurable objective 'time', it would be false to assume that 'time' per se explains how that point was reached. Indeed, the logical conclusion of applying the argument represented by Figure F above to perpetuities is that the transitory 'motion' of future conditional event occurring or not occurring may not exist in 'time' at all. Instead, its occurrence or non-occurrence takes place in a plane of possibility/ uncertainty – which the author now asserts makes it logical absurd to describe the Rule in purely *temporal* terms.

(vi) Contingent Future 'Things' as Conditional Slices Cut from a Temporal Pie

As a direct corollary of sub-section *(v)* above, the author observes that a consistent endeavour of English jurisprudence has usually been to recognise incorporeal rights as *time*-constrained interests. Accordingly, intellectual property laws and regulations prohibiting constraints on redemption (such as mortgages or dated 'gilts') all bear witness to the 'thingness' of objects existing transiently within discrete chunks of time. However, after the

expiry of that prescribed period, their 'thingness' disappears; and those objects then come to nought as the right of exclusion, redemption or enforcement evaporates. For clarity, this is because any constrained right is unattainable before it arises and becomes indefensible after it expires. When viewed in this light, each such object has its own temporal boundaries which do not depend upon enjoying 'substance' (for example, its formula, design, recipe or value) but only upon its allocated time-span which exists independently from that of other entities. At this point, we may now return to Einsteinian notions of relativity. Clearly, when viewed from that interest's own perspective, time passes accordingly to its own 'clock'. Yet, during that state of 'motion during which an interest's *internal* clock counts down to zero, we are no longer troubled by any lack of relativity. The starting and ending points are now anchored to specific points in objective time, with the result that its objectively determinable temporality may be elevated to existent 'thingness'. In simple terms, a lengthy remedial 'splint' has been applied to the fracture which supports the weight of the whole. Here, to anticipate the arguments appearing later, that 'splint' supplies the *necessity* which joins the beginning and end as one *continuous* causal process playing out over objective time.[668]

We have now reached the core intersection of 'thingness' and perpetuity theory - whereby the chief difference between absolute and conditional interests is simply that the latter is explicitly 'carved' into distinct and freestanding 'slices' of time, certainty, or substance which have been cut from the *whole*. Those 'slices' may then be apportioned differentially between the designated beneficiaries and any reversioners in default. This argument is supported by considering Joanne's gift of Greenacre on the following terms:

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668 See sub-sections *(3) Living Persons as an Instrument of Necessity and Certainty* and *(4) A Life as a 'Necessity' Implicitly 'Annexed' to the Modus* beginning on page 272 below.

19. To Paul during his lifetime, then to Matthew during his lifetime and then absolutely to such of Matthew's children who shall attain 21.

This gift is valid under the common law Rule since all of Matthew's children are bound to attain twenty-one within 21 years of their parent. In the meantime, Paul and Matthew each take a successive lifetime interest before the final absolute interests. From this, we may reasonably suppose that Joanne's ownership interest in, and dispositional control over, Greenacre allows her to create successive 'slices' of Greenacre all measured in time by the uncertainty of how long each life will last. Indeed, it is axiomatic that if Joanne had no such right to carve out those sub-interests, she would be able to make only *immediate* dispositions of objects in their *entirety* to her then-living beneficiaries. In that event, perpetuities could never exist at all - and any such purported gifts would be ineffective and utterly pointless.

This is a critical turning point in understanding perpetuities since we may now turn away from the route traditionally followed by common law perpetuity scholarship. Instead of asking whether donor appointed conditions *are* (or even whether they *should* be) valid per se, a new perspective from ancient ideas now allows us to dissect the nature of 'thingness' into much more subtle issues: These are the questions of causation, conditionality, necessity and revised ideas of temporality which echo back to the time of Aristotle.

(2) Creation and 'Thingness' in Greek and Islamic Scholarship

Nutshell

The legacy of ancient Greek and Neoplatonic philosophy allowed Avicenna to propose a theory which explains what 'things' are by examining how they were created. That constructional process is based upon a distinction between necessary and efficient causation. In turn, that resolves into notions of proximate and remote causes of which only the former can produce potential existents. Once applied to the creation of perpetuities, this model helps provide a formula by which we can distinguish between different varieties of otherwise similar conditions in terms of whether the posited final effect is necessitated by the condition upon which it depends.

(i) Prefatory Contextual Observations

[The reader is recommended to revisit sub-section (2) Assumptions, Caveats, Conventions and Definitions at point (l) on page 81 above.]

This chapter's focus falls the *Classical* Islamic school[669] because it provides a direct attempt to explain the nature of causation at a key moment when western legal scholarship might have been particularly receptive to those ideas. Certainly, Peter the Venerable (c 1092 to 1156 CE) argued unsuccessfully for greater understanding of Christendom's Moslem foes. Although ignored by Pope Clement IV, Roger Bacon (c 1214 to 1292 CE) also composed a treatise, circa 1268 CE, in which he opposed the characterisation of Islam as the coming of the Antichrist.[670] One key outcome of that more enlightened approach was to reveal how intellectually impoverished Christian Europe was in comparison to rival Arabian scholarship – which, in turn, encouraged early philosophers and translators such as Adelard of Bath (1080

669 That is, from the ninth to the thirteenth century CE.

670 Hugh Goddard, *A History of Christian-Muslim Relations,* 2nd Edition, (Edinburgh, Edinburgh University Press, 2020) particularly 83-87.

to 1152 CE) and Constantine the African (died 1098 CE) [671] to visit the Holy Land to study alongside the Arab masters.[672] By itself, that was a remarkable state of affairs when set against the backdrop of the Crusades (1095 to 1291 CE),[673] and particularly so where England demonstrated a greater eagerness to learn from its Arab foes than from ancient Rome.[674]

(ii) Avicenna's Emanationist Model of 'Thingness'

Beginning with the *polytheistic* times of Aristotle and Plato, the existence of 'things' has long been associated with the will of God, or of the *gods*. That marked the period of Greek

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671 Farshid Delshad, 'Mutual Impacts of Greek and Islamic Theological Thoughts in Classical Periods A Brief Review' (2008) XXII *Journal of Theological Interpretation* XXII, 67, 74.

672 For an insightful account of Avicenna's significance, place in the timeline of Arab philosophy and subsequent influence on western thought, see further: Amos Bertolacci *Arabic and islamic metaphysics*, Stanford Encyclopedia of Philosophy (2013); Michael E. Marmura, Avicenna's Proof from Contingency for God's Existence in the Metaphysics of the Shifa' (1980) 42 Medieval Studies, 337; David Twetten, Aristotelian Cosmology and Causality in Classical Arabic Philosophy and its Greek Background' in *Ideas in Motion in Baghdad and Beyond: Philosophical and Theological Exchanges between Christians and Muslims in the Third/Ninth and Fourth/Tenth Centuries*, Janos D (ed) (Leiden: Brill, 2016) chapter 11, 312 to 433 which provides much of the supporting superstructure for the following analysis.

673 Admittedly, there were those who also travelled to convert Islamic scholars to Christianity, but the intention of drawing Arab scholarship into parity with the West, rather than with any purely missionary zeal. Nevertheless, for whichever purpose, those endeavours largely failed to convert the devout followers of Islam. See further the enlightening account of Christian attitudes to Islam in – Bernard Hamilton, 'Knowing the Enemy: Western Understanding of Islam at the Time of the Crusades' (1997) 7 *Journal of the Royal Asiatic Society*, Third Series, 373.

674 See further section *(2) The Confluence of Fault-Lines in the Bracton Treatise* beginning on page 10 above and n 728 below.

philosophy (*falsafah*) as one of the two principal traditions of intellectual thought. The second was the theological tradition (*kalām*) made possible by the widespread *monotheism* evident during the pre-medieval period. The revered Muslim scholar, ibn Sīnā or Avicenna (980 to 1037 CE) stands at the confluence, or perhaps the collision, of those two traditions by proposing a new interpretation of 'things' as the creation of a *single* Abrahamic God. As in medieval England, the 'fault-lines' in that, potentially awkward, marriage of traditions were later exploited by al-Ghazālī' (1058 to 1111 CE) and Averroes (1126 to 1198 CE); and this may help explain why Aristotelian philosophy later veered towards scientific matters whilst the then-dominant Ash'arite Occasionalism[675] fell into the domain of strict Islamic Quranism.

Nevertheless, Avicenna provided new insight into how creationist forces could either bring, not bring or remove 'things' into or from material existence. By doing so, the author submits Avicenna provided a unique understanding of what 'things' *are* by explaining *how* they were proposedly *made.* This differed from the Aristotelian approach which asked *why* they were made in terms of their four causes.[676]

For Avicenna, the chief problem of the Aristotelian approach was that it imagined *matter* and *form* to be non-existent until combined to produce *existence.* As Avicenna convincingly argued, that approach was to postulate how two non-existents could join to create existence. Instead, he concluded that another force was required, that is God adding the *accident* of

675 The belief that God is the final and direct cause of every event in materiality.

676 These are *material* causes (e.g. wood used for making a chair), *formal* causes (e.g. the design or form of the chair) and *efficient* causes (e.g. the craftsman's skill used to make the chair) and *final* causes (e.g. the reason why the chair was made and the purpose to which it is put). See also n 672 above and the references therein.

existence to the *essence* of merged form and matter.[677] For this reason, Avicenna was considered to have proposed an *essentialist* solution to the problem. Yet, we should not settle upon that conclusion too hastily. If God has no form, matter, or essence - but is a 'what' not a 'thing' - Its[678] own being is then in 'Its-self' - and that does not depend upon *essence* at all. In this regard, we begin to intrude upon an enquiry whether the subsequent Thomist tradition which adopted Avicennian theory moved towards being more *existentialist* in character. However, the magnitude of that issue has occupied scholars for nearly 1,000 years and cannot be accommodated adequately in this thesis.

Nevertheless, Avicenna's departure from Aristotle was only partial. Sub-section (b) beginning on page 255 below will demonstrate how that constructional process was built upon Aristotle's distinction between *necessary* and *efficient* causation. In turn, that resolves into notions of *proximate* and *remote* causes of which only the former can produce potential existents. Once applied to the creation of perpetuities, this model helps provide a formula by which we can distinguish between different varieties of otherwise similar conditions in terms of whether the posited final effect is *necessitated* by the condition upon which it depends.

(a) The structure of Avicenna's celestial *nous*[679]

Avicenna's creationist process began with the necessary and involuntary (hence 'accidental') emanation of pure acts of thought from God as the 'One Perfect Being'. Since that effluxion has no founding cause other than His own self-contemplation, those

677 "Thus in first instance being (*hastī*) is said in two ways, as substance and as accident." Avicenna, *Book of Knowledge,* 8-9.

678 See further sub-section *(2) Assumptions, Caveats, Conventions and Definitions* at point (b) on page 75 above.

679 Literally, 'intellect' or 'common sense' as used in the British slang expression "nouse".

emanations *necessarily* provide the single source of all 'being' through the creation of an essence, or '*quiddity*' which might, in turn, eventually be emanated into materiality. Most importantly of all those emanated thoughts spring into immediate existence as a possibility to be interrogated by the process of 'celestial intellection' which began from that very moment. For this reason, He[680] is also known as the 'One Necessary Being', 'First Cause' or 'Prime Mover' since He alone initiates everything that has ever been, is now, or will be in the universe for all eternity.

The creationist process may be likened, very crudely, to a production line by which celestial entities successively evaluate whether each emanation is either 'possible' or 'impossible' in materiality. There, Avicenna postulated how God initially bid that a new celestial 'Soul' and a 'First Intellect' be established in their own 'heaven' to receive His emanations. From this, using Aristotle's distinction between the *intrinsic* 'material' and 'formal' causes, the *material* represents the passivity and mere potentiality of an inert body until it is animated, or given 'motion', by a 'Soul'. Indeed, Aristotle described the soul as the first *entelekeia;*[681] an ancient Greek term which has been variously translated as 'change', 'completion' or 'actuality';[682] although the overall intention to describe a *constructional* process seems clear. Thus, the First Soul, as the proximate efficient cause, activates the *formal* properties associated with each of God's emanated pure acts of thought. However, that is

680 Returning to a purely essentialist treatment of Avicenna's theory, the term 'It' is no longer appropriate.

681 Aristotle, *De Anima*, II.

682 Robert J. Wisnovsky, 'Avicenna and the Avicennian Tradition' in Peter Adamson and Richard C. Taylor (eds), *The Cambridge Guide to Arabic Philosophy* (Cambridge: CUP, 2005) 92, 99.

simply the first stage in the creationist process. The First Intellect, as *Final* Cause within its *own* sphere, is necessitated to bid the creation of a second sphere (which Plotinus termed *triads* of 'Intellect', 'Soul' and 'Heaven') to receive the first triad's emanations and re-perform those same acts of cognition afresh.[683]

The process of each sphere successively emanating further *triads*[684] continued until the energy produced during God's initial emanation was finally exhausted when installing the tenth Soul and 'Tenth Intellect' (also called the 'Active Intellect') in the last celestial sphere. However, Avicenna regarded this entity more as a 'Giver of Forms'[685] than as a true celestial

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683 This involves considering: *(a)* the essence of the Necessary Existent, *(b)* the essence of itself as a necessity required by the Necessary Existent; and *(c)* the essence of itself as a possible being. See for example, Michael E. Marmura, Some Aspects of Avicenna's Theory of God's Knowledge of Particulars' (1962) 82 *Journal of the American Oriental Society*, 299, 304-308.

684 Although the *triad* was largely conceived by Plotinus, even he questioned why there should be so many: Plotinus, *Enneades* ii, 5.1(10).9.7-27.

685 Essentially, the refined emanation disseminated in terms of a 'template' which expressed the Natural laws by which any such thing is governed. However, there is some disagreement as to the degree of particularity contained in those 'forms'. Marmura (n 683) at 307. For a comprehensive and insightful comparative investigation into the degree to which God knows particulars – see Kevin Lim, 'God's Knowledge of Particulars: Avicenna, Maimonides, and Gersonides' (2009) 5 *Journal of Islamic Philosophy,* 75. However, the modern view seems to be that these are 'universals', rather than 'particularities' or instantiations. See also Kara Richardson, 'Avicenna and Aquinas on Form and Generation' in Dag N. Hasse and Amos Bertolacci (eds.) *The Arabic, Hebrew and Latin Reception of Avicenna's Metaphysics,* (Berlin & Boston: De Gruyter,2012) 251.

soul.[686] That view would concur with them being ranked demiurgically[687] by God in *descending* order of seniority. The Tenth Intellect, representing the Moon, is the lowest ranking of them all. Nevertheless, functioning as the frontier between the non-material and material universe, the Active Intellect's role is to disseminate outcomes, as 'universals',[688] to the animal, mineral and vegetable existents and also into the human soul, most usually via the prophets.[689]

In is in the foregoing way that the celestial *triads* perform evaluative refinements to God's emanations. Indeed, by constructing a virtual 'fountain' from which all possibility of existence springs, each *triad* then becomes a *necessitated* evaluative stepping-stone in the *causal connection* from inception to materiality. However, there are important questions to be asked about God's involvement in the intellective process. Here, Avicenna provides his answer based upon: *(i)* Events in the eternal celestial world which can be known and defined. This is because each such celestial entity exists as the only one of its species, and is, therefore, knowable by God as a 'universality' since the 'particular' and the 'universal' are united in that single existent.[690] *(ii)* Events in the 'particular' (material) world of 'generation and

686 Avicenna, *The origin and destination*, at 3.5: 98.

687 From the Greek *dēmiourgos* - which meant 'artisan' or 'craftsman' but later to mean 'creator'.

688 That is, to establish general principles governing each *species* of 'thing' such that the 'individual' is known to God only through the knowledge of the 'universal' traits which it shares with all other members of the same *species*: Richardson (n 685)

689 See generally, Hulya Yaldir, 'Ibn Sina's Formulation Of Divine Knowledge: "The Necessary Existent Apprehends Intellectually All Things In A Universal Way', in *The Science And Education At The Beginning of The 21st Century In Turkey*, Volume 2 (Sofia: St Kliment Ohridski University Press, 2013) 459.

690 Marmura (n 683) 06.

corruption'.[691] In the latter case, since these events are both corruptible and transient, they cannot be defined - only described. As a result, they are largely unknown to God except through the character of their (universal) essence.

Others disagreed. However, al-Ghazālī's belief in al-Ash'ari's occasionalism led him to regard God as the proximate cause of all events in materiality – even if only in terms of *rewards* and *punishment*.[692] Thus, any impression given of God being a *micro-manager* of the Universe would appear to have been exaggerated. Indeed, notwithstanding Aquinas' argument that God never works through intermediaries,[693] Alexander of Aphrodisias (fl. 200 CE) had already explained how separating the celestial Soul from the Intellect then allowed each celestial *triad* to function as a necessitated, efficient and final cause of its own onward emanations. In this way, a plurality of final causes was created across the celestial *nous*. Moreover, since the body of each successive celestial *triad* is the only member of its own 'species', each exists as a distinct entity with its own unique purpose and rank. Thus, the intimate details of each triad are known fully to God because the 'universal' and the 'particular' are now combined into one. Thus, al- Ghazālī's rejoinder seems unnecessary since Alexander had already explained how God still 'pulls the strings' in the creational process since He is the *necessary* remote cause of all final outcomes within the celestial *nous*.

A graphical summary of the preceding process is now depicted in Figure G below:

691 ibid.

692 ibid 310.

693 Thomas Aquinas, *De Potentia* q. 3, aa. 4, 15, and 16; Alexander of Aphrodisias, *De intellectu,* 107-111.

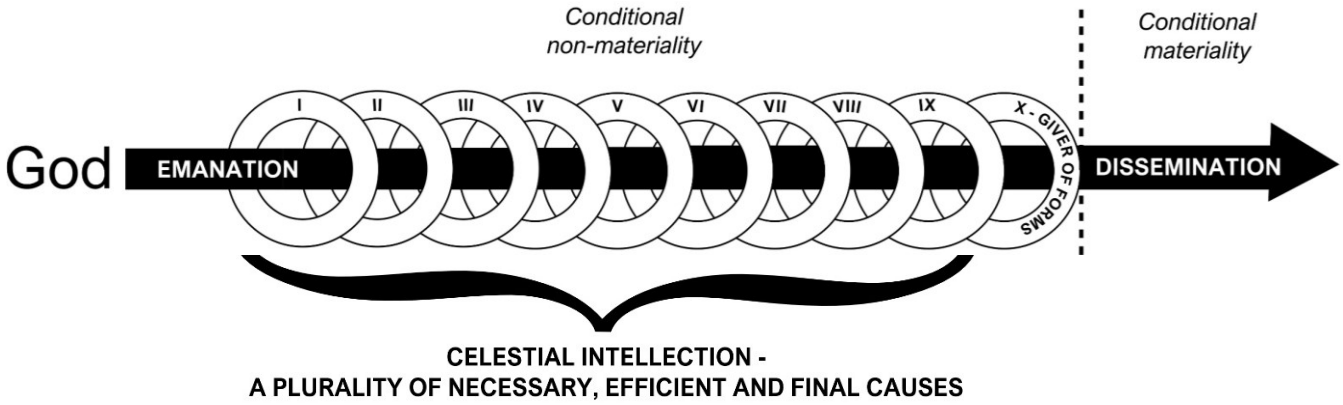

Figure G: Avicennian modality as informed by Ptolemy, Plotinus and Alexander

In Figure G above, Alexander's suggested *plurality of causes* is depicted as a progression through the first nine celestial *triads* – shown here as 'rings' along a causal pathway from emanation to dissemination. However, the Tenth Intellect is often regarded as a disseminator (rather than an emanator) which means, for present purposes, the 'Giver of Forms' stands somewhat apart from the preceding Intellects – and therefore outside the process of celestial intellection. Indeed, a fundamental change of form is fashioned by the Tenth Intellect where non-material possibilities are transformed into *material* possibilities – albeit whilst still being conditionally dependent upon God's bidding. It is in this realm that the real-world contingent future interests depicted in Figure I on page 262 below actually lie.

Nevertheless, more detailed attention must now be given to the modality of Avicenna's intellective process to provide a causal connection between a 'thing's' inception and its eventual entry into materiality. These involve applying two sets of distinctions, each of which is considered separately in sub-sections *(b)* and *(c)* following immediately below.

(b) Avicennian modality 1: Conditionality – Causality v Necessity

(α) The necessity of causes

The foregoing discussion posits that every entity created within Avicenna's emanationist framework depends upon there being a *preceding* cause which brought it into being. Without that cause, nothing could exist at all. However, the root cause of that existence does not lie in its 'essence', but rather in the *necessity* of its existence becoming *possible* in materiality. Thus, to avoid the problem of 'infinite regression',[694] all existent 'things' are said to have extraneous causes that *necessarily* lead back to God as the one First and Necessary Cause by which they were created.

Avicenna's distinction between necessity and causation was used to provide a logical proof of God's existence that did *not* depend upon an act of faith. There, the possibility of those Intellects' existence, and of all the thoughts and 'things' they contemplate during intellection, can only be resolved by an entity which *necessarily* exists. If not, conditional future possibilities might never be determined since there would then be nothing to *guarantee* that they *must necessarily* be decided upon.[695] The author argues this situation would result in perpetual conditionality since the eternal circularity implied therein could be broken only by a freak chance that a, still *undetermined*, future possibility might be united

694 See further n 699 below.

695 See generally: Marmura (n 672). In a sense, it appears to share some similarity with William Paley's 'Watchmaker' argument, although Paley's point was more closely related to God's influence in the overall design of things, rather than being the 'difference maker' in subsequent events. See the footnote immediately below,

with its counterpart 'determinant'[696] at just the right moment in time.[697] Indeed, the mere random possibility of this occurring would remove all *certainty* from the universe, thereby creating unresolvable cosmological chaos.[698] In the conspicuous absence of any such chaos, it must have seemed entirely reasonable for Avicenna to argue that proof had thereby been provided for God as the one Necessary Existent. Thus, as the only universal 'absolute', He exists to settle those conditional possibilities as supreme difference-maker.[699]

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696 Which Avicenna calls the 'difference-maker'. Here, we may imagine a balance between two alternative outcomes (such as being and not being) being disturbed by the 'weight' added by the difference-maker to one side or the other.

697 Here, for example, the determination of whether X either will, or will not, do Y needs to take place within X's lifetime and/ or whilst it is still possible that Y can be done. Any theoretical determination of that question outside of those limits would be pointless.

