Bequests of Tangible Chattels in Succession

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Many wills contain provisions giving chattels, or their use, to beneficiaries one after another. This will typically occur when the testator wishes to keep heirlooms or other valuable chattels within the family. If this is not done by way of an express trust, difficult legal questions can arise concerning the rights of the beneficiaries and of third parties. Several different outcomes are possible. This article identifies the law in this area, and makes suggestions for reform.

MANY testators bequeath chattels by way of successive interests — usually, but not always, to members of their families. This will typically be for the purpose of passing on, and keeping within the family, heirlooms or especially valuable chattels such as antiques, works of art and jewellery, and collections of various kinds.

In many cases this is done by way of a simple trust. The chattel may be given by the will to the trustee of the estate upon trust, say, to permit the testator's eldest child to use and enjoy the chattel for life, and possibly, after that person's death, upon a similar trust for his or her eldest child for life and, in any event, upon trust for the testator's eldest great-grandchild then living, absolutely.[1] Many variants of this basic scheme of disposition are possible and come readily to mind. In Queensland and Western Australia legislation contains somewhat unsatisfactory provisions designed to facilitate the administration of this kind of trust, and to protect the trustee.[2]

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1. This article does not deal with the possible application of the rule against remoteness of vesting which applies to certain types of disposition.
2. Trusts Act 1973 (Qld) s 73; Trustees Act 1962 (WA) s 72. These provisions are considered in detail infra pp 212-214.

The trust, however, is not the only legal device available to testators wishing to bequeath chattels in succession. Superficially, it appears that much the same result can be achieved without the interposition of an express trust between the testator and the beneficiaries; that is, by a disposition which simply bequeaths a chattel in the form 'to L (a life tenant) for life, remainder to R (a remainderman), absolutely', or, more extensively, 'to L1 for life, remainder to L2 for life, remainder to L3 for life, remainder to R, absolutely'. One or more of these persons might be identified by description, for example, as 'my eldest child's eldest child then living at his or her death'; and so on.[3]

A typical example of this form of bequest would be:

> 'I give my Regency rosewood sideboard to my son, John, for life, and after his death to his daughter, Susan, absolutely.'

A somewhat more complex form would be:

> 'I give my Regency rosewood sideboard to my son, John, for life, and after his death to his eldest child to survive him for life, and after that child's death, to his or her eldest child then surviving, absolutely.'

This type of gift is often called an executory bequest.[4] Unlike a trust, it purports simply to confer successive property interests upon the legatees at common law. It may well be chosen by the drafter of a will who deliberately wishes to avoid the expense, or the perceived inconvenience and complications, of a trust, or the intervention of a trustee in family affairs. Equally, it may result from the drafting efforts of the ill-informed, and, especially in the case of home-made wills, of those who are unaware of the difference between a bequest and a trust, and who may not have considered the legal consequences of this alternative, and deceptively simple, form of disposition.

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3. The initial letters 'L' and 'R' are used in this article schematically. L need not necessarily be a tenant for life; he or she may enjoy some lesser interest.
4. See especially ELG Tyler & NE Palmer (eds) *Crossley Vaines' Personal Property* 5th edn (London: Butterworths, 1973) 41-43; WJ Chappenden & JW Carter (eds) *Helmore's Personal Property and Mercantile Law (NSW)* 8th edn (Sydney: Law Book Co, 1979) 100-101; CH Sherrin, RFD Barlow & RA Wallington (eds) *Williams' Law Relating to Wills* 6th edn (London: Butterworths, 1987) 61; R Jennings (ed) *Jarman's Treatise on Wills* 8th edn (London: Sweet & Maxwell, 1951) 1442-1447; JC Gray *The Rule Against Perpetuities* 4th edn (Boston: Little Brown, 1942) 71-77; RH Kersley (ed) *Goodeve's Modern Law of Personal Property* 9th edn (London: Sweet & Maxwell, 1949) 9-10; C Williams (ed) *Williams on the Law of Personal Property* 18th edn (London: Sweet & Maxwell, 1926) 439-440; DT Oliver 'Interests for Life and Quasi-Remainders in Chattels Personal' (1908) 24 LQR 431; *Re Tritton* (1889) 5 TLR 687; *Re Thynne* [1911] 1 Ch 282; *Re Backhouse* [1921] 2 Ch 51; *Re Swan* [1915] 1 Ch 829.