698 That is on the assumption there is no rationalising effect imposed separately by so-called 'Chaos Theory'. There, pioneers including Edward Lorenz and Benoit Mandelbrot worked in the early nineteen-sixties to propose theories explaining the underlying order of complex systems exhibiting seemingly random disorderliness. Instead, they argued, that chaos might later be stabilised by unseen deterministic laws which operate through, for example, invisible interconnections and tendencies towards self-organisation.

699 The same logic demands there can only be *one* God. Aquinas argued that the 'simplicity' of God means He lacks all composition of matter, form or substance such that he is only '*esse without addition'*. From this, Aquinas observed that two (or more) gods could never have a separable or distinct being [Thomas Aquinas, *Summa Theologica*, q 3 a.] Were it otherwise, there would then be the possible absurdity of infinite regression. ["For otherwise all things are uncaused; or else the sum of existence is limited, and there is a circuit of causation within the sum; or else there will be regress to infinity, cause lying behind cause, so that the positing of prior causes will never cease." Per Eric R. Dodds, *Proclus: Elements of Theology*, 2nd ed, (Oxford: Clarendon, 1963) 13] Here, the author submits that Averroes' solution to the regression problem – in which he repositioned the Necessary Entity, as a final cause, at the *end*

The distinction between necessary and efficient causality immediately above provided the chief target for Avicenna's critics. There, his proposition that God works through celestial *intermediaries* challenged the widely held Aristotelian view that the 'First Mover' was also the *efficient* cause of everything and controlled every minutiae of life directly.[700] Accordingly, the highly deterministic Sunni scholar, al-Ghazālī' (1058 to 1111 CE) condemned Avicennian theory as one devised by *infidels*. There, necessity was not required as the guiding force of Nature since that was supplied entirely by God. Indeed, the chief distinction between Avicenna and al-Ghazālī' lies in the disputed role of necessity in achieving final causes. Whilst not disagreeing entirely with Avicenna's modality of necessity, Averroes (1126 to 1198 CE) argued that God exists without matter as the *final* cause - and not as the First or Self Mover described by Avicennian theory. Instead, to add a more Aristotelian *flavour* to Avicenna's hypothesis, Averroes argued that God formed the *unmoved* part of a *self-moved* celestial whole,[701] where He, having no matter or body, could not be located at any one place at any given moment. He exists everywhere, including at the interface between the *non-material* celestial *nous* and the *material* universe at the Tenth Sphere. In this way, Averroes

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of the series [Averroes, *Incoherence of the Incoherence*, at 165.] - provide little more than unconvincing *ex post facto* justification for the lack of a coherent beginning. Furthermore, differing opinions amongst the gods would also create multiple outcomes for every contingent possibility – which, excepting quantum theory in the physical sciences, is not evident in materiality.

700 Aristotle, *Physics*, at 7 and 8.

701 David Twetten, 'Averroes on the Prime Mover Proved in the Physics' (1995) 26 Viator: *Medieval and Renaissance Studies*, 107, 118. Averroes proposed an alternative instrumentality by which knowledge is received in materiality by means of "an essential self-mover, found in the heavens, and an accidental self-mover, found on earth". ibid at 122.

refashioned Avicennian modality to position God everywhere in the universe whilst leaving Avicenna's chain of causality substantially intact. Yet the author questions whether any such intellectual sleight-of-hand was ever needed. Alexander's hypothesis of a plurality of causes each being initiated by a unique species meant God was already fully incorporated in the intellective process and had knowledge of every *triad*.[702]

In summary, Avicenna's theory is rooted in one *necessary* cause (God) whose emanations are bid onward in an evaluative flow whereby each triad assesses whether the thought under intellection is possible in materiality. In this way, from a necessitated first beginning with God, a series of efficient causes performed individually by each celestial Soul supplies the animating force needed to propel that thought to the next triad. Here, the necessity of this process is supplied by God's bidding that each Intellect must do so where the original thought appears possible in materiality. In Avicenna's terms, the necessity of the cause demands the necessity of the effect. In this way, the existence, non-existence or terminated existence of those ideas as possibilities in the material world is thereby demonstrated to be the final effect of the necessary and efficient causes which fashioned them.

(B) Disentangling conditionality from causation

The preceding observation now takes us to one of the most important propositions for the study of perpetuities. Every 'thing' in materiality – including contingent future interests – exists as the *necessary* outcome of its 'essence' being possible. Yet, Avicenna goes further and formulates a dependency between causality and necessity that offers a completely new insight into the likely purposes of English perpetuity policy as in propositional statement II:

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702 See further page 232 above.

> **Statement II** - No 'thing' can exist unless it is either *necessary* in itself or is causally *necessitated* by something else.[703]

The author asserts this proposition may be reversed to produce an even more compelling formulation. The certainty that something will exist, if it exists at all, depends upon whether its creation is causally necessitated. In the absence of any such necessity, it cannot be posited that any 'thing' can be created since there is no certain and definite cause which insists it *must* exist. Thus, that which is *necessary* inevitably entails establishing that which is also to be regarded as a *certainty*.[704] Furthermore, what is *necessary* by itself (and God is the only entity to which this can refer) provides certainty that the intended or expected outcome (or effect) will occur in fact – but not exclusively so. For our present focus on perpetuities, the second part of Statement II permits that existence in materiality may also arise by having 'another' *necessitated* cause.

Notwithstanding the clear logic behind Avicennian theory, the author urges caution against further extending the distinction between causation and necessity. The reason is founded in the *unifying* effect of *conditionality*. Indeed, the ancient distinctions between the 'causal' and the 'conditional' realms introduced in point (I) on page 81 above belie their conceptual entanglement with necessity: Here, the study of valid perpetuities reveals how the donor-appointed *accidental* cause provides the necessity for the posited 'thing' (in this case, beneficial vesting) achieving actuality, if it ever does so at all. Thus, it is precisely at this point that the author contends English perpetuity theory and Neoplatonism touch – and this

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703 Avicenna, *Metaphysics*, I, 7, 47, 10–19.

704 "The necessary (*al-wājib*) indicates certainty (*ta'akkud*) of existence and existence is better known than non-existence, because existence is known by itself and non-existence is known, in a certain way, through existence." Avicenna, *Book of Knowledge,* 8-9.

becomes ever-more evident from El-Bizri's summary in which the same core ideas can be equally applicable to both:

> "In the case of a contingent being and its necessary existence due to something other than itself, necessity is due to an active external cause of existence while contingency lays down the conditions for such a necessary existence due to something else. Necessity is that which acts as the main reason behind bringing something from potentiality into actuality."[705]

The foregoing propositions are depicted graphically in Figure H below. Here, the zone of certain, existent and valid conditional future possibilities (or interests) occurs only in the intersection of necessity, causality and conditionality:

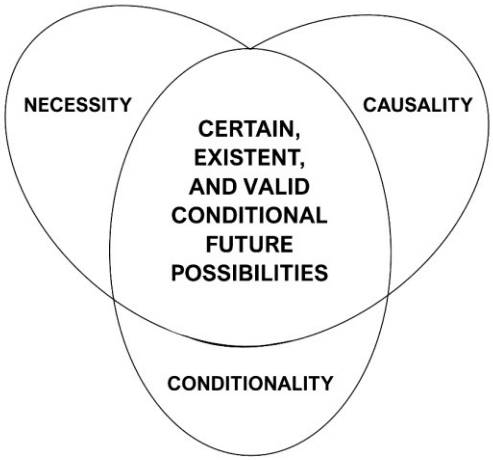

Figure H: Required elements for the certain and valid existence of future possibilities

A useful beginning can be made with the example of a public footpath across the countryside where, *after* its construction,[706] the landowner installed lockable 'stiles' or 'gates' which potentially interfered with passage along that path. This introduces a new conditional

705 Nader El-Bizri, 'Avicenna and Essentialism' (2001) 54 *The Review of Metaphysics*, 753-768.

706 This is an important caveat because it avoids the complicating possibility that the footpath was designed in such a way that the possibility was integrated into the *formal* cause.

possibility affecting the usage of that footpath; namely, whether the landowner has locked them or left them open. However, the author argues that any attempt to separate the causality supplied by the 'footpath' and the contingency possibility supplied by the landowner is mistaken. In this regard, the *efficient* (walking along the path) and the *final* cause (reaching the intended destination) is rendered impossible unless made achievable by the favourable occurrence of a landowner's decision to keep the stiles and gates open. In short, that successful passage along the footpath depends upon the necessity of those gates being unlocked. In this event, the conditional possibility and the causal connection between the start and end of the footpath begin to merge into one. The process becomes even closer to the Avicennian model of intellection if one was also to imagine that each stile or gate is owned and controlled by different landowners. There, a rambler's passage now depends upon the possibility that *every* landowner keeps their gates open since the path will remain blocked even if any one of them disagrees. In that event, the conditional possibility of successful passage depends upon the *multiple* necessities of external forces keeping those gates open. Here, necessity is supplied by a bar against obstruction under s. 137 Highways Act 1980.

The relevance of the preceding analogy to perpetuities becomes clear when considering the English Rule's treatment in gift (1) to "Mary's first legitimate daughter to attain twenty-one" given on page 1 above. There, the donor's express terms upon which that gifted interest depended supplied the *formal* cause since it fashioned the dispositive scheme he or she desired. By doing so, the *final* cause is the dynastic or protective purpose which the conditional gift was designed to serve. However, the *subsequent* occurrence (or non-occurrence) of those future possibilities also supplies the conditional 'hurdles' which must be traversed. In this way, the process of satisfying the stated conditions then becomes the

sequence of *efficient* causes (and arguably also the *material* causes[707]) needed for the gift to vest either beneficially or in reversion. Thus, gift (1) illustrates how notions of *conditionality* and *causality* are interwoven to produce the outcome posited by the *final* cause.

Plainly, gift (1) to 'Mary's first legitimate daughter to attain twenty-one' will vest if, and only if, Mary survives to marry and produce at least one legitimate daughter, of whom at least one survives to reach twenty-one. In this regard, Figure I below further deconstructs that scheme into discrete *enabling* conditions, each of which must be satisfied before the gift can succeed under English perpetuity law. Accordingly, since this interest is valid under the Rule, the author asserts these steps are *sufficient* to achieve the intended outcome whilst also being efficient to connect cause with the existence of the posited effect. In Aristotelian terms, the author submits this explains why the *efficient* cause of that effect is produced.

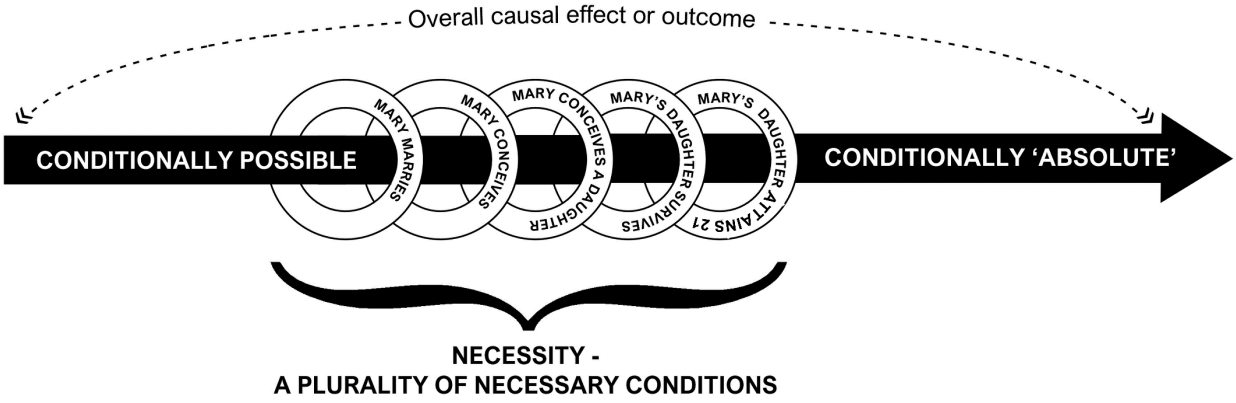

Figure I: Avicennian modality applied to contingent future gifts under the Rule

707 Here, it may reasonably be supposed that the passage of time and/or of accidental occurrences over time are equally 'materials' in the process by which the possibility of final vesting unfolds.

Here, the interrogation of each enabling sub-condition (identified as by the orbital shapes on Figure I above) is required to affirm that the gift to 'Mary's first legitimate daughter to attain twenty-one' must *necessarily* happen, or not happen, within the Rule's permissible projection of possibilities for the gift to be valid. Indeed, if any one of those conditional possibilities, as a conceptual stile or gate along the causal path, cannot necessarily take place within that projection, the Rule would invalidate the gift *ab initio*. True, there is no celestial *triad* bidding progress onwards, but the author argues that process is functionally identical to the logical proof of the necessity that one of Mary's daughters must inherit - if any of them ever does so. Clearly, Mary must necessarily marry and conceive a daughter, if she ever does so at all, within her own lifetime. Similarly, any such daughter must necessarily survive and reach twenty-one within that daughter's own lifetime, if at all – and necessarily within the next 21 years. In both cases, nothing further is needed for those events to follow their intended course. These events either will, or will not, happen within those lifetimes and do not rely upon the agency or intervention of others. For this reason, the gift to Mary's first daughter to attain twenty-one has an entirely *necessary* causal connection with the posited outcome which demands that she must either inherit, or the gift will fail completely. In this way, we find the required necessity is supplied by the life of someone who must, by definition, be alive or *en ventre sa mere* at the date of gift.

The conclusion to be drawn from the preceding discussion is that recognition of the necessary causal steps needed for the beneficiary to inherit provides a much more useful explanation than conditionality *per se*. True, gift (1) is expressly conditional, but the author submits we are simply groping around in the dark if no attention is paid to the reason why

the summative effect of that conditionality is valid - they are all *necessary* to achieve the posited effect of Mary's first daughter to attain twenty-one *will* inherit, if she does so at all.

(c) Avicennian modality 2: Possibility - Existence v Essence.

The process of intellection or contemplation implies the resolution of an issue or problem. If this was not the case, that exercise would be entirely pointless. Accordingly, the Avicennian creative process draws a sharp ontological distinction between three separate states: *Firstly*, that 'things' have an essence (or 'quiddity') such as being *golden*. *Secondly*, the concrete existence of a real 'thing', such as the unique and specific *gold ring* on my finger. *Thirdly*, the understanding of *gold* as a universal and predictable concept such that, if someone remarked, 'this is made of gold', everyone would know what was meant. Although stated explicitly by al-Fārābī (circa 872 to 950 CE),[708] the distinction between essence and existence has been implicit since ancient Greek times, not least by virtue of Aristotle's own argument that the terms 'being' and 'beings' have quite different meanings.[709]

The severability of the preceding distinctions allows intellection to continue without being constrained by, or being dependent upon, whether the 'thing' under contemplation exists in materiality at all. This is because a 'thing' exists immediately upon emanation from the One and can, therefore, be instantly conceived as an existent 'essence', 'universality' or 'particularity' notwithstanding that it is yet to be disseminated into materiality. Indeed, as noted earlier, the desired end point of intellection is not to distinguish between what is real

708 Al-Fārābī, *Book of Letters*, 4.

709 Aristotle, *Posterior Analytics,* II, 7, 92b at 10-11. There, for example, 'there are approximately 8 billion human beings on earth' (existence) which is a different proposition from a description of 'what a generic human being is' (essence or quiddity).

and what hypothetical. Instead, its purpose is to determine only whether the existence of that 'thing' is either possible or impossible in materiality. It is, however, to be regretted that Avicenna's undifferentiating use of the terms 'particular', 'singular' and 'individual' did not make those distinctions clear.[710] Perhaps even more unhelpfully, Avicenna's only example of God's understanding of the particular was that of a solar eclipse, not of any *human* activity.

The author argues that foregoing ontological distinctions are highly relevant to contingent future gifts in England, but only where the preceding benchmark context of 'existing in materiality' is now replaced with 'validity'. Clearly, valid perpetuities can only be produced in earthly materiality such that immateriality is no longer relevant. Thus, the following uncontroversial propositions may now be advanced about any individual contingent future interest - each being equal to one of the three ontological states postulated above:

Primus: Its *essence* lies in being a disposition made upon valid conditional terms.

Secundus: Its concrete *existence* is evident from the valid written disposition in my hand.

Tertius: Lawyers *universally* understand how the Rule treats valid conditional gifts.

From this, the debate about whether any single endowment creates a 'thing' (that is, a valid common law interest) may now proceed according to the longstanding principles of Socratic enquiry. However, as with Allan's thesis,[711] that argument might quickly descend into a self-fulfilling prophesy: The gift is good at common law *because* it is valid. Yet, that takes us nowhere in our understanding of how the Rule operates. Indeed, it is trite to say that valid contingent future interests exist as 'things' because the common law Rule and or UK statute

710 Marmura (n 683) 308.

711 See further sub-section *(iii) The 'Effective Lives' Hypothesis* beginning on page 45 above.

law[712] already states they form legally enforceable interests. However, since Avicennian theory teaches that all 'things' in materiality are also made dependent upon God's bidding, our best available proposition appears to be that valid contingent future interests exist only as *doubly* conditional entities at common law.

Regrettably, an all-too-familiar fog descends upon that debate if any reference to 'validity' is now extracted from those propositions. *Primus*, how can it be claimed that an entity is existent if its 'thingness' depends upon prior external adjudication which must, therefore, depend upon an initial assumption of 'thingness'? That suggests a classic 'chicken and egg' paradox, which leaves any such gift hovering precariously in limbo between 'thingness' and no 'thingness'. *Secundus*, the same pre-supposition applies equally to a written document.[713] An invalid disposition, even one in documented *physical* existence, proves nothing. *Tertius*, this entire thesis is dedicated to resolving the acknowledged lack of widespread understanding over how the Rule chooses its life in being.[714]

For present purposes, however, the chief point of concern falls upon the 'essence' of perpetuities by exploring the antithetical proposition that whilst a valid contingent future interest is a legally recognised 'thing', there is a realm of possibility beyond that point where it becomes a no 'thing' simply by a mistaken stroke of the pen. Clearly, this will help us understand where the Rule's boundaries 'bite', but without using its own terms to define

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712 Perpetuities and Accumulations Act 2009, UK Public General Acts, 2009 c.18.

713 Here, since many perpetuities endowments of property they would have been governed by the Statute of Frauds 1677, Acts of the English Parliament 1677 (29 Car 2) c 3 until repealed by the Law of Property (Miscellaneous Provisions) Act 1989 (c. 34, Statutes in Force 98:1), ss. 2(8), 4, Sch. 2.

714 LAW COMM at 4.16.

precisely where that outer frontier lies. Thus, attention now turns to the question of no 'thingness' and whether any such ontological state is possible despite al-Ghazālī's claim this is to suggest an absurdity.

(α) The problem that no 'thingness' implies regions in space where time may not exist

Building upon the argument introduced in sub-section (v) beginning on page 237 above, Not all scholars would agree that cause and effect are necessarily linear. Yet, even if true, that contention would add further weight to excluding notions of objective 'time' from questions of conditionality. Here, a useful distinction was drawn between God's *eternality* (timelessness) and the universe as being *perpetual* in time by the Nestorian Christian[715] Ibn Suwār (942 to 1017 CE). He proposed that since time exists only as something which *measures* a body's motion, temporality can only be the subsequent logical *effect* of the animation from which it was caused.[716] In short, the concept of time then becomes *post-existent* to any motion in the 'quiddity' it measures. This ingenious argument produces the counter-intuitive proposition that cause *precedes* time and that the common expectation of linear time is now subject to a prior contingency.

Further problems emerge where there is a lack of motion – such as in the 'binary switching' example summarised in Figure E on page 240 above – the author argues that event cannot easily be located in 'time'. If that event occurs by chance, there is nothing to anchor its occurrence to a *universal* timeline. Arguably, it remains adrift in time because it is

715 The Church of the East believed the divine and human natures of Christ were loosely joined by will, rather than existing in just one personhood.

716 Ibn Suwār, *Treatise on the argument of John the Grammarian on the first origin of the world*, at 247.7 to 18. These views reflect the earlier ideas of Alexander of Aphrodisias, *On Time*, at 93.22 to 28.

sandwiched between two temporal voids. To this, the author would add the further argument that any donor-appointed conditions which achieved that effect suggests that time itself could thereby be switched on or off without Divine intervention. The author submits that possibility would offend against the deepest tenets of Abrahamic theology and may help explain why perpetuities allegedly 'fight against God.[717]

The author responds to those potential difficulties by submitting how the problem of temporal voids is overcome when the *necessity* of 'motion' is pre-determined from the very outset. Plainly, if something must happen, if at all, it must also do so at some future point measured either in time or by means of a calculable probability. If that is right, any intervening voids in temporality must also disappear because they are simply staging posts in a *necessitated* journey with a start and end point rooted in measurable, objective time. To suggest otherwise would be equivalent to asking a train driver to turn off his or her clock whilst travelling *between* stations.

(ß) The problem of created no 'thingness'

Al-Ghazālī' (1058 to 1111 CE) dismissed the problem of purposefully *created* no 'thingness' as an absurdity since it implies God might choose that *nothing* will exist. From this, he regarded created nothingness as an impossibility. However, the favoured view is there is nothing illogical about God creating no 'thingness',[718] since He simply follows His own wish

717 See further n 727 below and the text to which it relates.

718 Thomas Aquinas, *Summa Theologica*, Part 1, Q 25, Art 3; cf Descartes who argued that God can do anything he wishes, but this interpretation has been convincingly refuted. See further: Richard R. La Croix, 'Descartes on Gods Ability to Do the Logically Impossible' (1984) 14 *Canadian Journal of Philosophy*, 455).

not to contradict the universals contained within the laws of physics emanated from Himself.[719] Here, we know through the agency of Lavoisier's law of conservation of mass that matter cannot be created or destroyed. Thus, we can suppose that God will not attempt to create *no* 'thingness' because He has already bid this to be impossible. This is further supported by Einstein's proposition that even empty space is not truly 'empty'; and thus, that true nothingness cannot exist.[720]

That said, there is nothing under Lavoisier's law which prevents the elemental particles contained within existing (real) 'things' being re-fashioned into something new. In this event, it could be counter-argued that God could bid that the *form* of things be changed, even if their *essence* cannot. However, this reply takes us nowhere in this enquiry. Since the universe is not depleted of those elements, there are still the same number of existent 'things' in materiality as there were beforehand. In general terms, therefore, the author suggests that perpetuities (as an existent future possibility of the same fundamental type as all other

719 This conundrum is famously addressed in Aquinas' so-called 'Paradox of the Stone', which asks: 'Is God able to create a stone so heavy that even He could not lift it? If the answer is yes, God cannot be all-powerful since He is unable to lift the stone. However, if the answer is no, He has thereby proved Himself incapable of creating an unliftable stone. Again, God's power seems equally limited. From this, it appears the paradox may be resolved by saying that God cannot be challenged to lift something which He has already bid to be unliftable'. Savage (1967) Yet, there are many alternative arguments. On being in the Bible which teaches that God may be greatly more concerned with forgiveness than with performing miracles: The Gospel According to Mark (2: 2-12).

720 Indeed, Einstein famously remarked that empty space is not filled with nothing. See further, James O. Weatherall, *Void: The Strange Physics of Nothing,* (New Haven: Yale University Press, 2016).

'things') cannot be a *no 'thing'* since that would be to postulate the creation of a void which offends against the very state of Nature.

In any event, the laws of physics overlap significantly with metaphysical concepts. Given the likelihood that not every emanation will be bid into existence, the presence of individual pockets throughout the universe where a specific *'thing'* does not occur is much less absurd than Al-Ghazālī' suggests. Clearly, if there is *potential* space in the universe for every disseminated 'thing', there would inevitably be 'gaps' left unfilled where they were not bid into materiality. Indeed, modern cosmological science has encountered a similar problem by finding the universe contains only five percent of so-called 'normal' matter. Yet, the *necessity* that the remaining void of ninety-five percent of the material universe must be filled with some 'thing' led to the discovering how sixty-eight percent is filled with 'dark energy' and a further twenty-seven percent is filled with 'dark matter',[721] the latter of which has only recently become detectable.[722] In metaphysics, therefore, there would seem to be no compelling reason why the material universe does not have similar *lacunae* where those otherwise existent 'things' *might have been.* Thus, the author argues there is no absurdity implied by those gaps – it simply reflects a miscomprehension of what those gaps represent due to a failure of understanding how they may be a *necessity* of Nature.

721 "Dark Energy, Dark Matter" (USA: NASA,) <https://science.nasa.gov/astrophysics/focus-areas/what-is-dark-energy> [online] nd.

722 NASA Press Release, *Hubble Detects Smallest Known Dark Matter Clumps*, January 08, 2020, Release ID: 2020-05

(γ) The problem of existents subsequently becoming non-existents.

Equally problematic is the reverse situation where initial existence is replaced by *non-existence* - such as, for example, God bidding that the viral entity responsible for HIV shall no longer exist. Here, we encounter two main difficulties:

Firstly, God must know that an entity exists before he can bid its non-existence. However, this would be possible only under the Occasionalist school where God maintained an intimate involvement in material affairs.[723] The majority view in modern times would be against God having any such specific intervention in worldly affairs. Indeed, the author suggests the situation would not be saved by His knowledge of 'particulars' through 'universals' since that virus is only a strain *within* a general category (or species) of 'things' known as 'viruses'. This means that God would not be aware of any *individual* strain of virus since His knowledge is only in a 'general way'.[724] When applied to perpetuities, the same principles apply to God's knowledge of conditional events, rather than of entities. Again, one might expect that He would lack the intimate control needed to bid specific entities into nonexistence.

Secondly, physicists would point immediately to Lavoisier's previously mentioned Law of Conservation of Mass - which states that matter cannot be created or destroyed. Thus, once created, the elemental substance of the HIV virus cannot be *uncreated*, only that its form can change by re-employing those sub-atomic, atomic and molecular 'things' to make something else. Again, this suggests limitations upon what the all-powerful God can do – and these have raised crucial questions over the ages. Nevertheless, there is a solution at hand: Avicennian

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723 Although it should be noted that this related only to rewards and punishments. See n 692 above.

724 See n 688 and 690 above and n 734 below and the textual arguments to which they relate.

theory depends upon the Necessary Existent being a guarantor and that all conditional possibilities will be determined through the instrumentality of cosmological constants known as the laws of Nature. Indeed, large portions of western philosophy and science share a common belief that natural laws are '*necessary'* or the *sine qua non* without which there could be no *structured* existence. Moreover, the work of Galileo, Descartes, and Spinoza all implicitly recognised their immutability; not least when provable by equally immutable principles of mathematics.[725]

The author submits that belief in the *necessity* of Nature has not been diminished in modern times. Indeed, the mathematical and observational proof of Einstein's 'General Relativity' theory has probably *enhanced* reliance upon empiricism. This seems true notwithstanding Leibniz's argument in the seventeenth century which claimed Nature's cosmological constants impressed only a *moral*, rather than a metaphysical, necessity upon possibilities. Thus, he argued wisdom was free to exercise choice over final outcomes.[726]

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725 J. K. McDonough, 'Leibniz on Pre-established Harmony and Causality' in *Lire Leibniz*, trans. Christian Leduc, eds. Mogens Laerke, Christian Leduc, and David Rabouin, (Vrin, 2017) 105, *Section 2. Causation in the Realm of Bodies.*

726 "These considerations make it clear that the laws of nature which regulate the movements are not absolutely necessary, nor are they fully arbitrary. The middle course is that they are a choice of the most perfect wisdom. And this great example of the laws of the movement shows most clearly in the world, due to a difference between these three cases; namely, *first* an absolute, metaphysical necessity or geometric, which can be called blind and which depends only on efficient causes; *second*, a moral necessity, which comes from free choice of wisdom over final causes; and *thirdly*, something absolutely arbitrary, depending on an indifference of balance that we imagine, but which cannot exist where there is no sufficient reason neither in the efficient cause nor in the final cause." Gottfried W. Leibniz, *Die*

However, Leibniz's theory will not be considered further in this thesis since the Bracton authors could not have been influenced by ideas first voiced over 400 years later.

To relate the preceding points to perpetuities, we find one of the clearest instances of *existent* possibilities *qua* 'thing' becoming non-existent where the designated vesting contingency fails. There is nothing the now-frustrated contingent beneficiaries can do to resurrect their expectations. They move instantly from holding a valid legal interest at common law to having nothing at all. Yet, there was no obvious offense against God's Natural law, or was there?

On the one hand, some might argue that superimposing further conditionality upon material 'things' offends against God's omnipotence. In short, that a living person in materiality is not an agent of *necessity* needed to do so validly. God is the one and only necessity. Moreover, as considered in sub-section *(v) 'Things' in Time* beginning on page 237 above, there may be equal difficulties arising from donor interference with *time* by creating an interruption, or dormancy, in beneficial enjoyment which belongs entirely in God's hands. Perhaps, as noted earlier, this provides a chief reason why perpetuities:

> … do fight against God, for they pretend to such a Stability in human Affairs, as the Nature of them admits not of, and they are against the Reason and the Policy of the Law, ...[727]

Perhaps, therefore, these were not decisions for mankind to make, no matter how wealthy or important the founders of dynastic trusts may have been. If so, one imagines how the implicit conflict between man and God was a matter requiring skilful handling by the

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Philosophische Schriften, (1677) Gerhardt C G I, ed, (Berlin: Weidmann, 1875-90) at 6:321 - translated from the original French by the author.

727 *Howard v The Duke of Norfolk* (1681) 3 Chan Cas 14 per Nottingham LC at 31.

thirteenth century treatise writers who would have been particularly mindful that portions of the Romanic and Grecian precedents had *pagan* origins. Perhaps this explains why western scholarship proved much more amenable to receiving scholarship from the Abrahamic world of Islam that it did from polytheistic Rome.[728]

The inconvenience of inactivity nullifying time might be overcome by presuming that mankind can only establish long periods of permissible stasis because of the Divine authorisation implicitly given to mankind by God. In other words, God provides the missing necessity. If the possibility of non-existence arises at the same moment when the 'thing' became existent, non-existence then becomes one of the necessitated outcomes of the scheme which brought it into creation. Were it otherwise, that would be like giving a good cause for complaint if someone bought a lottery ticket and lost. Clearly, there were always *two necessitated outcomes* – winning and losing – which is resolved only when the 'draw' takes place.

(δ) The problem of locating potential existents

In this sub-section, attention now turns to problem situations which strike at the very heart of perpetuities. In broad measure, this is the difficulty that potential existents may be non-existent. There are two aspects of this problem: *(a)* The question of where a future conditional interest is located and whether its existence is dependent upon other factors. In short, is this supposed 'thing' locatable and verifiable by itself? *(b)* Does an entity have the appearance of 'thingness', but closer inspection reveals there is no essence capable of existence. In short, to what extent can we be sure that the 'thing' at issue is a material possibility?

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728 See n 674 above and the text to which it relates.

(a) The author contends that the question of locating a potential existent typically involves matters of cause or effect. In short, whether the 'thing' at issue is more than just the effect of something else. This matter can be examined by exploring the following propositional statement:

> **Statement III** - The lead character in Disney's cartoon film, 'The Sleeping Beauty', is attractive.

Here, there is an important question regarding what is proposed to be in *existence.* This character exists only as a two-dimensional image painted onto a celluloid sheet. Moreover, human perception of Sleeping Beauty's attractiveness is simply the light *reflected* from that sheet, not the celluloid itself. Without light, Sleeping Beauty could not be experienced – and might even be said to have no existence at all in darkness. This point is amplified by developing al-Ghazālī's example of a blind person suddenly gaining vision. However, to what cause would that person attribute his or her new-found ability to see? In complete ignorance of 'light' as an existent, he or she might imagine the cause of seeing was having a working eye, not with some (completely unknown) illuminating force. Thus, imperfect knowledge means the effect (seeing) is thereby attributed to the wrong cause (that is, a working eye). Avicenna would probably have disagreed - using the example of a man floating in mid-air in total sensory deprivation to assert how that man would still be aware of his own existence.[729] It is part of a similar argument that anything which can be imagined, becomes an existent possibility - albeit only in mental form.[730] Famously, a similar question was tackled by asking, 'Does a tree

729 Wisnovsky (n 682) 103.

730 See further n 733 below and the text to which it relates.

falling in a deserted forest make any sound if there was no-one present to hear it?'.[731] The tree may exist, but does the sound? Certainly, that sound could be *imagined* by someone standing in Piccadilly Circus, but is this mental impression sufficient to locate the object (the falling tree) and its emergent properties (the imagined sound) as just one 'thing'? Immediately, there is an uncertainty over *where* the 'thing' in supposed existence (or non-existence) might be located, particularly if it may also be conditionally dependent upon something else (such as light or a human ear) for it to be perceived.

The preceding points now lead us to suggest how cause and effect is determined by a *mono*-directional flow of causality and conditionality. A tree will not fall simply because someone has imagined the sound of a falling tree. Equally, one might conceive of a situation where a tree is felled silently using cranes and hoists. Thus, sound *per se* can never be a necessary condition of a collapsing tree. Sight is dependent upon light, with the inevitable result that light becomes a precondition of being able to see. However, the reverse is not true. Light does not cause vision. Blind people cannot see even on the sunniest days Thus, ignoring modern advances in night-vision technologies, the only logical proposition is that the absence of light makes human vision impossible. In terms of conditionality, light becomes a necessary condition of sight, but the presence of light cannot be a sufficient condition of seeing since other factors (such as a working eye) also influence that outcome.

We might also ask whether it is Sleeping Beauty's pleasing physical appearance which is the 'thing' allegedly in existence? If so, we encounter similar difficulties locating the 'thing' at hand. Is her attractiveness an objectively determinable reality, or is it simply an opinion? However, does this matter? The emotions felt by the statement-maker will be 'real' to that

731 Charles R. Mann and George R. Twiss, *Physics*, (USA: Scott, Foresman and Co, 1910) 235.

person, suggesting they still exist – even if located only *internally* to the individual who experiences them. Furthermore, even if every living person agreed with Statement I above, are we justified elevating any such *shared belief* to the status of *existent reality*? Perhaps so, not least because Avicenna argues that possibilities in celestial non-materiality *are* existents within their own sphere.

When applied to perpetuities, is a designated future contingency simply an *anticipation* existing in the minds of potential beneficiaries? True, it may also exist separately as a written or unwritten promise by the donor, but that seems equally anticipatory. The donor *could* have chosen to give the property away unconditionally but did not to do so. Thus, he or she has thereby anticipated the alternative possibility of the gift failing completely. In that event, it seems perfectly arguable the *necessity* that one of those two possible outcomes *must* occur then elevates the parties' simple anticipations to a *necessitated* outcome. Accordingly, the author submits that al-Ghazālī's error in postulating the absurdity of non-existence is due to his neglect of negative outcomes.

(b) There are parallel concerns regarding the confusion which may result where seemingly existent 'things' may not exist at all. Consider the following propositional statement:

> **Statement IV** - Hercule Poirot was the most successful of all the detectives who lived and worked at that time.[732]

[732] There are numerous versions of this argument including ideas passing through the hands of Bertrand Russell and Noam Chomsky. This example was inspired by "Sherlock Holmes was a brilliant detective" in Kroon F and Voltolini A, "Fiction", *The Stanford Encyclopedia of Philosophy* (Winter 2019 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/win2019/entries/fiction/>. The substitution of Poirot is

Let us suppose empirical evidence proved this proposition was correct in fact. However, the author argues this takes us no-where except to prove the existence of the empirical data used to support that statement. Indeed, any such empirical proof is misleading because it simply adds a factual veneer to the earlier Statement III which belies a more telling situation; namely, that Hercule Poirot is fictional character who has *never* existed as a real person. Moreover, since Poirot did not have an actual career, over precisely what period are comparisons supposed to be drawn? However, to what extent does this apparent lack of material existence matter? We can still conceive of him and experience his words and deeds from books, movies, and plays. Avicenna would have been untroubled: If something could be conceived, then it would be capable of existence in mental form. Thus, as with Statement III above, the apparent non-existence of something represents an interesting conceptual discussion-point but does not create the 'absurdity' alleged by al-Ghazālī'.

Returning to perpetuities, the preceding arguments impact greatly upon the potential 'thingness' of contingent future possibilities – and particularly so when tested at the boundary between fiction and factual impossibility. This point may be explored using the following *testamentary* gift of Greenacre:

> (20) To such of my lineal relatives living on the date of my death who set foot on the planet Saturn during their own lifetimes.

For the same reasons given regarding gift (3) on page 20 above, gift (20) is perfectly valid under the common law Rule because the contingent postponement is restricted to occur within the lifetimes of then-existing persons - the surviving relatives. However, the technology

important because it avoids the complication of Conan Doyle also being a consulting detective - and therefore that the Sherlock Holmes character was partly biographical.

required to reach Saturn speedily enough does not yet exist and the immense gravitational forces on that planet would certainly make this a suicide mission. Thus, the conditional uncertainty implicit in gift (20) proves to be vastly greater than visiting Mars in gift (3) – not least because NASA has advanced plans for humans to visit Mars, but not Saturn. Yet, the Rule draws no distinction between these two contingent possibilities where one is demonstrably possible and the other seems quite illusory.

Yet, as with the analysis of Poirot in Statement IV above, there are difficulties finding a compelling reason for treating gifts (3) and (20) differently. The Rule's benchmark test depends only upon a conditional constraint supplied by just one lifetime, and that criteria is met without regard to their differing degrees of probability. Indeed, we need only refer back to Leach's four 'freak' cases to see how the common law has persistently failed to consider the *likelihood* of vesting separately from the existence of the life needed to constrain its final occurrence -even if that would involve a virtual impossibility.

The author contends *none* of the foregoing conclusions are negated by the Avicennian belief that a mental picture of something which no longer exists acquires all the *properties* (but not the substance) of that image when it was originally perceived.[733] Here, it must be understood that the subsequent recollection of an image of a non-existent Poirot can have no such properties: It is not *Poirot* that is remembered, but *David Suchet's* acting performance and *Agatha Christie's* words. Were it otherwise, this *ex post facto* elevation of the *non-substantial* to the *substantial* would then become a separate 'creationist' process outside the celestial *nous*. That cannot be right since it implies essence without intellection, compliance

733 Yasin A. Ceylan, 'A Critical Approach to the Avicennian Distinction of Essence and Existence' (1993) 32 *Islamic Studies*, 329, 333.

with God's 'forms' or even a *necessary* cause. The same must be equally true of perpetuities. Here, we should be careful not to defend void interests which, whilst having the appearance of being quite reasonable, nevertheless offend against the Rule's definitional criteria. That would be to repeat the same mistake made by Morris and Wade. For good or bad, the Rule is concerned only with the presence of a necessary condition that final vesting must occur, if at all, within 21 years of a then-living person's demise. Conditionality, per se, is irrelevant since the author asserts the *improbability* of vesting cannot be determined in any other way.

(d) Concluding upon the importance of necessity in Avicennian modality

The first aspect of Avicennian modality explored in sub-section *(b) Avicennian modality 1: Conditionality – Causality v Necessity* is explicitly made to depend upon the notion of necessity. Thus, no further explanation is required. Furthermore, it is evident from the discussions in sub-section *(c) Avicennian modality 2: Possibility - Existence v Essence.* (α) to (δ) above that potential difficulties involving the essence of conditional 'things' are all avoided where the posited outcome must *necessarily* result from its initiating cause. In each case, the author submits that certainty is salvaged from the spectre of uncertainty by the necessity that the posited event *must* happen, if it happens at all. Thus, whether a necessitated endpoint provides continuous, linear, objective time in (α); the necessity of non-contradiction supplied by immutable Natural laws in (β); God as the Necessary Existent from whom all authority and alternative outcomes emanate either as principal or through agents in (γ); or by the instrumentality of a life in being to ensure a necessitated outcome in (δ), a convincing solution is supplied by that which is *necessary*. Thus, the author submits that al-Ghazālī's claim that a no 'thing' is absurd is maintainable only where the 'splint' or 'bridge' supplied by a *necessary* outcome is removed.

The role of 'necessity' now seems crucial in the process by which 'thing's enter existence. For this reason, that element will now be employed as a *first* stage in the new model proposed and tested in Chapter 5 below. The second stage, 'annexation' as the modality by which necessity is guaranteed in materiality, is considered in sub-section (4) beginning on page 297 below.

(3) Two Collateral Issues

(i) Perpetual Conditionality

The Avicennian view of the material universe as 'things' held in a state of perpetual conditionality, brings us to a point where our common understanding of what it means to 'own' property confronts the most central principle of theology. Here, God is the only certain and unconditional entity as the One Necessary Being. However, if every 'thing' other than God is conditional, how can a coherent distinction then be raised between those supposedly *unconditional* claims and the *contingent* interests supplied by perpetuities? Where does that leave the so-called 'absolute' or allodial ownership claims made over property in English? Avicennian theory teaches that both are equally conditional at the sole behest of God. The resulting dilemma may be tackled by two arguments:

Firstly, there is a world of difference between Divine and donor-appointed conditionality which scarcely requires explanation. Thus, the conditionality imposed by mankind's own hands can be assigned to an unambiguously distinct category. However, this otherwise convincing argument is in danger of proving too much. If God's knowledge of particulars is

limited only to *universals*,[734] 'things' like perpetuities (of which there is only *one* species[735]) must thereby come within His knowledge and understanding.[736] At this point, the boundary between God's doing, and what mankind has been *authorised* to do by God's implicit bidding, then becomes rather less precisely definable.[737]

Secondly, if every 'thing' is conditional, how is it possible to raise a coherent distinction between the conditionality of so-called *absolute* interests and the conditionality of *contingent* future interests? Indeed, it is not unreasonable to suggest that any boundary in *permissible* degrees of conditionality between valid and invalid perpetuities would then appear to have no clear conceptual justification. The author responds to any such argument by contending this dilemma may be clarified by Avicenna's assertion that every *necessity* implies a concomitant *certainty*. In that event, the boundary between validity and invalidity is then revealed to have a coherent foundation in the pursuit of *certainty*, not simply limiting the acceptable limits of donor-appointed conditionality. By doing so, the parallels between Avicennian and ancient Roman theory[738] seem uncanny – although any firm hypotheses on this matter would require investigation beyond the scope of the present thesis.

734 See n 688 above and the text to which it relates.

735 That is to say, the broad category of 'things' which are all made to depend upon the outcome of an uncertain future event.

736 See further n 690 above and the text to which it relates.

737 See further page 251 above.

738 See sub-section *(iv) The Use of Donor-Appointed Conditions in Ancient Rome* beginning on page 94 above.

(ii) The Concept of 'Remote' Causation

The author submits the very language employed by perpetuity theorists has resulted from a failure to adhere strictly to Aristotelian notions of causality. Indeed, it is contended that a chief problem of modern common law perpetuity scholarship arose because overly broad notions of causality were substituted for the previous rigour of ancient Greek thinking.[739] This resulted in flawed *normative* hypotheses justified by the apparent unfairness of seemingly eccentric *final* causes. This error becomes particularly evident when consideration is given to the crucial distinction between *proximate* and *remote* final causes:

(a) The Aristotelian notion of '*proximate'* final causes was associated with a close and *necessary* connection between the cause and the existence of its posited effect. From this, a proximate final cause thereby supplied the *necessity* which offered logical proof that X was possible as an *existent* entity, and therefore would then become a valid, recognised 'thing'.[740] This fundamental proposition is incorporated in the present thesis explicitly in sub-section (3) beginning on page 295 below.

(b) '*Remote'* final causes were associated with *efficient* causation – usually through the agency of intermediaries or of intermediate effects – where the connection between cause

739 This is particularly evident from the extension of a single 'measuring life in being' to the inexactness of numerous lives. See further sub-section *(a) Early judicial voices on the propinquity of living persons* beginning on page 144 above.

740 Aristotle, *Posterior Analytics*, Book 1, Chapter 13.

and posited effect was treated as being too uncertain.[741] Thus, 'remoteness' came to signify a *lack* of proof that the posited effect was possible in materiality, and therefore invalid.[742]

The author contends that whilst the term 'remoteness' soon entered the vocabulary of English perpetuity theory its purely Aristotelian foundations were quickly lost. Instead, the question of whether a contingent interest was unduly 'remote' then came to be treated as a public policy issue based upon excessive prolongation, rather than as a logical conclusion to be drawn from Aristotle's notion of causal connection. That said, a possible counterargument might be advanced that since the common law of perpetuities was concerned with conditionality, not causality, the Aristotelian notion *remoteness of cause* no longer applied. However, for the reasons given in the example of a public footpath beginning on page 260 above, this is entirely unconvincing: The author argues that where both *causal* and *conditional* elements become entwined in one process, the remoteness of cause to its posited effect and the remoteness of a condition to that same effect then becomes practically indistinguishable.