In fact it is not, and since medieval times never has been, entirely clear what those legal consequences are. Nor is it clear that this form of disposition is correctly described as, or that it operates by way of, an executory bequest. This article reviews this area of the law of wills, and attempts to clarify the nature and incidents of a bequest of tangible chattels in succession other than by way of express trust. It will be seen that this form of disposition can lead to an uncertain outcome, and that it should probably be avoided by the prudent drafter of a will. It will also be seen that the law in this area, far from being simple, is complex, and that legislation is desirable to settle it.[5]

FOUR MODES OF BEQUEATHING CHATTELS IN SUCCESSION

It is well settled that the fundamental doctrines of estates and tenures in real property have no application to chattels at common law. Life estates and remainders may, of course, exist with respect to chattels in equity as incidents of a trust; and it is the certainty and flexibility associated with these that make the use of an express trust attractive where successive interests in chattels (or other kinds of property) are given by will. But the common law had, and still generally has, no concept of the limited ownership of a chattel such as a life interest or a term of years. 'A gift of a chattel for an hour', it has been said, 'is a gift of it forever'.[6] Historically, the reasons for this were said to be threefold: first, the inherently perishable nature of chattels; secondly, the interests of trade and commerce in goods; and thirdly, against this background, the discouragement of litigation. As Blackstone put it:

> By the rules of the ancient common law, there could be no future property, to take place in expectancy, created in personal goods and chattels; because, being things transitory, and by many accidents subject to be lost, destroyed or otherwise impaired, and the exigencies of trade requiring also a frequent circulation thereof, it would occasion perpetual suits and quarrels, and put a stop to the freedom of commerce, if such limitations in remainder were generally tolerated and allowed.[7]

At common law, the ownership of a chattel, as distinct from its possession, is absolute and indivisible. Ordinarily there can be no *legal* life estate or entailed

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5. This article is not concerned with chattels real, nor with the special rules of law applicable to heirlooms properly so-called, nor with bequests of chattels which are intended to be consumed (eg, a wine cellar). These are called bequests quae usu consumuntur and are also subject to special rules.
6. Brooke's Abridgement *Done et Remainder* pl 57, cited by WS Holdsworth *A History of English Law* 4th edn (London: Methuen, 1936) vol VII, 470.
7. W Blackstone *Commentaries on the Laws of England* (Oxford: OUP, 1765-1769), cited by Oliver supra n 4, 432.

estate, and no *legal* remainder, and hence no inter vivos settlements of chattels analogous to strict settlements of land. Equity, therefore, duly made good this deficiency in the common law, and came to recognise and protect its own limited interests in chattels arising by way of trust, broadly analogous to those existing in real property.[8] Trusts of chattels, like trusts of other property, have long been recognised and enforced in equity; but they are not our present concern.

Historically, the ecclesiastical courts, exercising their special and limited jurisdiction in respect of probate and legacies, came to recognise that bequests of chattels in successive interests could operate without the intervention of a trust.[9] Equity also acquired an auxiliary, remedial jurisdiction in respect of this type of bequest by compelling the intermediate legatees to perform the disposition according to its terms.[10] Where the property consisted of tangible chattels, equity's mode of enforcement was to require an inventory to be taken and signed by the relevant life tenant for the benefit of all parties.[11] Sometimes the life tenant might be ordered by the Court of Chancery to provide security. In addition, the equitable remedies of specific restitution and injunction were available to the succeeding life tenant or reminderman where the preceeding life tenant had wrongfully disposed of the chattel or threatened to do so.[12]

By the mid-eighteenth century Blackstone could say, qualifying the passage noted above: 'But yet in last wills and testaments such limitations of personal goods and chattels in remainder after a bequest for life were permitted'.[13] In other words, what could not be done without the interposition of a trust inter vivos could be done, after a fashion, by will. There is no reason known to the present writer why this should not still be the case today. But the questions here under consideration are: (i) How, precisely, does this simple form of bequest operate? (ii) What are its legal incidents? (iii) How is it administered?