In summary, the author argues that if pure Aristotelian theory had prevailed, a 'remote' possibility would simply have meant one whose founding cause (that is, the conditional terms upon which the gift was made) was not *necessarily* connected to its posited effect or outcome. If so, the gift would fail because it was not given on terms which insisted, as a matter of logical necessity, that the disposition must proceed as anticipated within strict limits. Indeed, it is further submitted this is likely be the origin of complaints that a perpetuity might *never* vest.

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741 See further Nicholas St John Green, 'Proximate and remote cause' (1870) 4 *American Law Review,* 201.

742 "*Nam posita causa remota non ponitur effectus, sed ipsa remota removetur*.": The remote cause being given, the effect may or may not follow. ibid.

The author argues this is precisely the point at which 'Causality' theory fails. Morris and Wade's thesis has adopted an overly broad view of 'remoteness' which begins to place policy, not principle, front and centre in perpetuity theory.[743] This explains why their three illustrations are void at common law, but also why each has a seductively attractive (but ultimately bogus) reason why they *should* be valid. Morris and Wade would have been better advised to recognise how those (invalid) lives bore an *efficient* causal link to final vesting, but that is not the same as being *necessary* in achieving that posited outcome.

Against this hypothesis lies the argument that gift (19) above remains valid at common law notwithstanding its (virtual) impossibility. So, how can that circle be squared? The author argues that a convincing answer can be found in the logical path between inception and conclusion. We can imagine how landing on Saturn might be achieved, and it is possible to anticipate all the practical steps needed to do so. Thus, unless and until proven to be logically *impossible*, the causal connection between start and finish remains *unbroken* as a possibility.

(C) Living Persons in English Perpetuity Theory

Nutshell

The preceding discussions are now applied specifically to the question of perpetuities. Here, the confluence of ancient Greek and Roman thinking, Neoplatonic and Avicennian philosophy, and the unique impact of feudalistic relations in medieval England, reveal an old – and hitherto overlooked - purpose of living persons as instruments of necessity, and ultimately of certainty, under the common law. This is tested further by reference to the law of determinable fees leading to an innovative restatement of how the Rule should work.

743 See further sub-section *(iv) The 'Causal Connection' Hypotheses* beginning at page 56 below.

The preceding discussions now bring us to the point where the conceptual threads revealed may now be woven into a new theory of conditionality and the role of 'measuring lives in being' under English common law. That said, since the superstructure of this hypothesis relies heavily upon sources taken from *outside* the common law, part of what follows is equally relevant to civilian and Islamic thinking. Regrettably, the scale of any such analysis is too great to be included in this thesis, but certainly merits further investigation at a later time.

In this section, the conceptual 'hub' is provided by the notion of 'measuring lives in being' since that is unarguably the centrality of English perpetuity theory. Thus, the following synthesis focuses exclusively upon developing a new understanding of any such life in *esse*.

(1) Living Persons Determine the 'Thingness' of Property

At the broadest level of generality, the most recent precedent for separating 'property' from the lifetime of its owner might be drawn from Penner's definition in the United States' Fourth (Draft) Restatement of Property 2017. There, objects should be "no more than contingently associated" with a specific owner before they are capable of being treated as property. There, the words 'no more than' are critical. If an object is inseparable from its owner, they must be considered as being coterminous with one-another; with the result that it has no independent existence capable of being regarded as property. Kant argued similarly regarding the need for 'distinctiveness'. Thus, for example, a 10-week-old foetus en ventre sa mere is most unlikely to be regarded as an object of property. Contrastingly, a thing which is only notionally measured by the life or lives of some person(s), such as an entail, is likely to be no more than just 'contingently associated' with them, such that it satisfies the criteria of existing quite distinctly from any living person.

The foregoing paragraph suggests that property might even be *defined* by its *lack* of any direct connection with a human life. Indeed, that conceptual detachment might even suggest how perpetuities become a persistent quasi-corporate 'thing' intended, as they were in ancient Rome, to provide continuing representation on earth *after* the founder's death.[744] If so, it could be suggested that the propinquity of living persons to a perpetuity's 'thingness' would then exist independently of *living* persons since their chief purpose is to serve the *dead*. Nevertheless, the author submits that any such proposition would be in grave error.

Firstly, the doctrine *res nullis cedit primo occupanti* discussed in sub-section *(ii) Occupancy Theory, Inheritance and Perpetuities* beginning on page 185 above anticipates that property interests arise where a living person took un-owned objects into their personal possession. Accordingly, the bond between mankind and owned property was then made definitionally dependent upon its occupation and defence by a *living* person. *Secondly*, the chief anti-perpetuity policy in ancient Rome depended upon *accelerating* the living donee's interest to a fully allodial interest. *Thirdly*, the Digest anticipates that only *one* person can control the occurrence of conditional possibilities since the possibility of interference by others was eliminated through the rules which disregarded external influence.[745] *Finally*, Roman law gave any co-owner an inviolable right of partition[746] who could, therefore, always make him or herself the sole owner of that part. Again, we find that the 'thingness' of property ownership in ancient Rome was always reducible to the *dominium* of one living person.

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744 See further sub-section *(2) The Importance of Testate Death* beginning on page 85 above.

745 See further n 277 above and the text to which it relates.

746 This was the action called *communi dividundo*: "DIGEST, Lib. X, tit. 3; INST. IV, tit. 17, Sec. S.

Similar ideas can be found in the heritability of post-Conquest grants in England.[747] There, almost all commentators would agree that notions of heritable life tenancies were commonplace by at least 1225. The later transmission of those landholdings then became bound to the next successor's life by a living person taking seisin of the land, and even to prove the prior seisin of the person from who they sought to inherit.[748] The swearing of homage sealed that association between a life, his lord and the land, and even provided a permissible prolongation to three successive generations in the case of the English *maritagium*.[749] Thus, by the early thirteenth century, the author contends that no informed person of the day would have doubted that living persons provided the yardstick by which landholdings were conceived.

More recently, we can see how the devolution of estates places a person's life or death explicitly at the heart of its quiddity or 'thingness'. Consider T's disposition of Blackacre *before* the English Settled Land Acts 1882 to 1925:

21. To A for her lifetime and then to B.

Here, the life estate held by A invests her with lifetime control; but is it not equally true that A's life also defines her portional stake in Blackacre, and thus, the *quantum* of *thingness* she enjoys? Indeed, the boundaries of the 'thing' now called 'A's life tenancy in Blackacre' depends crucially upon both the land itself and the restrictions necessarily implied by A's life tenancy and the remainder which follows. Yet A's interest is less that that enjoyed by T. Here,

747 See further sub-section *(2) Identifying the Seeds of Change* beginning on page 113 above.

748 See further sub-section (*3) Ruminating Upon the Potentially Unifying Role of Seisin* beginning on page 123 above.

749 See sub-section *(ii) Later Heritability* beginning on page 121 above.

the law of waste binds only a non-absolute possessor.[750] In that crucial respect, A suffers a real practical restriction because her interest is now impressed with an obligation not to neglect the land. That protective duty was not an insignificant burden and provided a sharp contrast between absolute ownership and a life tenancy.

The relationship between living persons and objects may arise under where the propinquity of A's life to the disposition also helps define a separate property 'thingness' called 'B's residual interest in Blackacre after A's demise'. Thus, A's life is instrumental in *two* property interests – the limited lifetime interest being predicated upon her life *continuing* whilst the absolute residual interest depends upon her life having *ended*. For this very reason, the author submits this provides compelling evidence of how each 'thingness' is the product of a unique fusion of persons, land, quantum of interest and duration.

(2) Lives as an Instrument of Ownership Authority or Control

Taken by itself*, '*thingness' does not necessarily imply that an object *is* owned property, but only that it is *capable* of being owned. Something more is required. Here, New Essentialism helps address this issue by asking whether there are one or more persons who can exercise authority or control over the 'thing' in question. By doing so, living persons thereby re-emerge in a separate role to demonstrate that some 'thing' is owned because it has been taken under the control of a living person.[751] Again, the following discussion is applied only to the question of perpetuities and is examined from two perspectives:

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750 See also n 586 above and the text to which it relates.

751 See sub-section *(ii) Occupancy Theory, Inheritance and Perpetuities* beginning on page 170 above.

(a) The Donor: A useful beginning can be made by considering the *donor's* authority to create a conditional future endowment. Here, is it not self-evident that valid contingent interests are created by an original, absolute owner because he or she has a lawful power to do so? Indeed, it has already been argued how perpetuities depend upon them enjoying a *monopoly* of ownership power over property.[752] Plainly, if that was not possible, valid contingent future interests could never exist at all.[753] A similar train of logic also explains why *invalid* contingent future interests are incapable of acquiring any kind of property status. Clearly, the required *authority* in law is missing since donors are expressly prohibited from creating any such interests as a policy against the abuse of a dominant position over others. Accordingly, social policy then determines that if some 'thing' cannot be created in law, that lack of control over its creation makes it equally incapable of being owned.

(b) The Donees: Initially, the critical reader might argue this is not a question worth asking since contingent future gifts are designed purposefully to *withhold* meaningful control from beneficiaries until the appointed vesting condition occurs. However, legal history reveals many examples of authority or control being held by the expectant *beneficiaries*. Quite naturally, these are *rival* to the donor's authority since the donee's yearning for beneficial enjoyment has often led to their various attempts to strike down the donor's dispositive scheme. This is particularly true of an English beneficiary's right to bar an entail or the

752 See sub-section *(iv) Ownership and Monopoly Power* beginning on page 28 above.

753 That said, it appears that *fideicommissa* were sometimes imposed as a restitutional remedy against *mala fides* in circumstances largely akin to that of a constructive trusteeship in modern English law: INST. 2.23.12.

widespread practice of life tenants alienating marriage portions despite the terms of settlement.[754]

Beyond England's shores, sub-*section* (iv) beginning on page 99 above revealed the even stronger controls held by contingent beneficiaries. There, Romanic jurisprudence invested potential beneficiaries with putative lifetime control over future contingent events,[755] annulled many conditions which fell outside the donee's direct control,[756] and nullified any self-serving third-party influence over the gift.[757] That marked a comprehensive programme of accelerating the 'vesting' of conditional gifts in the donee from the very outset.

New Essentialist/ Architecture theory supplements that understanding. The preceding discussion demonstrates how *valid* ownership interests have a recognisable 'thingness', accompanied by sufficient dispositional *authority*, by which an interest capable of individual ownership might be created. Moreover, it seems self-evident that where any such purported interest is invalid, and enjoys no *lawful* existence, no living person exists to exercise 'authority' over it and to provide boundaries upon its 'thingness'. In both cases, therefore, this paper argues the outcome depends equally upon the propinquity, or non-propinquity, of living persons as a determinant of the 'thingness' and 'authority' needed to create private property ownership.

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754 See further n 431 above and the text to which it relates.

755 DIGEST 36.2.4; 35.1.22.

756 'When a legacy is left to a woman under the condition 'if she does not marry' and is further charged on her honour to make it over to Titius if she does marry, the opportune rule is that even should she marry, she can claim the legacy and need not comply with the further charge.' DIGEST 35.1.22.

757 DIGEST 35.1.24. See also DIGEST 35.1.40 and 35.1.81.1.

Figure D on page 222 above may now be expanded to reflect the hypothesised impact of Aristotelian, Neoplatonic, Avicennian and New Essentialist/ Architecture theory on perpetuities: In this regard, the propinquity of a life as a necessary condition that there can be no transgression beyond 'line B' on Figure K below simply superimposes these individual conclusions regarding 'thingness' and 'authority' onto Figure D above. The reader will also recognise how the stated 'emergent features' have been drawn from the thesis presented thus far.

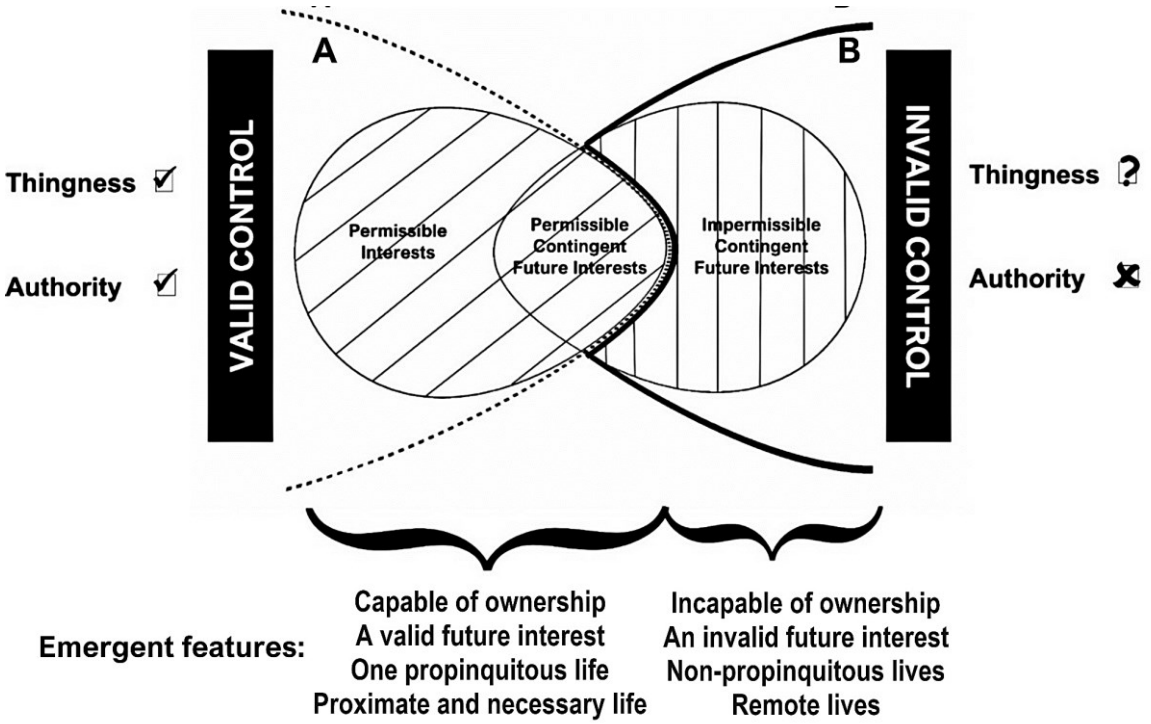

Figure K: Mapping 'thingness' and 'authority' onto Figure D

To examine this model in terms of Aristotelian philosophy, those lives serve as a proximate and necessary condition that any such transgression cannot occur. The consequences of validity or invalidity follow from that distinction whereby valid interests are impressed with the 'thingness' and 'authority' provided by a proximate and necessary life, whereas invalid interests are not. Whilst it is clear there is no 'authority' to create invalid

interests (represented by the crossed tick-box on Figure K above), it could reasonably be argued that invalid interests thereby lack 'thingness' if they are neither recognised nor defensible at law – represented by the "?" in the 'thingness' tick-box also on Figure K above.

One key strength of this proposal is that perpetuities and the propinquity of a living person as a necessary condition of a valid interest at common law are now incorporated into a *one* 'big picture' view of English property law. For clarity, this is because the role of perpetuity law is defined by the same elements of 'thingness' and 'authority' used in property ownership theory such that all questions may then be tackled at once using precisely the same vocabulary. The author submits that is helpful since it also eliminates the opportunity for the definitional circularities and *non sequiturs* discussed above.[758]

The model summarised in Figure K above offers further benefits: Line 'A' is *not* fixed. Therefore, it can accommodate the abundance of policy justifications for the Rule to be found, for example, in Stake's excellent review of perpetuity policy concerns.[759] Any one of these could cause a leftward or rightward shift of line 'A'. Clearly, the proportional size of the vertical and horizontal hatched areas would then change, with a corresponding enlargement or contraction of the boundaries of permissibility and the *quantum* of proprietary control. Indeed, in jurisdictions such as Manitoba where the Rule has been abolished entirely, there is no line 'B' or any vertically hatched area at all. From this, it follows that any such shifts in

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758 See sub-sections *(α) The theory implies a definitional circularity* and *(b) Relevant lives* beginning on pages 50 and 57 respectively above.

759 Jeffrey E. Stake, 'Darwin, Donations, and the Illusion of Dead Hand Control' (1990). Articles by Maurer Faculty. Paper 628. <http://www.repository.law.indiana.edu/facpub/628> [online].

ownership authority also suggest that the *quantum* of ownership interest in that *thing* must also vary by an equivalent amount.

Furthermore, the author contends the three regions and line 'A' in Figure K above could easily be re-designated represent almost *any* policy concern ranging from assisted suicide to NHS resource allocation decisions - where the zone of intersection then becomes a region of compromise or debate in the 'Public' or 'National' interest.

By its very nature, the justification for this proposition is entirely intuitive. Indeed, it is noteworthy that Kant, demonstrating a heavy reliance upon Roman jurisprudence, would regard the possibility of owning 'an object of choice' (which, for present purposes, is valuable property), but not having use of it, (in this case, that property being withdrawn from use as an instrument of dynastic control) as entirely *self-contradictory*.[760] Nevertheless, the author contends his point was somewhat overstated. If so, Kant's solution that nature and law-giving combine to unite the *possible* with the *actual*[761] would, if applied to perpetuities, imply the use of Romanic theory to *accelerate* conditional interests to full ownership. However, this seems to offer little more than the pragmatic solution of simply redefining the *conditional* property within the diagonal hatched area to *absoluteness*. If so, no meaningful ownership exists in the vertically hatched region, and that Kantian theory seems to suggest line 'B' probably represents the final edge of a metaphysical cliff. Yet, whilst that argument offers a plausible overall conclusion, the author submits that Kant placed his cart before the *causal* horse since the boundaries of permissible perpetuity would then be defined by the limits of

760 Immanuel Kant, *Metaphysics of morals* (1797) at 6:247:251 [at 405 to 406]; Mary Gregor, 'Kant's Theory of Property' (1988) 41 *The Review of Metaphysics* 757, 775.

761 Kant, ibid, at 6:257, [at 410].

property ownership. That would be a similar, but *reversed*, version of Professor Allan's unhelpful self-fulfilling prophesy that valid interests have valid measuring lives, or that an unlawful perpetuity is unconstrained by any life and becomes an unlawful property interest.[762] Moreover, there is the additional difficulty that the very notion of control by living persons rests upon a *non sequitur* explained in the second point on page 224 above.

Nevertheless, the author recognises that whilst the concepts of 'thingness' and 'authority' introduce an informative philosophical framework to the debate, they lack the precision and rigor needed by legal practitioners to help navigate their way through complex modern-day dispositions. Indeed, it is submitted that any such leap towards abstraction seems likely to replace previous complaints about conceptual complexity with an, arguably even greater, problem of dysfunctional vagueness. That is the very antithesis of New Essentialism/ Architecture theory's search for *coherent* centrality and Gray and Gray's imperative of 'conceptual vigilance' considered above.[763] However, whilst the author acknowledges the model developed thus far lacks precision, Figure K provides the conceptual clarity needed to help develop a new and suitably robust formula in Chapter 5 below.

(3) Living Persons as an Instrument of Necessity and Certainty

The Romanic conception of living person providing an instrument of personal control in perpetuities seems attractive until one engages with Avicennian theory; that is, how an existent 'thing' is dependent upon the *necessity* of its creation. At this point, therefore, a living person is not just instrumental in ensuring the posited effect, it must do so as a matter of

762 See further sub-section (*α) The theory implies a definitional circularity* beginning on page 50 above.

763 See n 625 above.

logical necessity.[764] Here, there is no question of that instrumentality being shared or substituted by another Romanic agent,[765] Avicenna's *necessary* condition (which the author will later conclude is what the common law now calls a 'measuring life in being') is the *sine qua non* without which there can never be an effective constraint on future uncertainty.

A similar conclusion can be reached from what we may now call Avicennian 'necessity' theory. There, we have seen how the necessitated connection between the founding condition and the posited effect proves the *certainty* of its occurrence, if it ever occurs at all. Moreover, we have found from the preceding analysis of the sub-contingencies upon which the dispositive scheme is built, the *necessitated* existence of a living person supplies that certainty in English law.[766] Again, as in ancient Rome, any such living person either produces, or fails to produce, a valid contingent future interest by means of a logical sequence of efficient causes all bound together in a scheme which *demands* that life must make this so.[767] Yet, the author recognises this proposition is only partially in place. In sub-section (iv) immediately below, the necessitating effect of any such life has even deeper foundations in the common law doctrine of *annexation*.

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764 See sub-section *(β) Disentangling conditionality from causation* beginning on page 237 above.

765 Such as someone who has an interest the gift failing. See sub-*section (iv) The Use of Donor-Appointed Conditions in Ancient Rome* beginning on page 94 above and particularly at *point (a)* beginning on page 88 above.

766 See sub-section *(b) Avicennian modality 1: Conditionality – Causality v Necessity* beginning at page 234 above, and particularly the argument supported by Figure I on page 241.

767 ibid; see also sub-section *(ii) The Concept of 'Remote' Causation* beginning on page 189 above. That said, pages 206 above and 286 below how a *non sequitur* at the heart of Romanic jurisprudence means Avicennian theory may prove to be the more robust.

(4) A Life as a 'Necessity' Implicitly 'Annexed' to the Modus

The discussion in sub-section *(b) Annexing conditional terms to the modus* beginning on page 151 above now returns to the fore by helping cement the causal necessity of donor-appointed conditions to their gifts. However, this reference to annexation is not the same notion which would be familiar to modern practitioners. Instead of attaching, joining or merging some 'thing' to another 'thing', Bereford CJ in *Fitzwarin's Case* (1311) identified the purpose of annexation as the creation of new *private* law between the parties that *defeated* the common law.[768] Given that medieval construction of the term annexation, the question then becomes, 'precisely how and why were new laws fashioned by those private agreements?'

It seems pedestrian to suggest that Bereford's intention was simply to help fill the enormous gaps in English jurisprudence which existed during those early times. The Bracton authors barely mentioned the largest of these gaps, a law of contract, when it would have been most opportune for them to do so. Indeed, why did it take another three centuries before a law governing private contracts emerged in the seminal decision of *Slade's Case* (1602).[769] Yet, the sphere of contract might be expected to have been one of the first to benefit from development. However, the author suggests a much more prosaic explanation. Fourteenth century England was not a period of mercantilism, but where wealth was represented almost entirely by land *not* commerce. Indeed, we find *Fitzwarin's Case* (1311) involved a claim for *dower* in a family plagued with infighting, and the new law being

768 *FitzWarin's Case* (1311) Mich 5 Edw II 28. See further n 470 above and the text to which it relates.