Contemporary commentators on the law of wills tend either to deal with this topic cursorily or not at all. In Australia, the matter is discussed by Helmore[14] (in

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8. See generally Holdsworth supra n 6, vol IV, 476; vol V, 304-307; vol VI, 642-644.
9. Holdsworth ibid, vol VII, 471, 475-477; *Manning's Case* (1609) 8 Co Rep 94b; 77 ER 618; *Hide v Parrat* (1696) 2 Vern 331; 23 ER 813; *Lampet's Case* (1612) 10 Co Rep 46b; 77 ER 994.
10. *Williams on the Law of Personal Property* supra n 4, 441; Holdsworth supra n 6, vol VII, 474 et seq (this was enforced by injunction). *Re Swan* supra n 4 — in this case an award of equitable compensation was made.
11. *Conduitt v Soane* (1844) 1 Coll 285; 63 ER 421; *Temple v Thring* (1887) 56 LJ Ch 768; *Foley v Burnell* (1783) 1 Bro CC 274; 28 ER 1125.
12. *Williams on the Law of Personal Property* supra n 4, 441-442; Oliver supra n 4, 434.
13. Blackstone supra n 7.
14. Supra n 4.

the context of personal property law), but not by Atherton & Vines,[15] Hardingham, Neave & Ford,[16] Lee,[17] or Certoma[18] in their commentaries on the law of wills. In England, the question is considered in *Williams on Personal Property*,[19] and by Crossley Vaines,[20] Goodeve,[21] and especially by Jarman[22] — albeit inconclusively. It is considered briefly in *Williams on Wills*,[23] but not in Theobald,[24] Mellows[25] or Bailey.[26] In the United States, it was dealt with extensively by John Chipman Gray in his classic *The Rule Against Perpetuities*,[27] and also, and more recently, by the editors of *Page on Wills*,[28] in which several paragraphs of that equally classic work testify to the potential for voluminous litigation on this subject.

It might be concluded from the foregoing, as well as from the dearth of recent Anglo-Australian case law in this area, that the matter is of little practical significance, notwithstanding the many modern cases collected in the American texts. However, even the briefest consideration reveals that a bequest of a chattel in the simple form 'to L for life, remainder to R' is susceptible of various modes of operation, each having quite different legal incidents and effects. These relate to the rights and property interests given by such a bequest, including the legatees' ability to pass title to a purchaser or donee, and the mode of its administration.

Looking at the matter historically, there appear to be at least four possible modes by which this type of bequest may validly operate. Each of these modes has emerged from ancient case law and has been espoused by one or more of the commentators referred to above. It also appears that there is no clear authority in favour of any one mode. The four modes are as follows:

First, it is possible that the entire ownership of the chattel is given immediately by the will to L, R having merely an executory interest, which is not itself a form of property but which is analogous to an executory interest in land. Secondly, it is possible that the entire ownership is given immediately to R, L having merely

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15. R Atherton & P Vines *Australian Succession Law: Commentary and Materials* (Sydney: Butterworths, 1996).
16. IJ Hardingham, MA Neave & HAJ Ford *Wills and Intestacy in Australia and New Zealand* 2nd edn (Sydney: Law Book Co, 1989).
17. WA Lee *Manual of Queensland Succession Law* 4th edn (Sydney: Law Book Co, 1995).
18. GL Certoma *The Law of Succession in NSW* 3rd edn (Sydney: Law Book Co, 1997).
19. Supra n 4.
20. Supra n 4.
21. Supra n 4.
22. Supra n 4.
23. Supra n 4.
24. HS Theobald *Wills* 14th edn (London: Sweet & Maxwell, 1982).
25. CV Margrave-Jones (ed) *Mellows on The Law of Succession* 5th edn (London: Butterworths, 1993).
26. SJ Bailey *The Law of Wills* 6th edn (London: Pitman, 1967).
27. Supra n 4.
28. WH Page *The Law of Wills* rev'd edn (Cincinnati: WH Anderson, 1961) paras 37.65-37.70.

possession of the chattel, for the purpose of use and enjoyment, for life. The technical term for L's interest in this case, derived from Roman law, is a 'usufruct'. Thirdly, it is possible that, even though L is, by definition, *not* made an express trustee by the will, nevertheless he or she might be regarded in equity as a trustee by operation of law for himself or herself for life and then for R. Fourthly, although there is again, by definition, no express trust, the testator's personal representative, whether executor or administrator, might be regarded as trustee by operation of law for L for life, and then for R. For purposes of discussion, these four possible modes of operation may be called, respectively, the executory bequest mode, the usufruct mode, the life tenant-trustee mode, and the executor-trustee mode.[29] Each of these modes, as one would expect, carries its own particular incidents and effects; and these will be noticed below.

Executory bequest

Under this mode the disposition operates entirely at common law. The chattel is owned by L, subject to R's so-called executory interest. R's interest depends entirely upon him or her surviving L. If R does not survive, then R's estate is entitled to nothing.

What, exactly, is an executory bequest? The technical meaning and significance of an executory interest in property, whether real or personal, is that it is a future interest, operating at law, that is neither a reversion nor a remainder. The essential point in our example is that R has no present proprietary interest in the chattel during the continuance of the preceding interest or interests. Rather, R's proprietary interest, as it were, *springs up* when it is found that R has in fact survived L. Until then R, unlike a reversioner or remainderman, does not own any property in the chattel, but has merely a legal chose in action to protect his or her possible future interest.[30] This means that L, as owner, might well succeed in passing valid title to the chattel by sale or gift to a third party, and regardless of whether that person is a bona fide purchaser for value without notice of R's interest. But R could not do this at common law, although by legislation he or she can now do it in some jurisdictions.[31]

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29. Logically, a fifth mode must exist, namely where R is a constructive trustee for L and other intermediate interests; but no authority discovered by the present writer favours this possibility, and it would in any case be subject to overwhelming legal and practical difficulties, particularly those relating to the identification of R.
30. *Re Tritton* supra n 4; *Re Thynne* supra n 4; *Re Backhouse* supra n 4.
31. This legislation was originally contained in the Real Property Act 1845 (Eng) s 6, later in the Law of Property Act 1925 (Eng) s 4. The effect of the legislation is to enable R to dispose of an expectancy. In Australia, see: Conveyancing Act 1919 (NSW) s 50; Property Law Act 1974 (Qld) s 31; Law of Property Act 1936 (SA) s 10; Conveyancing and Law of Property Act 1884 (Tas) s 80; Property Law Act 1958 (Vic) s 19. There is no corresponding legislation in force in Western Australia.

It follows from this that, because this mode of bequest operates entirely *at law*, L's ownership, although apparently given by the will only for life, might well become absolute. This would occur if R predeceased L, or if R were a person identified by description only, and the description failed for uncertainty. It would also occur if R disclaimed the bequest. In any of these cases the chattel would belong to L (or to L's estate after death) absolutely, and would not revert to the testator's estate. This would also occur where the chattel was merely given to L for life, but with no gift over, as could easily happen in the case of a home-made will. The basis for this result in each of the supposed cases is that, apart from statute, there can be no limited ownership of a chattel at law: 'a gift of a chattel for an hour is a gift of it forever'.[32]

The executory bequest has found the support of many commentators in the long history of the subject.[33] Most recently it appears to have been espoused by the editors of Helmore,[34] Crossley Vaines[35] and Williams.[36]

It is obvious, though, that this mode of disposition is anomalous in at least two senses. First, it is not clear what are the extent of the interests enjoyed by L and R respectively, at least so long as the possibility of R's interest taking effect continues. L cannot be regarded as the absolute owner during this period because R undoubtedly has a chose in action to protect his or her interest. This chose in action is not, however, itself a proprietary interest in the chattel. It does not require to be registered as a bill of sale; it is merely a right to obtain a court order. The true position, it is suggested, is that L has an absolute proprietary interest for some legal purposes, but not for others. It seems unclear whether, or to what extent, L can, by sale or gift of the chattel, defeat R's interest — whatever it is. Secondly, the executory bequest concept allows the distinct possibility that the testator's manifest intention will be defeated. The will shows that L is to have a life interest only; but if R predeceases L, then L's interest may well become absolute. This is because, the executory bequest having failed, there would be no reason not to recognise the impossibility of limited ownership of chattels, such as life interests, at law.