769 *Slade's Case* (1602) 4 Co. Rep. 91a.

fashioned was that of an abused woman's property rights which Bereford CJ himself regarded as 'mischievous'.[770]

Nevertheless, the veil of darkness which descended up those old notions of annexation must be recognised and should not allow this thesis to descend into unprovable speculation. Instead, the author submits that Aristotelian theory has much to contribute to our understanding of perpetuities and modern notions of annexation. This is particularly so when we are reminded how the creation of perpetuities in England always creates *two* contingent interests – that is, the possibility of beneficial vesting *in interest* alongside the alternative possibility of vesting *in reversion*. Thus, it would seem strange to examine the Rule only as a policy instrument concerned to ensuring 'fairness' for beneficiaries. Yet, it is to be regretted that this perspective is almost completely overlooked in the literature. Thus, it is to reversionary interests that our focus now turns.

(i) Perpetuities from The Reversioner's Perspective

(a) Basic Principles of remainders and reversions

Coke defined a remainder as "a residue of an estate in land depending upon a particular estate and created together with the same".[771] As such, a remainder is a residuary interest created at the *same* time as the grant of a particular estate and which follows the first granted interest. This may be illustrated by a gift of Blackacre:

(22) To B for life and then to C and his heirs.

770 *FitzWarin's Case* (1311) Mich 5 Edw II 28.

771 CO LITT f. 49a.

Here, both B's immediate estate and C's future estate are created at the same time, where the latter - being *in futuro* - is the estate in remainder. Therefore, C's estate takes a vested remainder in Blackacre since, B will eventually die and there is no contingency[772] to prevent either C or his heirs from receiving that property in the future. However, a remainder may also be made contingent upon an uncertain future event - which can be illustrated by the following gift of Whiteacre:

(23) To A for life with remainder to B and his heirs if B goes to Rome.

Since there can be no abeyance in seisin[773], B will receive Whiteacre only if he goes to Rome before A's death - and the uncertainty whether he will or will not then makes that remainder *contingent* upon his visit.

Reversions are a different kind of interest. Here, Coke defined these as follows:

> A reversion is where the residue of the estate always doth continue in him … who made the particular estate, or where the particular estate is derived out of his estate.[774]

Thus, a reversion is a part of the estate that returns to the grantor *by operation of law*[775] where it has not been fully disposed of by his gift. This may be illustrated by A's gift of Greenacre:

(24) To C for life.

772 Other than where C dies before A and without leaving heirs.

773 Preston (n 475) Vol. 1, 216.

774 CO LITT f 322b

775 Challis (n 471) 78.

Clearly, once C dies - there being no other interest in succession - Greenacre must then return to A as a reversion. Equally clearly, A's interest is not in remainder since, the gift did not *expressly* create a separate estate in his own favour at the time of grant.

(b) Determinable Fees in English Law

According to Challis[776], a determinable fee is one where the grant of a fee is made subject to a qualification permitted by law which then determines on that event's occurrence. However, since all fees should be capable of continuing forever, any such determining event must be one which may *never* happen[777]. Therefore, if the event which is expressed to determine the estate must happen, the purported grant passes no fee in law since, it then becomes certain the fee cannot endure forever[778].

(c) Varieties of Determinable Fee

There appear to be two varieties of determinable fee. These are:

One - until a specified event shall happen, provided it may never happen. This variety of determinable interest may be illustrated by the following example gift of Blackacre:

(25) To A and his heirs until the Manor House shall fall.

In this instance, the falling of the Manor House ends A's succession of heirs and Blackacre will then revert to the grantor's estate.

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776 ibid 251 et seq.

777 If the determining event becomes impossible, for example where it is dependent on the marriage of a now-deceased person, the determinable fee can never be enlarged into a full fee simple except by a release of the possibility of reverter. ibid 254.

778 Preston (n 475) Vol. 1, 479.

Two - so long as an existing situation continues, provided the status quo may continue indefinitely. Here, this second variety of determinable interest may be illustrated by an almost identical bequest:

> (26) To A and his heirs so long as the Manor House shall stand.

As before, the Manor House falling determines the granted fee precisely because the estate is limited to last for only so long as the house stands. The right of reverter arises once that continuing state of things has come to an end.

Immediately, it can be seen these two varieties of interest are distinguished only by their different drafting style. Clearly, the occurrence of any event can be expressed either positively or negatively in the manner illustrated above. In this regard, it does not matter whether a draftsman uses the words "until" or "unless", or, "so long as" or "while" to describe the limitation - provided it is one which may never happen. In both gifts (25) and (26) above, the Manor House could stand forever - and the uncertainty over how long it might stand then creates a valid determinable interest at common law. This proposition is also important because it means, at least insofar as perpetuity law is concerned, the common law seems to have closed its eyes to the difference between positive and negative covenants, thereby removing any need to question whether it 'runs' with the land.[779]

Challis lists many different examples of determinable fee,[780] to which several more are now added to illustrate the wide variety of those estates. These are divided into two lists for

779 This crucial proposition is further developed on page 281 below.

780 Challis (n 471) 255 et seq.

reasons WHICH will allow us to draw a better comparison between English determinable fees and perpetuities under the common law Rule:

List A

To A and his heirs being lords of the manor of Kingston Lisle.[781]

To A and his heirs being the Kings of Scotland.[782]

To A and his heirs as tenants of the Manor Dale.[783]

To A as long as a tree shall grow.[784]

To A as long as such a tree shall stand.[785]

To A as long as the Church of St. Paul shall stand.[786]

To A as long as he shall pay 20s. annually to B.[787]

To A so long as B shall have heirs.[788]

To A so long as any male issue of B shall live.[789]

To A until the marriage of B shall take place.[790]

To A until such time as he or his heirs shall default in paying the £20 instalments.[791]

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781 Preston (n 475) Vol. 1, 443.

782 CO LITT f. 27 a, note 6.

783 CO LITT f. 27 a; 2 Blk Comm at 109.

784 *Lilford's Case* (1614) 11 Co. Rep. 49a; *Ayres v Faulkland* (1697) 1 Salk 231.

785 *Idle v Cook* (1705) 1 P. Wms. 70, 75.

786 *Walsingham's Case* (1579) 2 Plowd. 557.

787 Plowd. 557;

788 CO LITT f. 18 a.; See further the references quoted by Challis (n 471) 256.

789 *Poole v Needham* (1608) Yelv 149.

790 Preston (n 475) Vol. 1, 432, 442.

791 *Anon* (1585) 1 Leon. 33.

To A in trust to pay his sister £100 per year until his debts and legacies were paid.[792]

To A in trust until the rents and profits shall pay the bequests in the grantor's will.[793]

To pay quit rents to A and his heirs until he pays £5000 to the grantor.[794]

To A for so long as it shall be used as a coffee shop and newsroom.[795]

List B

To A until he shall pay £20 to G (the grantor).[796]

To A until the grantor's son born of his said wife shall reach 21.[797]

To A until he makes a good and sufficient 40-year lease of the land.[798]

To A until he otherwise should or did dispose of the same.[799]

To A until B returns from Rome.[800]

To A until X is made baily of his manor.[801]

To A until B goes to Rome.[802]

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792 *Wellington v Wellington* (1788) 1 Wl. Bl. 645.

793 *Shields v Atkins* (1747) 3 Atk. 560.

794 *A.G. v Cummins* (1895) Reported (1906) 1 Ir. Rep 406.

795 *Hopper v Corporation of Liverpool* (1944) 88 S. J. 218.

796 *Lethieullier v Tracy* (1754) 3 Atk, 774 per Lord Hardwicke.

797 *Anon.* (1571) Dy. 300 b, pl. 39; *Cocket v Sheldon* (1561) Serj. Moore's Rep. 15.

798 *Lusher v Banbong* (1570) 3 Dy. 290 a.

799 *Earl of Bath's Case* (1664-76) Carter, 96; *Clere's Case* (1599) 6 Co. Rep. 17.

800 Charles Fearne, *An Essay on the Learning of Contingent Remainders*, Butler C, (London: R H Small, 1845) 12.

801 CO LITT f. 42 a, Note 6.

802 William Sheppard, Sheppard's Touchstone of Common Assurances Or, a Plain and Familiar Treatise, Opening the Learning of the Common Assurances, (7th Ed.) (London: J W T Clark, 1820) 25. See also gift (23) above.

To A until he is promoted to a benefice.[803]

In each of these examples, the event on which any possibility of reverter may arise is entirely uncertain. There is no certainty that, for example, any annuities, outstanding debts, or legacies will ever be paid, or, that a tree will ever *grow*, even if it is still alive.

(ii) Determinable Fees and the Principle of Uncertainty

(a) The Ipso Facto Ending of Determinable Fees

The precise way in which the granted fee ends is crucial to defining exactly what is a determinable fee. Here, Challis states:

> "The happening of the future event ipso facto determines the estate without any entry or claim by the person entitled to the possibility of reverter".[804]

It is precisely that *ipso facto* determination of the granted estate which distinguishes these interests from conditional fees set to end on breach of condition subsequent. Here, Challis submits that determinable fees contain a limitation which is annexed to the granted fee - so defining its natural boundaries by operating *internally* to the grant as a valid limitation at common law. This, he claims, is because the only exceptions to that principle apply to conditions annexed to estates less than a full fee simple.[805]

In contrast, rights arising from a breach of condition subsequent operate *externally* to the limitation - which then renders the estate as being only liable to suffer a re-entry. Any

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803 ibid 125.

804 Challis (n 471) 252; *Anon* (1675) 2 Mod. 7.

805 Statute of Wills, 1540 Hen 8 c.3L s.1; Law of Property Amendment Act 1859, 22 & 23 Vict. c.35 s.3; Conveyancing Act 1881 ss 10, 12.

final ending of the conditional fee is then made entirely dependent on the grantor's valid exercise of an act of re-entry since any external breach of condition cannot ipso facto determine the fee. Here, there is still something the *grantor* must do to bring that estate to an end.

The author submits that the foregoing distinction between 'internal' and 'external' conditions is directly equivalent to the Aristotelian notion of 'proximate' and 'remote' causality. Clearly, a contingency which is so 'proximate' to the final effect such as to necessarily cause its occurrence may then be said to be 'annexed' to the causal process which brings it about. In other words, the condition imposed (that is, the conditional covenant made to transfer the estate depending upon a future event) is so highly proximate to grant that they cannot be separated. From this, an annexed condition becomes so integral to the limitation that it 'runs' with the grant. The opposite is equally true. A contingency which has only a remote instrumentality in producing a final effect does not necessarily ensure its occurrence. In that event, any such 'remote' condition cannot be 'annexed' to the modus because it has no *necessary* control over the posited outcome. The condition no longer 'runs' with the limitation because they are always separated by their *remoteness*. Accordingly, the terms 'internal' and 'proximate' may then be used as legal shorthand for the tight integration of *necessary* conditions in the covenanted promise by which they are annexed – and without any apparent need to consider whether they are *positive* or *negative* for the reasons already given on page 779 above.

The author is fully aware that the foregoing invites an application of the conditionality of covenants to granted property beyond its intended context of restrictive covenants over realty. Moreover, some may also question where the benefit and burden of a conditional covenant to transfer the land in future might be found? However, as considered further

below, the stable door of *not* distinguishing between determinable fees and other perpetuities on the basis of annexation was opened a long time ago by Palles CB in *A-G v Cummins* (1895).[806] From this, the author submits that the following propositional statement is worth proposing as an intermediary step in the current argument:

> **Statement V** – The existence of a proximate, internal condition which necessitates the posited final effect creates a valid limitation because that contingency is thereby annexed, and runs with, the modus and cannot be separated from it.

(b) Annexation: Uncertain Duration and Initial Certainty

The preceding discussion has demonstrated how the uncertainty required of determinable fees contrasts quite markedly with the Rule Against Perpetuities' initial certainty requirement. At first sight, therefore, valid determinable fees and valid contingent future gifts may then appear almost exact opposites. This situation is made more perplexing by the fact that otherwise void contingent gifts of land could be framed in terms of them being perfectly valid determinable fees. Consider the following example gift of Blackacre:

(27) To B's grandchildren who shall marry[807]

which is void under the common law Rule. However, all the circumstantial conditions listed in the analysis of Morris and Wade's hypothesis in Chapter 5 below - and upon which that gift is

806 See n 813 below and sub-section *(2) The Question of Compatibility* beginning on page 294 below.

807 This is a slightly different gift to Morris and Wade's example. Their gift was to the *first* grandchild who married. The present formulation raised precisely the same issues as the original.

presumably predicated - may be satisfied by A's quite valid grant of a determinable fee in Blackacre:

> (28) To B and his married heirs until none of his grandchildren shall marry or until Blackacre has been offered for sale before that time to someone who is not a lineal descendant of B.[808]

where the factual circumstances of this gift are that B is alive, but unmarried - and that A is ninety years old. Eventually, the succession of heirs will pass Blackacre only to B's married grandchildren - on the occurrence of which the possibility of reverter will then lapse. The donor is thus able to achieve by determinable gift what could not be achieved by contingent trust.[809] This may be precisely why Gray objects so strongly to determinable fees.[810]

However, the entirely different outcomes predicted by gifts (27) and (28) above are not quite so contradictory as first appears. In policy terms, gift (27) is void because it might never vest - for all the reasons introduced in subsection *(b) Relevant lives* beginning on page 60 above and the logical testing of Morris and Wade's hypothesis in Chapter 5 below. Contrastingly, gift (28) vests immediately in favour of B and all his then-married heirs. Therefore, an important distinction between these two gifts is raised by when the interests thereunder will vest. Further, there is no inherent contradiction between their differing certainty requirements or that the principles applied to each of them are mutually exclusive.

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808 This partial restriction on alienation has been held quite valid. *Re Macleay* (1875) L. R. 20 Eq. 186.

809 It is, however, possible that any presumed entail might be barred by operation of *Taltarum's Case (Talcarn's Case)* (1472) 12 Edw. IV 19 pl.25.

810 Gray (n 7) §. 1.

This point will become clear when it is remembered the Rule is concerned with vesting and the principles of determinable fees are concerned with divesting.

The occurrence of B's grandchildren marrying then operates to void gift (28) because it postpones vesting too remotely. That outcome should be clear from the discussion in both Chapters III and VI above. However, the same remote event serves to validate gift (29) precisely because it then postpones the possibility of divestment almost indefinitely. When viewed in this light, the common law's policy preference for early and stable vesting is then seen to have been satisfied in both instances.

The possibility of conflict between determinable fees and the principles on which the Rule is founded may be assessed further by postulating what happens when determinable fees are made subject to the Rule. Here, the question then arises, how can an estate which must be capable of enduring forever be validly limited to occur within a life in being and 21 years thereafter? This would mean the granted estate must necessarily end before within that time and, accordingly, no fee can then pass. However, that argument would be to confuse the rules as to how indefinitely the right of reverter must be postponed with the potential for how long the granted fee might last in fact. In short, the proper distinction is that to be drawn between the possibility of reverter and the possible endurance of the determinable fee.

This distinction may be explained more fully as follows. In gift (22) above, the possibility that B might never visit Rome in A's lifetime creates a valid determinable fee. Yet, since the possibility of reverter must arise, if at all, during A's lifetime, that reverter must also necessarily occur within the Rule's permitted period. Clearly, this is because A is inherently a life in being at the date of gift. Accordingly, the gift in example (23) is not only a valid determinable fee, it is also valid under the Rule Against Perpetuities. For this reason, List B on page 303 above identifies all those dispositions which fall into *both* categories.

However, not all determinable fees are so limited to end within the Rule's permissible boundaries. Indeed, none of the gifts described in examples (25), (26) and (27) above must necessarily be determined, if at all, within a life in being and 21 years thereafter. Therefore, if these gifts are to be made subject to the Rule, they are clearly void for perpetuity - and the granted fee must then fail entirely.[811] Yet, what does this mean for the validity of the gift qua determinable fee? Here, the simple answer is nothing at all. The imposition of a separate rule of law - which, by much-criticised judicial authority began, only in 1944[812] - serves only to remind us that the remote possibility of *divesting* may also tend to a perpetuity. That is simply a super-added policy limitation on determinable fees, nothing more. Indeed, its policy concern goes to show that a determinable interest is more, rather than less, likely to endure forever if the granted fee may then be divested so remotely.

The question then arises, 'what does the law of determinable fees tell us about perpetuities?' The answer is as straightforward as it is ingenious. The author submits that despite all appearances to the contrary, the boundaries of validity under perpetuity law are precisely the same as that under determinable fees. The validation of both types of interest depend upon whether the contingent event is *annexed* to the grant – which can only happen when a *necessary* causal connection attaches that condition to the *final effect* of either vesting (whether beneficially or in reversion) or divesting (as in a contingent reversion), respectively. If it is, both types of grant are valid. If not, the contingent future interest or the contingent reversion must be invalid.

811 Applying the decision in *Re Moore* (1888) 39 Ch.D. 116.

812 *Hopper v Corporation of Liverpool* (1944) 88 S. J. 218. Query whether Section 4(3) Law of Property Act 1925 also serves to impose the Rule upon determinable fees.

There is no better authority for the intuitively satisfying symmetry produced by the foregoing conclusion than the often-overlooked judgment of Palles CB in *A-G v Cummins* (1895). There, rejecting the claim that the Rule applied, he concluded:

> Now there is not a trace in the books of any rule which limited the period during which the determination of an estate by condition should take effect, and it is abundantly clear that the modern rule could not have applied, because the donor *[sic]* took not by way of new limitation, but by the determination of the estate given.[813]

To which, for clarity, it should be added that any such determination can only occur by a validly annexed condition which requires that it must do so when and if the designated divesting contingency occurs.

(D) CONCLUDING THOUGHTS

It is helpful to summarise the scale of the difficulties involved in fashioning a single theory of conditionality and measuring lives in being under English common law: As previously discussed, the modality of Roman thinking may be based upon a *non sequitur* by which it is damaged to the very roots. [814] It deserves repetition to note how Avicennian theory implies that a living person cannot enjoy any *necessitated* influence over future contingent events since that life is also a conditional possibility.[815] In that event, the highest level of influence exercisable by a living donee then becomes that of causal *efficiency*, not the required causal

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813 *A-G v Cummins* (1895), per Palles CB at 409.

814 That is, the second point beginning on page 206 above and further n 695 above and the related textual argument on page above and sub-section *(ii) The Concept of 'Remote' Causation* beginning on page 260 above.

815 See further sub-section *(α) The necessity of causes* beginning on page 234 above.

necessity. The author argues those ideas may have cast a long shadow over English jurisprudence - but which came to light only during the so-called 'measuring lives' or 'reformist' debates begun in 1947.[816] There, almost from nowhere, 'causality' theory was promulgated by leading theorists (including Morris and Wade, Dukeminier, Lynn, Waggoner, and others[817]) as an inherent feature of English common law through which they justified the assertion that 'measuring lives in being' had a 'causal' connection, or circumstantial 'relevance', to the gift. Whilst Leach's tacit approval of causality theory means his name could be added to that list, it is best omitted since he did not think it necessary to spell that relationship out.[818]

The author argues that Roman jurisprudence probably never thought of conditionality in strictly *causal* terms. Instead, the Romanic thinking suggestedly received by the Bracton authors as a precedent for employing a test of *lifetime control* served different purposes. *Firstly*, there was the overriding question of uncertainty.[819] *Secondly*, analysis of the modality employed by Roman law points in an exactly opposite direction. There, the living donee's imputed control made them *instrumental* to the vesting contingency far beyond simply being part of a chain of events which led to a specific end point. In reality, that life *in esse* was

816 These were introduced earlier in the *Prefatory Introduction* at page 1 above and in Chapter I Section B subsections (4) and (5) beginning at page 33 above.

817 MORRIS & WADE; Dukeminier (n 192); Robert J. Lynn, 'Reforming the Common Law Rule Against Perpetuities' (1961) 28 U. Chicago LR 488; Robert J Lynn, 'Reforming the Rule Against Perpetuities: Choosing the Measuring Lives' (1965) Duke LJ 720 ; Waggoner (n 84).

818 Leach (n 75) 1146; Leach (n 75) at 17 note 25.

819 See further sub-section (*4) Concluding Remarks on Roman Fideicommissa* beginning on page 99 above.

treated as having *produced* that outcome in fact.[820] Indeed, any attempt to impute notions of *causality* in reaching that end-point may be dispelled quickly: Consider the invalidation of conditions which can be frustrated by those with an interest in their non-satisfaction.[821] This seems to be much more like a *regulatory* provision, rather than a causal step *per se*, since the mere existence of the disruptive *rival* claim then made the beneficial claim absolute irrespective of any individual's actions *in fact*. Thus, it has strong methodological similarities with the English 'initial certainty' principle. Indeed, the author submits that to suggest Digest 35.1.24 establishes a causal modality would be equivalent to proposing that the English Rule is itself a 'causal' link in the creation of perpetuities rather than simply a law by which they are governed. The author is entirely unaware of any such disingenuous arguments appearing anywhere in print.

820 See sub-section (*iv) The Use of Donor-Appointed Conditions in Ancient Rome* beginning at page 94 above.

821 See n 277 above and the text to which it relates.

CHAPTER 5 – PRESENTING AND DEFENDING THE HYPOTHESIS

Nutshell

The arguments developed in the preceding chapters are now consolidated to craft a re-formulation of the Rule's terms. Here, the difficulties exhibited by both the 'Effective' and 'Causal Connection' hypotheses are overcome by redefining the Rule's effect in terms of the determining event (that is, the *final* effect) being precipitated by a *necessary*, rather than by an *efficient*, cause. In this case, that cause is submitted to have been supplied only the *one* necessary life whose demise *ipso facto* determines the concurrent interests. Once established, this new formulation is assessed to ensure it accurately explains and predicts both validity and invalidity at common law whilst also demonstrating how this enquiry's overall objectives have been fully met.

(A) JUSTIFYING AND PROPOSING THE 'NECESSARY LIFE' HYPOTHESIS

(1) Introduction

The analysis thus far suggests a much closer and more exact propinquity of living persons to valid dispositions than anything previously suggested by 'causality' theorists.[822] Indeed, the author argues their use of a more generalised framework, instead of a precise formula, makes the conclusions they reached even less convincing. Thus, the question then becomes, 'how can any such 'Necessary Life' hypothesis offer an improved theory?'