One might conclude that the concept of an executory bequest at least enables a testator's apparent intention to be carried out and enforced according to its terms, except where a failure of R's interest produces an absolute interest in L, and also, possibly, where L has alienated the chattel to a third party. However, in each of the latter two cases the testator's intention would be defeated by legal technicalities difficult to support on grounds of common sense.

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32. Brooke's Abridgement supra n 6.
33. Most of these commentators are identified by Oliver supra n 4.
34. Supra n 4.
35. Supra n 4.
36. *Williams on the Law of Personal Property* supra n 4.

Usufruct

Under this mode of bequest, the entire property in the chattel is said to belong to R, L merely having rights of use and enjoyment during the period of his or her life interest.

Usufruct is a concept borrowed from the civil law by the ecclesiastical courts, and adopted by English equity in relation to bequests.[37] Its most basic meaning is 'the right of reaping the fruits (*fructus*) of things belonging to others, without destroying or wasting the subject'[38] over which the right extends. Its essence in relation to bequests of chattels in succession is the right to use, without consuming in use, the property of another.

The most obvious parallel to usufruct in the common law is bailment. But the two concepts have very different origins and are in every respect quite separate and distinct. Bailment is wholly a creature of the common law. A bequest of a chattel for an apparently limited interest does not fall into any one or more of the six established categories of bailment,[39] and has never been treated as doing so.

By the doctrine of usufruct, if the bequest to R fails for some reason, such as uncertainty in the description of R or as a result of R's disclaimer, then the chattel belongs to the residuary beneficiaries, or next-of-kin of the testator, as the case may be, or to those who represent those persons after death. These interests are proprietary and absolute, but subject to the usufruct interests, and they will become possessory upon the cesser of those interests. If L purports to alienate the chattel by sale or gift, then the alienee will be liable in an action by R (or those who represent R) to recover the chattel, or, alternatively, for damages for its conversion: it is a case of 'nemo dat quod non habet'.

Like the executory bequest, usufruct is undoubtedly a valid form of testamentary disposition. It is recognised as such by Gray,[40] Oliver[41] and Holdsworth.[42] In an article reviewing some of the older authorities, Oliver concluded that this theory commanded the best historical pedigree of all possible modes in cases where the terms of a will are ambiguous as to the intended mode of operation of a bequest of a chattel in successive interests.[43] From a policy point of view, there is much to commend it. It does no violence to the fundamental law of personal

37. The history of the matter can be traced through the following cases: *Vachel v Vachel* (1669) 1 Chan Cas 129; 22 ER 727; *Hide v Parrat* supra n 9; *Randall v Russell* (1817) 3 Mer 190; 36 ER 73; *Evans v Walker* (1876) 3 Ch D 211.
38. W Jowitt *Dictionary of English Law* 2nd edn (London: Sweet & Maxwell, 1977).
39. (i) depositum; (ii) commodatum; (iii) locatio et conductio; (iv) vadium; (v) locatio operis faciendi; (vi) mandatum: see Jowitt ibid.
40. Supra n 4.
41. Supra n 4.
42. Supra n 6, vol VII, 476-478.
43. Oliver supra n 4.

property because R is the only person with any title to the chattel: L's rights are merely possessory. By treating the bequest as merely giving the *use* of the chattel to L, a balance is struck between effecting the testator's intention and preserving the fundamentals of property law. R can certainly alienate the chattel; but L, having both enforceable rights to possession and (one assumes) actual possession, can hardly be dispossessed; and, if dispossessed, L has every right to recover possession.