What we can surmise at the present juncture is four-fold: *(i)* That Greek, Romanic, Neoplatonic and Avicennian theory all point towards a resolution based upon proving the *certainty* (or perhaps the *predictability*) of posited outcomes.[823] *(ii)* Unlike Romanic theory, the Avicennian tradition rooted in Neoplatonic philosophy supports the notion of 'necessity'

822 See further sub-section *(iv) The 'Causal Connection' Hypotheses* beginning on page 56 above.

823 See sub-section *(3) Living Persons as an Instrument of Necessity and Certainty* beginning on page 272 below.

being the mother of certainty, consistency, and temporal order.[824] *(iii)* Although the Bracton authors seemed overly-influenced by Roman thinking, they fashioned a new theory that conditions must be *annexed* to the limitation before a valid interest could be created.[825] By doing so, the causal link to a posited final effect must be one of intimate proximity achieved by *annexing* the condition to the gift.[826] *(iv)* By Lord Nottingham's time, it seems clear that the existence of just *one* living person whose demise instantly determined the interest's conditionality created a valid contingent future interest. In short, only *one* extant life could supply the necessity which ensured the final posited outcome must occur, if it ever did so at all, *within* that lifetime.[827]

Regarding point *(iv)* immediately above, we should remind ourselves that a similar proposition is also implied by Avicennian and Romanic theory, albeit by different routes. The four points made on page 287 above demonstrate the centrality under ancient Roman law of the personal control held by one living person. Furthermore, Avicennian theory proposes such a high causal proximity between the necessitating condition and the final posited effect that it would be highly improbable for this to be achieved by more than *one* living person. That said, for the reasons set out in the discussion beginning on page 224 above, Avicennian theory

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824 See sub-section *(α) The problem that no 'thingness' implies regions in space where time may not exist* beginning on page 245 above.

825 See sub-section (*b) Annexing conditional terms to the modus* beginning on page 138 above.

826 See sub-sections *(3) Ruminating Upon the Potentially Unifying Role of Seisin* beginning on page 123 above and (*4) A Life as a 'Necessity' Implicitly 'Annexed' to the Modus* beginning on page 273 above.

827 See sub-section *(β) Lord Nottingham and the propinquity of living persons* beginning on page 146 above.

may offer a more compelling explanation since it avoids the *non sequitur* at the heart of Romanic thinking on the resolution of contingent events by conditional entities[828] – although strong elements of the 'certainty' demanded by Romanic jurisprudence remain.

For the foregoing reasons, the following graphical summary of the understanding gained thus far which weighs heavily towards the conceptually more robust propositions of Avicennian theory. Accordingly, a 'big picture' view depicted in Figure J below is based upon the Avicennian connection between 'lives', 'things' and 'necessary conditions':

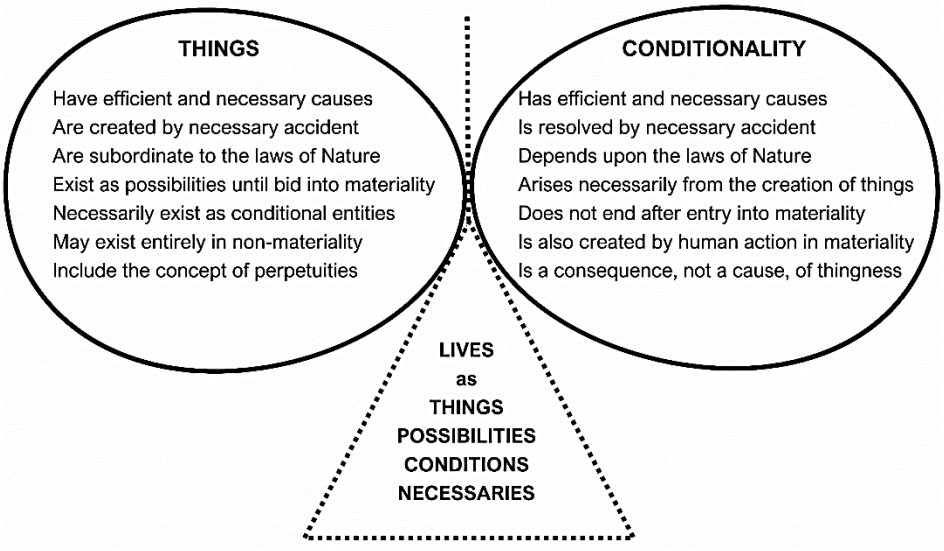

Figure J: The confluence of 'things', conditions and a living person

Here, the Avicennian model of postulated 'thingness' and inherent conditionality are united by the *necessity* of their existence. However, whilst all of these exist in *immateriality*, human-created conditionality can only exist in the physical universe – for the obvious reason that a human donor resides *only* in materiality and mankind is a 'thing' which Abrahamic

828 See pages 206 above and 291 below together with the refences to earlier sections cited therein.

theology insists can never be Divine. True, the consequences of any such man-made conditionality may be to intrude upon God's reserved powers, but emergent principles suggest how scholarship, either wittingly or unwittingly, has devised systems of governance whose effect has largely been to impose necessity and certainty upon any potential disorder. At this point, therefore, the author submits the circle is likely to have been squared by translating the modality of Divine possibilities into a similarly *necessary* creational process, but now in the hands of *mankind*, not divinity.

Figure J above demonstrates the author's contention that living persons share precisely the same characteristics as the 'things' and the conditional terms upon which they are devised, but with one crucial exception: It is only the *one* life *in esse* which supplies the *necessity* that proves the posited outcome is rooted in logical certainty. Indeed, the Aristotelian notion of causal *remoteness* is defined by the *lack* of necessity through which that outcome might *accidentally* occur.[829] By itself, that is weighty authority in support of the 'Necessary Life' hypothesis because of its insistence upon Aristotelian *causal necessity*. However, a separate logical proof of this proposition is also provided in sub-section *(γ) Proof that only a 'life' can restrict a gift* beginning on page 338 below.

Accordingly, the author submits that a living person who governs a valid perpetuity exists *simultaneously* at the shared tangent between the two spheres depicted in Figure J above. Indeed, the foregoing analysis of potential 'measuring lives in being' is reduced to only *one* life *in esse* because only he or she can impress exactly the required 'thingness', 'possibility', and 'conditionality' needed to *necessitate* and validate the *valid* perpetuity they constrain. Indeed, it is precisely this addition of 'necessitation' which distinguishes the current

829 See sub-section *(ii) The Concept of 'Remote' Causation* beginning at page 260 above.

hypothesis from Allan's thesis – whose chief error was to focus only upon the *validating* effect of 'measuring lives in being'.[830] Furthermore, the *non sequitur* evident in Romanic theory - which denies conditional agents any logical control over a contingent future event – is avoided by the Avicennian notion that *necessity* means any such event *must* happen, if it ever does so at *all.*[831] In short, the propinquity of that necessitating life now guarantees that the posited outcome is possible (valid) in materiality - and the *triumvirate* of a life, necessity and conditionality is then made complete by their logically simultaneous *annexation* which thereby creates a valid limitation. Plainly, if any one of those intimately *proximate* elements was absent, Aristotelian theory would condemn to voidness that otherwise potentially valid 'thing' as both a *remote* cause and an equally distant *remote* possibility.

Contrastingly, if a necessary cause is thereby incorporated as a 'splint' or 'bridge' to connect all the *intermediate* 'final' causes (as depicted in Figures H and I above and Figure L below), that is equal to saying the posited final effect is thereby made inevitable. From this, 'necessity', 'inevitability' and 'annexation' become merged in a single logical process leading to the one and only possible outcome that the concurrent interests *must* end. Moreover, in accordance with standard common law terminology, the necessity of the cause produces the certainty of the final effect with the result that it must also *ipso facto* determine the conditional estate – whether beneficially or in reversion.[832] No further action is needed.

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830 See further sub-section *(α) The theory implies a definitional circularity* beginning on page 50 above.

831 See sub-section (*d) Concluding upon the importance of necessity in Avicennian modality* beginning on page 257 above,

832 See further sub-section *(C) The Question of Vesting* beginning on page 4 above.

The author's conclusion is the *necessity* which becomes the mother of all *certainty* also provides an ideal solution for solving the riddle about how the Rule's 'measuring life in being' is selected. Here, the Rule's 'initial certainty' requirement may now be re-constructed such that the *ipso facto* determination of the concurrent interests precipitates an immediate *vesting in interest.* In that event, the expressions '*ipso facto determinable'* and *'vesting'* then become entirely synonymous terms since they both describe precisely the same event.

The author submits the foregoing argument reveals a new purpose for the common law's 'measuring lives in being'. Instead of simply providing an instrument which validates a contingent future gift at common law, that life is *causally* instrumental in the process by which the disposition is restricted. However, unless due recognition is given to the author's contention that the 'causality' at work is that of Aristotle and not Morris and Wade *et alia*, the Rule's 'initial certainty' requirement would still be little improved. Plainly, the methodological error that certainty of vesting simply describes the *effect*, not the cause, of a gift being held valid under the Rule would remain.

The author contends that, for the reasons already given throughout Chapter 4 above, the underlying cause of validity lies in the *necessity* that the final effect *must* happen, if it ever does so, within the Rule's permissible projection of possibilities. Accordingly, the flaw in Gray's statement of the Rule is that the cause of validity (that is, its *necessity*) was mistakenly substituted by an *efficient* cause which practitioners believed had the *effect* of creating a valid interest. Gray had perhaps overlooked the difference between *efficient* and *necessary* causes, and a moment's reflection might have allowed him to realise his error. However, modern experience teaches how this has created more problems than it solved: *Firstly*, it suggests such an imprecise *causality* that, in the overly eager hands of modern reformists, the available candidate lives were extended far beyond the role of providing *necessary* and *proximate*

causality to those founded only upon *efficient* and *remote* causes. *Secondly*, this error also encouraged the same kind of circular thinking that led Allan so astray by focusing entirely upon the effect of validity, rather than upon its cause.[833]

The author submits the foregoing discussion leads to the following revised definitional formula which, unlike modern theory, specifies the precise *type* of cause needed to create a valid perpetuity under English law:

> **Statement VI** – A non-vested interest is void at inception unless the death of one person then-living *necessarily* causes its *ipso facto* determination within the following twenty-one years.

For clarity, this statement includes all the elements identified as crucial in the preceding discussions: The need for *one measuring life* in being; The *causal process* by which a valid interest is constructed; The *necessity* which supplies the 'splint' to heal all breaks in time and causality; and the *ipso facto* determining effect resulting from the *annexation* of the necessitating condition supplied by that life to the modus.

(2) The Question of Compatibility

Point (c) in sub-section *(2) Rationale and the Overall Direction of Travel* on page 220 above set the objective of ensuring that any re-formulation of the Rule must also be consistent with the feudalistic system and the unique context of landholdings in England. Yet, the reader may question whether this has been accomplished. Accordingly, the author contends this compatibility is inherent in the new hypothesis for the following reasons:

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833 See sub-section (*α) The theory implies a definitional circularity* beginning on page 50 above.

Firstly, unlike Roman law which denied any entitlement to a reversionary interest on the failure of a gift, the newly stated hypothesis depends uniquely upon English ideas that every contingent gift has *two* alternative possible outcomes. As introduced in sub-section *(i) Perpetuities from The Reversioner's Perspective* beginning on page 298 above, these are the competing outcomes of *beneficial* and *reversionary* vesting. Since these continue as *rival* claims until the final determining event, they were described as '*concurrent*' interests. From this, it is evident how the proposed *ipso facto* determination of those *concurrent* interests is rooted entirely in English common law. Roman law had no such concept under the principle *'semel heres semper heres'* which eliminated any possibility of a reversionary claim.[834]

Secondly, the concepts of 'seisin' and 'right' - as the cornerstone of England's law of estates – allowed seisin to become the 'baton' passed from one landholder to his or her successor which provided the certainty of there always being someone 'sitting upon the land'. That was a rationale which Haskins insightfully claimed then "... became encysted in the tissues of judicial thought ..." [835] From this, the author contends this established the two enduring features of common law that: (a) Land could only be conceived in terms of spans of the individual human *lifetimes* who enjoyed possession, and (b) land dispositions which placed seisin in suspension should be voided.

The author argues that the full significance of Haskins' claim can be seen particularly in regard to disputed heirship claims - either in the *Assize Mort d'Ancestor* or in the *Assize Novel*

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834 'Once an heir, always an heir'. See sub-section *(iii) Inalienability* beginning on page 93 above.

835 Haskins (n 106) 31.

Disseisin – also came to depend upon proving the *predecessor* had taken seisin.[836] Thus, the 'baton' so envisioned by seisin then started to look both *forwards* and *backwards* in time in its search for certainty. In that regard, it may reasonably be proposed that the *certainty* which seisin demanded most probably became a *necessity* that this must be so. Indeed, the author submits that is a strong argument to explain how the common law's pursuit of *certainty* might easily co-exist within the 'Necessary Lives' hypothesis. Clearly, the present thesis has done no more than take those long-established common law principles and simply added the *necessity* of being constrained by the Rule's permissible 'projection of possibilities'.[837] In any event, the chief proof relevant for the question set in this section is simply that the 'Necessary Lives' contains nothing *inconsistent* or incompatible with broader common law principles: Even if the permeation of necessity into the common law *might* have happened, it is by no means absurd to suggest that it was at least *able* to happen. No further proof than that is needed.

Thirdly, similar purposes were evident from the taking of *homage* in medieval England as a means of binding the incoming feudal 'tenant' to both the land and his lord – in return for guaranteed protection. Thus, we can see how this ritual promise succeeded in attaching the landholder to the granted estate and sealed the debt, responsibility and benefits due to the lord. In the notable absence of any developed notion of contract law in medieval times,[838] the author contends that any such process of annexing promises to the land proved to be as close

836 See sub-section *(3) Ruminating Upon the Potentially Unifying Role of Seisin* beginning on page 123 above.

837 See Jones (n 67).

838 See sub-section *(4) A Life as a 'Necessity' Implicitly 'Annexed' to the Modus* beginning on page 273 below.

to an enforceable commitment as was legally possible in those early times.[839] True, the taking of homage quickly assumed the separate purpose of piling up defences against any subsequent attack,[840] but the function served by annexation had proliferated so greatly in the common law of property that it might be surprising if there was no connection with English perpetuity law. Accordingly, the author submits that, on the basis of the arguments raised here and on pages 303 and 305 above, this proposition is substantiated fully.

In conclusion, therefore, the author submits the 'Necessary Lives' hypothesis is rooted firmly in the common law tradition and its feudal antecedents. Accordingly, it thereby satisfies the objective stated at the beginning of this section.

(3) The 'Necessary Life' Hypothesis

The traditional analysis of contingent interests solely in terms of the legal estate has led to the perpetuity problem being considered entirely from the perspective of how long beneficial enjoyment should remain in contingent abeyance before it must finally vest. From that standpoint, the proximity or remoteness of the legal estate's *final* vesting is then presumed to be the Rule's *sole* concern. Whilst that is undoubtedly an accurate statement of the Rule's purpose, the preceding analysis of the Effective Lives hypothesis[841] has highlighted the methodological problems. There, the *presumed* effectiveness of measuring lives was shown to be explicable only by reference to the *predicted* initial certainty of vesting. This resulted in the circular problem that its operation cannot be explained without simply

839 See sub-section (*i) An Expanded 'Bundle of Rights and Duties' in a Feudal Context* beginning on page 176 above.

840 See sub-section *(i) Early Heritability* beginning on page 132 above.

841 See sub-section *(d) Commentary* beginning on page 49 above.

repeating the Rule's own initial certainty requirement.[842] Accordingly, a broader viewpoint is needed to break that cycle of self-definition.

The author contends that a new insight into the Rule's underlying method can be found in sub-section (i) beginning on page 298 above. There, the change in viewpoint from just a contingent beneficiary's perspective to include that of a contingent reversioner suggests how the Rule's vesting requirement might be refashioned in a way that avoids merely re-stating the initial certainty rule. Instead, the author argues it is *how* the contingent event determines the concurrent interests, rather than in *whom* the legal interest might eventually vest, which explains the Rule's true *modus operandi*.

If the preceding argument is correct, it is submitted that an interesting introductory proposition may then be made about the Rule's underlying rationale. Here, the matter of perpetuities may now be reduced to asking two questions as at the date of gift. These are:

> **One** - Is there an express or implied condition of the gift which *necessarily* restricts its potential endurance?
>
> **Two** - If so, does the occurrence or non-occurrence of that conditional future event *ipso facto* determine the concurrent interests within the Rule's 'lawful projection of possibilities'?[843]

[842] See sub-section *(α) The theory implies a definitional circularity* beginning on page 50 above.

[843] That is to say, either the contingent beneficial or contingent reversionary interests could thereby vest in interest.

By doing so, it will also be demonstrated how this two-stage test may also help explain the suggested annexation *between* proximate and remote causes, as well as to their more conspicuous role in producing the final effect or outcome.[844]

In operational terms, this two-stage test works quite simply. Once applied to each implicit condition separately, if an affirmative answer is provided to *both* these questions the condition is restricted sufficiently to create a valid common law interest. If not, that condition contributes no more than an *efficient* cause of vesting which, by itself, is insufficient to validate the gift *in toto*.[845] However, once we find *any one* implicit condition which satisfies *both* tests, the logical *necessity* of vesting within the Rule's permitted projection of possibilities provides a 'bridge' or 'splint' to connect all the *efficient* conditions into one *necessitated* final cause. The conditional gift thereby acquires logical certainty that the posited outcome (beneficial or reversionary vesting) must happen - and is valid at common law for that very reason.

(B) EXPLAINING AND TESTING THE IMPROVED FORMULA

(1) Prefatory Remarks

The reader may be struck by how the proposed two-stage formula shares a similarity with the Causal Connection hypothesis. However, it must be emphasised that no claim is now made that the common law *explicitly* dealt with perpetuity cases in the way suggested above.

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844 See further page 305 below.

845 The reader will be aware how these 'incidental' causes must always be at least *efficient* in producing the posited outcome because, if they were not, they would never have been identified initially as having any testable instrumentality in the vesting process.

That assertion would be as unprovable as Morris and Wade's claims.[846] Instead, this two-stage process is suggested only to provide a useful way of describing the logical constructs in common law methodology as implicitly influenced by Avicennian philosophy. Furthermore, it also allows certain aspects of Deech's argument into the debate. Here, assessing what contribution each implicit condition makes to the final outcome also meets Deech's concerns to interrogate the wider conditional environment of contingent future gifts.[847] In this way, the author submits the chief novelty provided by the 'Necessary Life' hypothesis is to help discriminate between *proximate* and *remote* conditions and to categorise them depending upon what individual contribution each makes in the vesting process.

(2) Testing The 'Necessary Life' Hypothesis

(i) A valid gift

It is useful to begin by noting that lawyers often speak of there being a *single* contingency upon which vesting is set to depend. From this, it is assumed that there is but one vesting contingency which the Rule tests. However, that is to state the matter much too simplistically. Instead, the author submits that any single vesting contingency is predicated upon a number of circumstantial conditions which are implied by the making of a gift. Here, that broader conditional environment may be illustrated by N's valid disposition to:

(29) To the first of E's children who reach twenty-one.

846 Indeed, to the extent that it implies any splitting of the designated vesting contingencies, that would be to offend against the rule that if the grantor has not split his contingencies, the courts will not do it for him. *Proctor v Bishop of Bath and Wells* (1794) 2 Bl. H. 358.

847 Deech (n 99) 605.

where E is alive with no children. As in gift (1) above,[848] is it not clear that N's scheme is founded upon three conditional assumptions about both the present and the future? These are either expressed or implied in his gift and appear to be:[849]

(I) that E is alive at the date of gift, and

(II) that E produces children, and

(III) that at least one child will survive to twenty-one.

In terms of Avicennian theory, this causal process is depicted by Figure L below which simply applies the model introduced in Figure I on page 262 above.

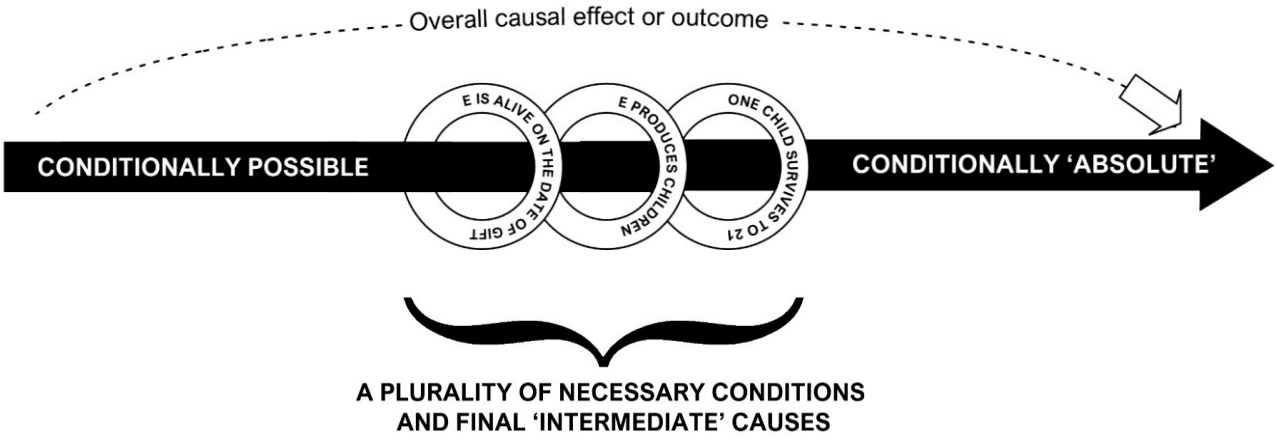

Figure L: An Avicennian conception of gift (29)

If none of those present and future assumptions were correct, the gift would be entirely pointless. Clearly, there could be no serious dispositive intention where any such gift was made, for example, to the children of any already deceased bachelor. Yet, it is not

848 See page 2 above.

849 A complete list would include a variety of conditions precedent such as the proper execution and constitution of the trust. However, given the presumption of a genuine gift, none of these will be considered further.

immediately clear which of them is pivotal in establishing the gift's validity. Accordingly, each of the conditions (I) to (III) above will now be examined to see if any of them is able to restrict vesting under the Rule. However, to avoid any duplication in the following explanations, condition (I) will be examined last.

(a) That E produces children

(α) Stage one

The reader might conceive of there being three possible outcomes of the stage one test:

Firstly, one might argue how the implied condition of *procreation* contained in condition (II) above is satisfied immediately by both the common law presumption of fertility[850] and its expectancy that heirs will be produced.[851] If so, those legal presumptions would ensure this condition is met, irrespective of E's actual age,[852] and must therefore result in it passing stage one. However, whilst portions of that argument are sound, there is a flaw revealed by the following *alternative* explanation.

Secondly, the terms of the stage one test involve searching for a *restriction* of the period within which the gift may finally vest. Here, quite apart from restricting the estate in favour of E's children, the common law presumptions noted above achieve the exact *opposite* by *expanding* the number of potential claimants and the time frame within which the gift might eventually vest. Furthermore, the common law held that no heir could exist until *after* his or

850 See page 48 above.

851 *Pay's Case* (1602) Cro. Eliz. 878.

852 Hence the "freak" cases of 'fertile octogenarians' and 'precocious toddlers' previously discussed in sub-section *(i) The Rule's Allegedly Eccentric Behaviour* beginning on page 33 above.

her father's death[853] since the one (or more) potential heir(s) could not be identified definitively before that time. For these reasons, it could be argued that condition (II) must fail stage one because an uncertainty can never give rise to a necessity. For these reasons, both the first and the second arguments seem equally dubious.

Thirdly, quite contrary to the second argument immediately above, there is no such expansion in the likely vesting period. The reason is clear. The Rule has no conception of time per se, but only of a 'projection of possibilities'.[854] Since that projection is measured in terms of lives, not objective time, the possibility of E producing further children is completely neutral to the gift's possible endurance. In that event, a restriction is most definitely implied by condition (II) – that is, the number of children E can produce during his own lifetime. Accordingly, the author submits the same logical necessity which prevents E producing more children after he or she has died also allows condition (II) to pass stage one testing.

(β) Stage two

The task now falls to consider whether condition (II) *ipso facto* determines the interest within the Rule's permissible projection of possibilities. Here, the analysis is further complicated by the age contingency in condition (III) below since all such children cannot claim a share of the gift simply by being alive. One surviving child must also survive to twenty-one if the vesting contingency is to be met fully. Accordingly, the task then becomes one of disentangling the *proximate* condition of *procreation* from the seemingly *remote* condition of *survivorship* specified in (III) below.

853 See also footnotes 117 and 413 above.

854 Jones (n 67).

The author argues that apparently unresolvable conundrum may be tackled by applying Aristotelian and Avicennian principles. Here, the analysis in Chapter 4 - as applied in Figure L above - is argued to be perfectly capable of admitting *efficient* causes in a process which *necessitates* that the final posited outcome must happen, if it ever does so at all. Clearly, gift (29) is valid notwithstanding that it contains both 'efficient' and 'remote' causes. Indeed, recognising the *two* distinct types of causality at work is submitted to help us unravel their individual effects and avoid journeying down the wrong path to reach a bogus conclusion.

The matter may also be explored by applying elements of Deech's postulate. The author submits that the broader conditional environment will always intrude upon the *particular* - and this is precisely why we experience purely *accidental* effects. However, as in the case of gift (29), the broader conditional environment (such as the designated 21-year vesting contingency) also intrudes upon the possibility of vesting, but is this intrusion accidental or instrumental? Here, some might argue the age contingency in condition (III) has all the appearance of being an accidental, *efficient* (remote) limitation when viewed from the perspective of the second *triad* relating to condition (II) on Figure L above. This is because its instrumentality in the vesting process is simply to provide an additional time postponement which is neither necessitated by condition (II) nor is it *ipso facto* determined by its possible occurrence twenty-one years later.

Despite its seemingly compelling logic, the preceding argument is defeated by a more rigorous analysis of the causality connecting a new-born child to the subsequent attainment of twenty-one. Given the argument in sub-section (b) below, a child must necessarily reach twenty-one within 21 years of its birth. However, that 21-year period has a temporality which is fundamentally different from its preceding cause. Time periods (such as age contingencies)

exist in objective linear *time*, whereas the lives to which they are attached exist only *probabilistically*. Thus, the Rule's 'projection of possibilities' has no difficulty treating the fixed time-period as a certainty when attached to the valid life upon which it depends. From this, the author submits that the certainty of attaining twenty-one is inevitable in gift (29) and must, therefore, be achieved automatically and without any further action. In short, that is a dictionary definition of the term '*ipso facto* determination' since its occurrence is followed by a temporal certainty.

To conclude, condition (II) must pass stage two since, by inference, its purpose it to provide a causal 'stepping-stone', or as an intermediate *triad* depicted in Figure L above, to facilitate the satisfaction of condition (III). Plainly, in the case of gift (29), this is also constrained to occur within the Rule's permissible 'projection of possibilities' for the reasons which follow in sub-section (b) below. However, the author suggests that a further proposition may be deduced from the preceding discussion. It does not seem at all unreasonable to suppose that the annexation of conditions to the modus also implies annexation of its constituent conditions *to each other*. Indeed, that is nothing more than a logical extension of any argument whereby necessity provides a 'splint' or 'bridge' connecting inception with its posited end. For clarity, the 'connection' in this situation is the individual efficient, remote causes which together contribute to the necessitated final effect, or outcome.

(b) That at least one child will survive to twenty-one

(α) Stage one

Plainly, the condition of attaining twenty-one *necessarily* restricts the timespan in which a beneficiary may claim the gift. This means the period during which the gift remains in

contingent abeyance must also *necessarily* be determined by that same implied condition of *survival*. For this reason, condition (III) passes the stage one test.

(β) Stage two

There are two issues impinging upon the second-stage status of condition (III). These are:

Firstly, the preceding argument is equally true of *all* specified age contingencies, whether twenty-one, fifty or eighty years. Accordingly, a second stage test is needed to assess whether the achievement of that age contingency *ipso facto* restricts the gift's final determination to occur within the Rule's lawful projection of possibilities. Clearly, the attainment of twenty-one would precipitate an ipso facto determination of gift (29) in that child's favour,[855] who may then claim his share to the exclusion of any reversioner.[856] In that regard, the condition expressed in (III) that he or she must do so thereby passes stage-two testing.

Secondly, as noted above, a specified age contingency is meaningful only when it is sufficiently proximate (that is, necessarily attached or annexed) to a life whose demise *ipso facto* sets a 21 year-long clock running toward its final determination. In the case of gift (29), this requirement is satisfied because any child to reach twenty-one must do so within 21 years of E's death and 21 years of their own birth. However, its occurrence *could* be dependent upon the death of a much remote person - such as a gift to the first *grandchild* (of a *then*-

855 Albeit 21-years later. See sub-section *(α)* (β) *Stage two* beginning on page 303 above.

856 *Saunders v Vautier*, (1841) 4 Beav 115; affirmed Cr. & Ph. 240. Clearly, that child's potential share of the fund will be unascertained if there are other potential beneficiaries. In this event, it is common practice for trustees to appoint the minimum amount to which he would be entitled - an appointment which may be increased if those other potential beneficiaries subsequently die before reaching twenty-one.

living grandparent) - who attains twenty-one. That gift is void since N may produce more offspring before his or her own death, with the result that all first-generation children (which may then include an *afterborn* child) thereby lose any *proximate* cause to a gift. Plainly, the corpus might eventually be claimed by a child whose parent was not living at the date of gift.[857] Therefore, the author submits that any age contingency, even one of 21 years, must be predicated upon another restraining *necessary* condition before the gift can be held valid. It cannot imply validity by itself.[858] Indeed, we may regard the allowed period of 21 years as simply a permitted extension to the definition of an existing life - and has been so applied even where no minority is actually involved.[859] Thus, it may reasonably be suggested that E's validating effect arises from the time-honoured merger of both a life *and* an age contingency.[860] In this regard, the question whether condition (III) *ipso facto* determines the concurrent interests to either vest or fail within the Rule's permissible projection of possibilities, is the result of a summative assessment that the life and the vesting contingency are sufficiently proximate to each other. In the case of gift (29) they are, which means

857 That is to say, the parent's propinquity to the gift's final vesting is too remote.

858 *Pirbright v Salwey* (1896) WN 86 and *Re Hooper* (1932) Ch 465 deal with the entirely different scenario where the successive context of the gifts presently under consideration is missing. There, a perpetuity period of only 21 years is applied where there is no principal beneficiary capable of measuring the gift. These cases deal with the 'purpose trust' type situation.

859 *Cadell v Palmer* (1833) 1 Cl. & F. 372. This decision settled that the previously allowed period of a minority (*Stephens v Stephens* (1736) Ca.t. Talb. 228) was a gross period allowable for all gifts - whether involving a period of minority or not.

860 See sub-section *(β) Stage two* beginning on page 303 above.

condition (III) then passes stage two testing because the fixed period of 21 years provides certainty in their causal effect; that is, final vesting of the concurrent interests.

(c) That E is alive at the date of gift

(α) Why the gift is valid

At this point it becomes clear why condition (I) has been left until last. E's life is so heavily implicated in, and necessitated by, conditions (II) and (III) that it proves impossible to extricate E from the gift. Indeed, as a matter of Avicennian logic, that is perfectly sufficient to make E the proximate cause of the final vesting event, notwithstanding any intervening elements of potentially remote causation. Nevertheless, for clarity, it is important that the validating effect of E's life is fully explained:

As noted earlier, N's gift makes sense only where E is alive and able to produce children. However, as before, the Rule's concern is with future possibilities alone. Therefore, the common law's presumption of mortality[861] now demands that E's death be deemed to occur *immediately* after the gift takes effect. Accordingly, if E is now presumed to die, the Rule's 21-year clock instantly starts ticking as it begins to count down the permissible 21-year period in which any of his then-living children may claim a vested share. Since it is perfectly possible for those children to reach twenty-one within that permissible timeline, E's life (or rather, his presumed demise) then becomes the principal *necessitating* condition upon which the concurrent interests are *ipso facto* determined in 21 years-time.

The restraining character of E's life, and thus of implied condition (I) above, may be understood more fully through four interdependent propositions now made about E's relationship with gift (29). These are as follows:

861 See page 47 above.

One: E is a valid measuring life. This point should not require further explanation.

Two: It is not simply coincidental that E is living at the date of gift. As mentioned earlier, the gift is predicated on the conditional assumption that E is alive. Plainly, without him or her, the gift cannot proceed at all. In short, he or she is then made *necessary* to its inception.

Three: There is no other express or implied condition of the gift which *necessarily* restricts its ultimate vesting. As already seen in sub-section (b) *(β) Stage two* beginning on page 331 above, the age contingency (as the only other possible determining condition) cannot, of itself, validly restrict a gift under stage two. That contingency must be restrained by a life, in this case E's, which then performs the required ipso facto determination within the Rule's permissible limits.

Four: It is only E's death which necessarily sets the permissible 21-year clock ticking. From this, his or her demise ipso facto determines the identity all those persons, if any, who might live to receive a vested share on attaining twenty-one. E cannot produce more children after he or she has died – and any existing children then have 21 years in which to attain that age. As a matter of strict logic, that is perfectly attainable. Accordingly, the author submits the logical certainty that this event must happen, if at all, thereby annexes the *necessity* of its occurrence to the modus. We know from the Bracton authors how this may be presumed to occur by implication, which thereby completes the formality of that life becoming a validly restraining condition.[862] In short, E is made equally *necessary* to the when the gift must *end*. Once so established, the author argues the common law was content to let matters take their own course since the hand of fate was then controlled tightly by the logic of the gift.

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862 See further sub-section *(b) Annexing conditional terms to the modus* beginning on page 138 above.

(β) Why lives can only be tested at stage two

Stage one searches for the necessity that the gift is restricted by the conditional term under investigation. However, as already discussed earlier in sub-section *(b) That at least one child will survive to twenty-one* beginning on page 330 above, the vesting contingency is most often attached (annexed) to a life in being, although not invariably so.[863] The difficulty then arises that the restriction provided by a 'life' cannot be tested independently of the conditions to which it is annexed.

Deech would probably describe the same difficulty in slightly different terms: She might begin by contending that 'lives' have become a *generalised* concept once they were detached from their origins in strict family settlements.[864] Indeed, the artificiality of this notion led the common law to extend the meaning of a 'life' to include a period of minority and so permit vesting in favour of adult issue.[865] However, the author submits that *Pay's Case* (1602)[866] provides support for seeing that development as more than just an administrative convenience. There, the court held that descent to an heir was to be *expected*, which means *future* living persons then became *anticipated*. By doing so, the abstraction underpinning the

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863 A contingent gift set to vest on circumstances existent at the date of someone's death means the 'life' and the vesting period are the same. See sub-section *(γ) Proof that only a 'life' can restrict a gift* beginning on page 312 below.

864 Deech (n 99) 604.

865 It was borrowed from pre-existing rules governing the permissible remainders of inheritance after the statute de Donis 1285. There, creation of fee tails was limited to a life and a period of minority - which was then 21 years. This general view appears to be supported by the Law Commission - Law Comm. (1998) at para. 2.8. There, the Rule was suggested to share "the same underlying policy as a number of common law devices that were also intended to place restrictions on the ability of property owners to create future interests".

866 *Pay's Case* (1602) Cro. Eliz. 878.

'lives' concept is confirmed by the straightforward observation that where living persons do not yet exist, the common law expects they *will* exist in the future. From this, the author submits living persons may either be real or anticipatory - and each of these two different ontological states imply a different propinquity to the final vesting contingency.

The preceding classification of different varieties of living persons can be traced to Bractonian times where a real distinction was drawn between those *with* and those *without* seisin.[867] Yet, the author contends that medieval distinction is not far distant from the ontology of 'lives' now being proposed since it resonates strongly with the conclusion of them being causally *necessary* to the posited final effect. Furthermore, it seems evident that the transfer of seisin is as much a *necessitated* step in the determination of the concurrent interests as the donor's conditional terms when originally specified at their creation.

Immediately, we are drawn back to the 'thingness' foundations of the present hypothesis. What 'things' are, or what conditional existence they may have, bears strong resemblance to Heidegger's notions of the shifting sands of 'standpoint and level'. [868] Here, valid perpetuity 'things' (which the English Rule defines as a future interest set to vest within a life in being and 21 years thereafter) emerge in a wide variety of donative contexts. Thus, whilst they all share the commonality that vesting is held in conditional suspension, the permutation of valid perpetuities is almost limitless.

867 See the first point in sub-section *(3) Ruminating Upon the Potentially Unifying Role of Seisin* beginning at page 123 above.

868 See page 212 above.

The preceding argument is visualised in Figure M below where the Rule is conceived as the outermost case of a Russian matryoshka. There, within the Rule's *umbrella* conditions for validity at common law, a multitude of perpetuity sub-species (examples of which are labelled (a), (b) and (c)) all exist quite validly. In short, these three illustrative perpetuities represent the potentially infinite permutation of valid - but nevertheless slightly different - perpetuity 'things': [869]

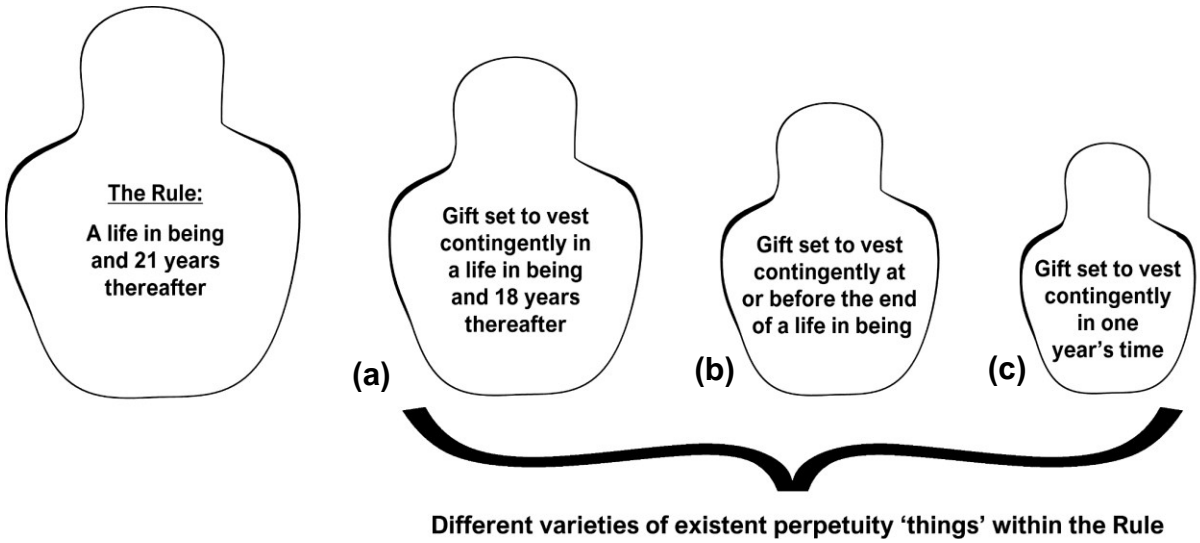

Figure M: Sub-species of valid perpetuities imagined as matryoshka

The preceding argument has significant practical consequences. Self-evidently, it now becomes impossible to disentangle the definition of a 'measuring life in being' from the perpetuity period - which then makes it impossible to test these lives separately at stage one. That impossibility explains the error which lies at the heart of modern 'causally-related lives' theory. Indeed, the present view of 'lives' being a *life and 21 years thereafter* means their

869 This proves particularly helpful when explaining Morris and Wade's errors in sub-section *(ii) Testing Void Gifts* beginning on page 314 below.

determining character can only be proven by passing the second stage test. Yet, that does not mean stage one is irrelevant. These lives cannot pass stage two unless they also *inferentially* satisfy stage one. Indeed, it is that very inference which also explains why the Effective Lives hypothesis falls unavoidably into a definitional circularity. The general *relevance* of an 'effective' life was determined at the wrong stage.

(γ) Proof that only a 'life' can restrict a gift

It would be interesting to change the facts underpinning gift (29) above and presume that E had died before the date of gift leaving two orphaned children. Clearly, E is no longer a measuring life because he was not a 'life in being' when the gift was made. Of course, the gift is perfectly valid, but why? Is this because E's children now become measuring lives of the gift to themselves, or, is the gift valid because 'lives' are no longer needed at all?

The preceding question can be answered by reference to sub-section (b) *(β) Stage two* above. There, it was argued that an age contingency cannot, by itself, operate as a condition which ipso facto determines the gift to within lawful limits. Accordingly, a gift can never be valid without reference to a determining condition upon which that age contingency depends. Therefore, it follows that E's children must operate as measuring lives of the gift to themselves since, without these lives, there would then be no peg upon which to hang the stated age contingency.[870] This view is supported by the decision in *Pownall v Graham* (1863)[871] where a gift 'for the longest period allowed' was held to run for 21 years from the

870 See n 858 above concerning the possible counterargument that a 21-year contingency could attract a perpetuity period not constructed in terms of lives at all.

871 *Pownall v Graham* (1863) 33 Beav 242. See also *Re Vaux* (1939) Ch 465. Allan(1965) at 109.

death of the *last surviving brother,*[872] whereby the notion of a life was conjoined with the 21-year extension. In that event, the gift then shares all the features of matryoshka (a) in Figure M above. Furthermore, if E was dead, it would be clear this valid gift would end within those children's own lifetimes, as depicted by matryoshka (b). That which must necessarily happen within *one* lifetime must also happen within a 'life in being and 21 years thereafter'.[873]

The third scenario, which might appear to be a hybrid example mid-way between matryoshkas (b) and (c) in Figure M above, is perhaps the trickiest of them all. If E was dead, and the stated vesting contingency had been set at *thirty* years, is the gift valid or void? Some might argue any such gift is valid since those then-living children are bound to attain *thirty*, if they ever do so at all, within their own lifetimes. However, this would be a false conclusion. Since the presumption of mortality imagines all those children died immediately after the gift was made, what certainty is that any of them must necessarily reach thirty years old within the next 21 years? Clearly, no certainty at all. The gift fails because the lives in being at that time do not constrain the gift to within lawful limits. Accordingly, it is evident that a living person is always required under the Rule.

The author submits that validity under the newly conceived Rule presented herein may now be seen to depend entirely upon a life which *necessarily* precipitates its final determination to within valid limits. That life then operates as an *internal* marker of validity at common law since the donor-appointed conditions must necessarily be attached to that one living person. If this is right, the present framework now offers proof that it is only *lives*

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872 Cf. *Portman v Portman* (1922) 2 AC 473 which held that a gift limited to take effect 'so far as the rules of law and equity will permit' was not valid.

873 Here, the reader may recall a similar argument used to hypothesise the how lives were subsumed under the Rule. See sub-section *(β) 'Umbrella' lives* beginning on page 150 above.

which can operate as ipso facto determining conditions of valid gifts because no other conditions capable of doing so. From this, the underlying assumptions of the Effective Lives hypothesis have now been shown to be justified. Yet, it is to be regretted that theory was largely incapable of providing any such proof itself[874].

(d) Interim conclusion

It deserves repetition that the theory proposed thus far indicates how valid lives operate as restraining conditions of the gift which *ipso facto determine* its possible endurance to within the Rule's permissible vesting period. In doing so, it appears to offer a logically coherent framework which: *(i)* identifies numerous conditional circumstances implied in the making of a gift, *(ii)* rejects irrelevant conditions at either stage one or stage two and *(iii)* proves a life-in-being is the *only* implied condition capable of passing stage two testing.

At this preliminary stage, therefore, the above-noted benefits seem to offer an improved theory of how the Rule works. Yet, the theory can only be assessed properly if unambiguously *void* gifts are now examined to make sure the present theory does not, inadvertently, suggest they should be valid. If it did, this framework would fail to meet the stated objectives by repeating the same error that appears in Morris and Wade's hypothesis.

(ii) Testing Void Gifts

The proposed two-stage test will now be performed on three void gifts to see whether it can both explain and accurately predict their invalidity. Here, the following example gifts are the same as those used to support the Morris and Wade's 'Causal Connection' hypothesis[875].

874 See further sub-section *(d) Commentary* beginning on page 49 page above.

875 See sub-section *(iv) The 'Causal Connection' Hypotheses* beginning on page 59 above.

(a) A gift upon marriage

Consider Morris and Wade's first example of a gift to:

(30) A's first grandchild to marry.