There is, however, one considerable difficulty with the concept of usufruct. This is that R, the only relevant owner of the chattel, may not be identifiable. As previously suggested, R may merely be described, for example, as 'my eldest lineal descendant then living', following the granting of a usufruct interest for life. In such a case it would *necessarily* be impossible, at the date of the testator's death, to identify that person (although, depending upon the facts, not necessarily impossible to see who would own the chattel upon the non-existence of such a person). In this case it might well be impossible to determine who owns the chattel and, consequently, who may dispose of it, and who has an insurable interest.

Life-tenant trustee

Under this mode of operation it is said that L is a trustee for himself or herself for life and then for R. This means that what, on the face of it, looks like successive legal interests given by the will are not such at all. Rather, both L and R have immediately vested equitable, proprietary interests in the chattel notwithstanding the testator's apparent intention *not* to create a trust.

What kind of trust is this? Under the two previous modes we were concerned with successive legal interests based on the premise that the testator had not created an express trust. If the testator had intended this, then the question of successive legal interests would not arise. It follows that if a trust does exist here it must be wholly by operation of law — a constructive trust.

There is significant support for this mode among the authorities. It was espoused by *Williams on the Law of Personal Property*[44] and by *Fearne on Contingent Remainders*.[45] There is some old case law in its favour.[46] What is clear is that, historically, equity recognised, in some cases, what we may be obliged to call L's life interest and R's remainder, whereas the common law would not; and that R could obtain the equitable remedies of injunction, account and, possibly, specific restitution of chattels, to protect his or her interest.

These remedies would facilitate equity's concern to effectuate a testator's plain intention,[47] leading to what we would nowadays call 'L's equitable duty to

44. Supra n 4.
45. 10th edn, cited in Oliver supra n 4, 437.
46. *Re Swan* supra n 4; *Shirley v Ferrers* (1690) 1 P Wms 6 note; 24 ER 271; *Catchmay v Nicholas* (1673) Rep Temp Finch 116; 23 ER 63.
47. *Williams on the Law of Personal Property* supra n 4.

account to R for the chattel'. It is a short, but certainly difficult, step from this to say that equity would see a fiduciary relationship between L and R. If this step were taken, then L's position would attract the law of constructive trusts, including the provisions contained in trustees' legislation. No modern case in English or Australian law discovered by the present writer seems to support this position. If such a trust exists it must be on the authority of old case law, supported by the considerable authority of *Fearne*.

Such a trust would enable L to pass title to a bona fide purchaser for value without notice of R's interest. L would, of course, be accountable to R for any such improper dealing. If L's interest were to fail for some reason, then R's interest would be accelerated and R would own the chattel absolutely. If R's interest were to fail, then L would take as trustee for himself or herself for life and then for those entitled to the testator's estate.

Executor-trustee

Some old authority exists to support the view that a testator's personal representative might be regarded as a trustee of the chattel for all interested parties. Again, we are necessarily dealing here not with an express trust but with a possible trust arising by operation of law. Holdsworth writes:

> The essence of the medieval will was the appointment of an executor; and the executor was the person who took the property on trust for ... the beneficiaries.... Hence, just as many things which were impossible at common law could be done [by] a foeffee to uses, so many things otherwise impossible could be done through the medium of an executor. The common law judges were perfectly well aware of this fact; and therefore they did not hesitate to allow testators to do by will what they refused to allow them to do by an act inter vivos [ie, to bequeath limited interests in chattels].[48]

To allow the bequest to operate in this way would be to recognise equitable proprietary interests belonging to both L and R until L's death, when R's interest would become absolute. But the interposition of a notionally independent trustee as the sole legal owner of the chattel introduces different considerations relevant to purported dealings with it, even if L or R, or perhaps L and R, were in fact the testator's personal representatives. The executor-trustee could defeat the equitable interests by sale to a bona fide purchaser for value without notice.[49] If L, or R so long as his or her interest remained equitable, purported to alienate to a third party, then such an alienation could only pass equitable title. That might be a consideration in favour of this mode of operation of the bequest.

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48. Holdsworth supra n 6, vol VII 471.
49. The legatee-beneficiaries would, of course, have compensatory rights against the executor-trustee personally.