Where A is alive and has no married grandchildren. Given the common law's presumptions of fertility and mortality[876], the lives of A's existing children (if any) must be disregarded such that the gift contains similar conditional assumptions as those in gift (29) above. For clarity, these may be re-stated thus:

(I) that A is alive at the date of gift, and

(II) that A produces children, and

(III) that A's children will produce children, and

(IV) that at least one grandchild will marry.

Each of these express or implied conditions will now be considered separately.

(α) That A is alive at the date of gift

The preceding analysis of gift (29) above concluded by demonstrating how validly restraining conditions create valid common law interests. By doing so, the 'life' then serves as a nexus to which valid restraining conditions are attached since it is only that *one* person who provides the 'fulcrum' against which contingent events are levered. The 'life' and the designated condition are thereby entwined as one. However, the natural conclusion of this argument must be that *void* gifts have an irreparable fracture in the necessary connection between beginning and end. In other words, the lever has no fulcrum.

876 See further sub-sections *(b) The presumption of mortality* and *(c) The presumption of fertility* beginning on page 47 above.

The foregoing 'fracture' becomes evident from the operation of the common law's presumption of mortality[877] - which predicts the consequences of what happens if A died immediately after the disposition took effect. The conclusion is bleak. Any final determination of the gift then depends upon a *double* assumption of procreation followed by an uncertain future decision to enter marriage. Yet, as discussed earlier, the presumption of fertility means there is no shortage of potential living persons, the problem will always be that it is logically impossible for two uncertain conditional events – each controlled separately by two different people – to combine into one *necessitated* process. For this reason, gift (30) fails stage one testing.

The author contends that A's demise is also incapable of precipitating an ipso facto determination of that gift within the following 21 years since it would be entirely pointless to add that time-period to his or her own life. The 21-year extension would only repair the situation if added to the lives of their *grandchildren*. However, that is not possible. Indeed, no-one has ever suggested that the 21-year period in gross can simply be re-deployed wherever needed. Thus, A's life can be no more than a remote efficient cause by which the posited outcome of vesting *might* occur, but only as the result of a purely accidental occurrence. That is plainly insufficient to allow A's demise to trigger an ipso facto determination within 21 years of when gift (30) is scheduled to vest, if it ever does so at al - and the implied condition that A is alive at the date of gift is then shown to be incapable of passing the framework's second-stage test. Thus, we find condition (I) is only *remotely* connected to conditions (II) and (III) and can never be bridged by any implied *necessity*.

877 ibid.

Accordingly, the author submits that lack of necessitation means the concurrent interests are no longer restricted to end within the Rule' permissible 'projection of possibilities'.

(β) That A produces children

As discussed in sub-section *(a) That E produces children* beginning on page 327 above, this implied condition cannot determine the gift. Moreover, the common law's presumption of fertility means A's existing son cannot be presumed to be his *only* issue. Indeed, the ever-expanding class of potential beneficiaries implied by that presumption *might* only be restricted validly by operation of so-called 'class-closing' rule in *Andrews v Partington* (1797),[878] rather than by the internal logic of the gift itself.

(γ) That A's children will produce children

Here, this term adds a *second* condition of procreation to that in sub-section (β) immediately above to create a *double* contingency of accidental, remote causes. Plainly, condition (III) must then fail both stage one and two testing. This point has already been discussed in sub-section (α) above and should require no further discussion.

(δ) That at least one grandchild will marry

As with a specified age contingency, marriage would also appear to restrict the gift's possible endurance. The logic is clear: Once the wedding ceremony takes place, the concurrent interests are necessarily determined since the gift is set to end when that event occurs. However, unlike age contingencies, even valid ones, there is no fixed period within which any such decision to marry must be made. Indeed, it may *never* be made – a problem which is regarded as one of the chief policy objections against perpetuities. Thus, that very

878 *Andrews v Partington* (1797) 3 Bro. CC 401.

lack of necessity means it fails stage one. Furthermore, the absence of restriction means it also fails testing at stage two. A condition which imposes no logical restriction clearly remains unrestricted to occur within the Rule's permitted period, or at all.

(ε) Outcome

None of the express or implied conditions of gift (30) can cause its ipso facto determination within the Rule's permissible limits. Indeed, the gift could continue almost indefinitely since, it is set to depend upon an uncertain event which might *never* happen at all. In terms of Avicennian logic, this gift is based upon *three* remote causes, none of which are restricted to necessarily within the Rule's projection of future possibilities. Graphically, this situation can be visualised as a matryoshka in Figure M above which is potentially rather larger than the outer casing supplied by the Rule itself. There is, therefore, no appeal to common sense which will ever allow Morris and Wade to fit their over-sized doll inside the restricted shape representing the Rule.

(b) A gift to grandchildren

Consider, further, a gift to:

(31) Such of A's grandchildren who shall attain twenty-one

As in sub-section (a) above, the presumptions of fertility and mortality mean the lives of A's existing children must be disregarded. Thus, the conditions expressed or implied by this gift appear to be:

(I) that A is alive at the date of gift, and

(II) that A produces children, and

(III) that A's children will produce children, and

(IV) that at least one grandchild will survive to twenty-one.

As before, these conditions will now be examined separately.

(α) That A is alive at the date of gift

What consequences follow from A being alive at the date of gift? Here, the presumption of fertility[879] examines the possibility of an after-born child[880] - who, since he or she was not alive on the date of disposition, cannot then restrict the gift in favour of his or her *own* lineage within the Rule's mandated 'projection of possibilities' . The opposite is equally true. None of A's children living at the date of gift can restrict the potential gift in favour of any such after-born child's own issue. In both cases, therefore, those seeming relevant lives emerge as purely efficient, remote conditions, and accordingly, must fail the stage one test.

If the preceding argument is right, the detachment of A's life from precipitating an ipso facto determination of the gift within permissible limits means he or she is unable to pass the framework's second-stage test. Indeed, in the absence of any necessary restriction, there is nothing to test such that gift (31) fails for reasons largely similar to those already given in sub-section (a) (α) on page 341 above.

879 See sub-section *(c) The presumption of fertility* beginning on page 48 above.

880 If the donor did not believe A to be still alive, the gift could be construed as having been made only in favour of issue of A's then-living children (*Second Bank-State St. Trust Co. v Second Bank-State St. Trust Co*. 140 N.E., 2d, 201 (Mass 1957). See further, *Lanier v Lanier* 218 Ga. 137 (Ga 1962). This would be a valid gift at common law since those children's lives would then operate to determine its continuance within lawful limits. As it stands, however, A must be presumed to be living.

(β) That A produces children

See sub-section (a)(β) on page 343 above.

(γ) That A's children will produce children

See sub-section (a)(γ) on page 343 above.

(δ) That at least one grandchild will survive to twenty-one

Of itself, the contingency specified in condition (IV) is perfectly able to satisfy the first stage of the present analytical framework. However, as already discussed in sub-section (ii) (b) beginning on page 330 above, this condition fails the second stage test because it is dependent upon lives which are not capable of precipitating an ipso facto determination of the gift within lawful limits. In short, the otherwise valid age restriction is invalidated by the remote lives to which it is related and would remain as a purely efficient, remote cause of final vesting.

(ε) Outcome

When all these various conditions are considered, it becomes clear *no* condition of the gift can determine its possible continuance to within the Rule's permissible period. This lack of valid restriction means the gift fails under each second-stage test and must be held void for that very reason. As noted in sub-section (a) (ε) on page 344 above, and for largely the same reasons, the matryoshka produced by this disposition is potentially larger than can fit inside the Rule's outer 'casing'.

(c) A 30-year age contingency

Morris and Wade's final example involved T's gift to:

> (32) My eldest descendant living 30 years after the death of the survivor of all the lineal descendants of King George VI who shall be living at my death.

Here, the express or implied conditions attaching to this gift appears to be:

(I) that royal descendants are living at the date of gift, and

(II) that T produces children, and

(III) that at least one child attains *thirty*, **or**

(IV) that at least one further child will marry and produce a child who attains *thirty*.[881]

Each of these conditions will now be assessed in the same way as before.

(α) That royal descendants are living at the date of gift

Here, the stated age contingency of attaining thirty has an immediate effect on the relationship between those royal lives and the possibility of vesting. In sub-section (i)(c) beginning on page 333 above, it was the E's death alone which set a 21-year clock ticking - and that necessarily restricted a determination of the gift within the Rule's permissible limits. However, that is no longer possible in gift (32) since only a 30 year-long clock could restrict this disposition sufficiently. Unfortunately, no such lengthy timeframe is available under common law Rule; and these royal lives cannot then *lawfully* determine the gift for that very reason. Express condition (I) must, therefore, fail under stage two.

881 There may, of course, be sufficient time for great grandchildren to be produced. Thus, in the interests of brevity, the question of procreation is ended at condition (III).

The same conclusion is reached by the common law's presumption of mortality[882]. If all those royal lives were presumed to end immediately after the disposition took effect, the question then becomes - can the gift then be lawfully and necessarily ipso facto determined in favour of T's eldest living descendant exactly 30 years later? Clearly, the answer is no. Any such descendant could be produced by someone not living at the date of gift and the disposition fails for that very reason. Once viewed in that light, Morris and Wade's use of expressly selected royal lives then becomes something of a red herring. Indeed, since none of the children or grandchildren or even great-grandchildren can now be regarded as a potential 'measuring life in being', this de-complicates the entire process.

(β) That T produces children

As with sub-section (ii)(a) beginning on page 327 above, this implied condition cannot operate to restrict or determine the gift. Furthermore, to the extent there is an implied assumption that T's children must also produce children in order to create a sufficiently extensive lineage, the preceding comments in sub-sections *(a) That E produces children* beginning on page 327 above and (b)(β) on page 346 above are then made equally relevant to this condition.

(γ) That at least one child will survive to thirty

Whilst any age contingency must pass the first stage of this two-stage enquiry, condition (III) will always fail under the second stage - for the reasons already given in sub-section (i) (b) beginning on page 330 above. However, that failure to pass stage two is further proven by its

882 See sub-section *(b) The presumption of mortality* beginning on page 47 above.

stated contingency of attaining *thirty* - which cannot occur within the Rule's permissible period of only 21 years.

The alternative possibility in condition (IV) of a grandchild being produced who then reaches thirty follows precisely the same logic. No further consideration is needed.

(δ) Outcome

It has now been demonstrated that *none* of the express or implied conditions of gift (32) is able to restrict its ultimate determination, either within the Rule's permitted period, or at all. Accordingly, the gift is void for perpetuity because there is no *ipso facto* determining condition which passes the second-stage test. Again, the matryoshka for this gift is enlarged beyond the limits established by the Rule's outer casing for similar reasons to those considered in sub-sections (ii) (a) (ε) and (ii) (b) (ε) above. There are potentially *three* or more remote causes and no necessary or proximate cause which connects them.

(d) The Potential Impact of This New Theory

(α) The 'Any Lives' and 'Constructive Lives' hypotheses

The author asserts that the 'Any Lives' hypothesis was been so completely trounced by the arguments raised throughout his thesis that no useful purpose would be served by any further discussion.[883] Although due credit has been given to elements of Deech's 'Constructive Lives' hypothesis, the absence of any concrete formula supplied to predict the selection of a 'common law measuring life in being' means there is very little of that theory

883 See further sub-section *(iv) Possible Eighteenth-Century Views of Measuring Lives at Common Law* beginning on page 144 above.

which is testable under the proposed 'Necessary Lives' model. For this reason, no more need be said.

(β) The 'Effective Lives' Hypothesis

The preceding discussion appears to have provided the Effective Lives hypothesis with proof that measuring lives are, indeed, the sole determinants of validity at common law and that it is the Rule's initial certainty requirement which selects them. Yet, it has done so by taking an entirely different approach to the problem which did not begin by assuming a connection between lives and validity. To this extent, it is submitted that the Effective Lives hypothesis has used the wrong method to reach the right conclusion - an opinion which is provable by asking one simple question of Professors Allan, Fetters and Maudsley. It is this. Within the terms of your own theory, will you please tell us *how* effective measuring lives validate gifts at common law? They cannot answer without either *(i)* simply reversing the Rule's initial certainty requirement, or *(ii)* embarking on a dialogue whose reasoning is predicated on their *unproven* assumption that lives determine validity, or *(iii)* simply presuming the initial certainty Rule always applies. To this extent, it is submitted the most provable of all the measuring lives theories has found itself to be the easiest to disprove. Unfortunately, it is not a theory at all, it is a tautology.

(γ) The 'Causal Connection' Hypothesis

The re-analysis of Morris and Wade's hypothesis in this chapter highlights three main problem areas in addition to those mentioned on page 73 et seq. above. These are:

Firstly, the preceding discussion has set out to show how a contingent future gift is predicated upon express and implies circumstantial conditions - all of which are in *some way relevant* to its final vesting. Indeed, any such gift would be meaningless without them.

However, as the preceding analysis has demonstrated, any of those conditions' relevance to the *permissible vesting period* is established only where the Rule's initial certainty requirement is met by them passing stage two testing. Yet, to consider Morris and Wade's chosen lives, these are presumed relevant only because they *could* restrict the gift were it not for the Rule's initial certainty requirement. Unfortunately, this new framework has demonstrated that simply confuses a relevant *efficient* conditional cause with relevance to the necessitated cause demanded by the Rule. In both logic and reality, these are quite separate.

Secondly, it should now be clear from the re-analysis of Morris and Wade's three example gifts that invalidity in each of these cases arises from the absence of any express or implied condition which necessarily restricts vesting either sufficiently, or at all. From this, separate proof is now offered for the argument made on page 65 et seq. above that the Rule declares these gifts void because the projection of future possibilities upon which vesting must depend has no necessitated proximate cause.

Finally, the Causal Connection hypothesis suffers from the difficulty that it seems incapable of setting a clear boundary between relevant and irrelevant lives. This is largely because it cannot discriminate between relevance to the gift and relevance to the Rule. Here, relevance, per se, is a too broadly-based concept - which is precisely why the new framework divides the question of validity into two distinct stages, with stage two being dependent upon satisfying the Rule's initial certainty requirement. From that viewpoint, the present framework overcomes this problem by its ability to describe different relationships differently. By doing so, the notion of conditionality may then be divided into two separate categories – efficient and necessitated conditions which, in turn, yield remote and proximate

causes. Immediately, the inappropriately elastic concept of relevance disappears and clearly discriminates between *necessary* and purely *accidental* (remote) lives.[884] In this regard, the author submits that whether the reader agrees or disagrees with the theory now being proposed, there is at least no uncertainty about where that definitional line falls. By itself, this provides a new point of clarity in perpetuity theory which modern reformists are advised to heed.

(C) HAVE THE STATED OBJECTIVES BEEN MET?

The author submits the notion of 'necessity' has an intuitive attraction in helping explain the nature of conditionality and how a living person serves to constrain uncertainty. The benefits of the 'Necessary Life' theory are submitted to be: *(a)* It resolves the *non sequitur* of conditional entities determining contingent outcomes, *(b)* provides a linear cosmological constant which ensures that consequences flow *from* causes, *(c)* guarantees that certainty triumphs over uncertainty, *(d)* provides decisive proof that possibilities can exist in materiality, *(e)* distinguishes between different degrees of conditionality, *(f)* is entirely consistent with early common law principles, feudalism, seisin and the doctrine of annexation,[885] and also *(g)* eliminates the possibility of lacunae in time itself.

When applied to the sub-category of perpetuities, the 'Necessary Life' hypothesis is also submitted to show how the *necessity* supplied by a living person; *(i)* explains how and why a living person can control final outcomes, *(ii)* disproves the relevance of multiple lives, *(iii)*

884 Into which category would fall all *non-effective* lives - including Morris and Wade's 'relevant' lives.

885 See sub-section *(2) The Question of Compatibility* beginning on page 294 above.

specifies a formula for resolving the so-called 'measuring lives in being' debate, *(iv)* rests upon consistent foundations of feudalistic landholding in post-Conquest England,[886] *(v)* examines perpetuities from the perspective of both the beneficial and reversionary interest, *(vi)* supplies testable boundaries of certainty upon future conditions affecting the descent of land, whilst also *(vii)* providing a model whose *modus operandi* does not depend upon simply restating the Rule's initial certainty requirement. Accordingly, the author submits the objectives set in sub-sections *(1) The Need For A More Comprehensive Theory* beginning on pages 77 above and *(3) Desired Outcomes* beginning on page 82 above appear to have been met fully. Furthermore, by doing so, the present thesis has also met the overall objective found in the title of, "Revealing ancient purposes for common law 'lives in being'". Plainly, the new understanding is founded entirely upon that ancient learning.

(D) Conclusion and Further Questions

Unfortunately, any scientific proof of the present hypothesis continues to elude us since that exists on the other side of the veil from which no-one can return. Regrettably, there is also the equally confounding effect of the 'fault lines' in English common law considered in sub-section *(2) The Confluence of Fault-Lines in the Bracton Treatise* beginning at page 11 above. Thus, we left only with a piecemeal and somewhat haphazard insight into questions of uncertainty and how they can be better understood through the necessity supplied by a living person. Nevertheless, the author's reply is to ask, 'why have so many scholars, over such vast swathes of time, consistently identified *necessity* (or the closely-related concept of certainty) as a common factor when making property dispositions?' Even where notions of

886 ibid.

necessity are not made explicit, the author argues they lie scattered in the substratum of the common law and deducible only from the logical testing performed earlier in Chapter 5. Therefore, for the most part, we must content ourselves with the strong likelihood that the smoking gun of English perpetuity theory is pointing at the influence of the ancients:

Aristotle addressed himself to questions of causation which were largely unrelated to the creation of 'things' but was concerned with exploring logical processes. However, the ancient Romans were much more emphatic about how a living person could accelerate his or her ownership of conditionally gifted property through the possibility of them exercising personal *control*. The Neoplatonists took a different path where *necessity* became the mother of certainty, but Avicenna never illustrated that principle in terms of *human* action except by reference a solar eclipse. A less instructive example would be hard to find.

By the Bractonian era, the preceding centuries of post-Conquest rule stamped living persons indelibly onto the character of real property in two ways: *Firstly*, in the form of paying homage personally to the superior lord – which was followed swiftly by the notion of taking seisin. Indeed, seisin soon became entrenched in real property and succession law by making a living person accountable for the land through possession, but also as a pre-requisite for heirs to inherit. *Secondly*, through the pursuit of heritability, the *maritagium* further impressed the notion of successive living persons as an instrument of English landholdings. Indeed, the first elements of perpetuity were supplied when homage could be postponed for three generations. In that sense, landholdings began to acquire greater longevity than just one life, albeit still measured by the passing of living persons. The same process was at work in continental Europe where the similar device of employing *fideicommissary substitutions*, with successive life tenants, became even more entrenched than in England.

The foregoing contextual observations make it unsurprising that the Bracton authors knew living persons were intimately involved in the land, but probably did not understand fully how or why that was so. Therein lay the need to find explanations from elsewhere. From this, the suggested fault-lines in English common law[887] are submitted to have arisen partly from applying unfamiliar philosophical and jurisprudential arguments to help backfill the gaps which the early treatise writers could not otherwise plug. If so, why not also medieval Islamic and Christian theology? The institutions for receiving those influences were already quite well-established. Indeed, the first law school in England had been associated closely with the Christian ministry at York Cathedral since the ninth-century CE.[888]

There is little doubt of Azo's *Romanic* influence over the Bracton treatise,[889] but It seems equally reasonable to suppose that the Bracton authors were also aware of Avicenna's theories on conditionality. Certainly, translations of Islamic scholarship into Latin, after the sacking of Toledo's libraries by western Christians, had reached Paris and Oxford by 1250. Moreover, Bishop Grosseteste at Oxford developed a cosmological model which seemed unmistakably similar to portions of al-Fārābī's work. Accordingly, Islamic influence may have provided a conceptual bridge between the Bracton treatise and the ancient Roman's notion of *living persons* to help distinguish between valid and invalid conditions. Indeed, given the logical conclusion of Avicenna's hypothesis was that the material universe is filled entirely with otherwise *indistinguishable* contingencies, the Bracton authors might then have found

887 See sub-section *(1) The Peculiarities of English Jurisprudence* beginning on page 7 above.

888 Sherman (n 39) 319; Edward D. Re, 'The Roman Contribution to the Common Law' (1961) 29 Fordham LR, 447, 460.

889 See n 27 above.

the Roman precedent offered a much less 'alien' view of the world they knew. Thus, whilst a 'one lifetime' boundary might now seem arbitrary or imprecise to modern eyes, the notion of living persons as a 'necessary' condition would have provided a valuable means to distinguish between different conditional situations. Here, that distinction is now submitted to lie between conditional events which are either capable, or incapable, of being constrained necessarily by one *living* person. In this way, the propinquity of a living person to a valid gift is explained according to Aristotelian ideas that necessary, proximate causes lead to situations of deemed certainty.

Much work remains to be done on the re-envisioned connection between English common law and the ancient influences described herein. Whilst there is considerable scholarship on the Romanic influence, much less exists regarding the effect of Grecian and Classical Muslim thinking upon the common law. This is surprising given the eagerness of western Christians to learn from the Arabian scholars. One suspects the explanation lies in the same prejudice which largely ignored contributions to 'feudal' scholarship by continental academics such as Bloch, Ganshof and Güterbock. This was the conceit that Pollock and Maitland *at alia* knew better than them all.

It is submitted the present hypothesis overcomes many of the difficulties arising from existing theory and seems to offer an important resolution to the 'measuring lives' debate. Moreover, a useful predictive tool has been proposed from which we have gained an improved understanding of the Rule's operation. Now, with reference to Avicennian theory, understand not only *how* the Rule chooses a life in being, we can also see why. The missing ingredient is submitted to be the annexation of a life to the modus as a necessary condition which demands that the concurrent interests must be determined within the Rule's strict

limits. Lord Nottingham came tantalisingly close to recognising this, but all hope of making good sense of English perpetuity law was lost soon after Twisden J's contribution. Questions of causality, conditionality and perpetuity law were left in unexplained abeyance until stated by Professor Gray and revered as a gospel which no-one dared challenge, until now.

In the poetic terms which so appealed to Barton Leach, the author now offers a personal lament for the demise of an exquisitely beautiful product of the ancient and medieval mind:

Angels grieve over how the Rule's opacity,
Was caused by Gray neglecting necessity.
And Twisden too, when all's said and done,
That a measuring life can be more than one.

Oh, how the Rule would have been made simpler,
If now re-written in the words of Avicenna.
Perhaps our legislatures should be challenged to say,
Whether such cohesive law-making still exists today?