Nevertheless, this mode is subject to an overriding objection. It is one thing for a trustee of an express trust to accept the office: this is done knowingly and, it is presumed, willingly. It is quite another thing for an executor or administrator, who contemplates merely the duties of administering the deceased's assets, to find himself or herself saddled with ongoing duties of trusteeship by operation of law. The offices of personal representative, and of trustee for persons in succession, are so different in their nature and incidents as to make this mode of disposition inappropriate to the problem under discussion. It would be unfair for the law to impose upon an unwitting executor or administrator duties of ongoing trusteeship where none was either intended to be created by the testator or accepted by the personal representative.

In the writer's view, this is the least attractive of the four relevant modes of bequest: it seems so completely unsatisfactory that it will not be further considered.

TESTATOR'S PRESUMED INTENTION

It will have been noticed that the foregoing alternatives come into play only where the relevant terms of the will are not only unclear or ambiguous as to the intended mode of operation of the bequest, but where they are *irresolvably* so by the normal processes of testamentary construction. Where this is not the case, then effect can be given to the testator's intention by application of one or other of at least the first three modes we have identified. None of these has any inherent legally-invalidating vice, and each seems to be sufficiently supported by authority.

For example, if it is clear from the will that L is intended to have mere rights to possession of the chattel, and not ownership in any sense (ie, a usufruct), and he or she can be identified at the relevant time, then there seems no reason why a modern court could not give effect to that intention according to the usufruct mode. If, on the other hand, the will shows clearly that L is to be, and is *only* to be, the legal owner, and in no sense a trustee, then the disposition could well be treated as an executory bequest, at least where R is identifiable at the relevant time. Other modes would be excluded in giving effect to the testator's intention.

One must proceed, therefore, upon the basis that the will shows merely an intention to bequeath a chattel in successive interests other than by way of express trust — and nothing else. It is time to consider specifically our two initial examples. Suppose, then, that the will provides as follows:

> 'I give my Regency rosewood sideboard to my son, John, for life, and after his death to his eldest child to survive him for life, and after that child's death, to his or her eldest child then surviving, absolutely.'

It is, of course, possible that this disposition could give rise to a perpetuity problem; but it need not necessarily do so, and we will assume that it does not.

The bequest tells us nothing expressly about the testator's preferred mode of operation. But this very fact, it is suggested, raises a presumption about the testator's intention. The presumption is that, in bequeathing the chattel in specie to the legatees in succession, the testator wished to protect the several interests given by the will, separately and equally, so far as the law allows. This presumption would, by its very nature, tend to exclude both the executory bequest and the usufruct mode of bequest for the following reasons.

If treated as an executory bequest, L1 (ie, John, in the above example) might well acquire absolute ownership of the chattel upon the actual failure of the interests of L2 and R. This, as we have seen, is an inherent, if anomalous, possibility in executory bequests due to the common law's general abhorrence of the limited ownership of chattels. In our example, this result would be contrary, not to the testator's presumed intention, but to his or her *expressed* intention. In addition, under this mode of operation, it seems uncertain, legally, whether L1 (or L2) could, by alienation, defeat L2's (or R's) acquisition of the chattel in specie, leaving L2 (or R) merely with compensatory remedies.

In our present example, it is suggested, it would be impossible to apply the usufruct mode simply because R cannot be identified with certainty at any point until his or her interest actually becomes possessory: an unidentifiable person cannot own a chattel at common law. The usufruct mode would presuppose a much simpler bequest, for example:

> 'I give my Regency rosewood sideboard to my son, John, for life, and after his death to his daughter, Susan, absolutely.'

Here, it would certainly be possible to apply the usufruct mode but, it is suggested, inappropriate. This is because usufruct entails the distinction between the unequal, and conceptually different, incidents attributable to ownership, on the one hand, and mere possession, on the other. That is to say, the rights of the parties would be governed by a regime embodying an inherent tension. Whereas L's rights to legal possession would arise from the will, the ownership rights of a third party to whom R might alienate the chattel by sale or gift would arise from that alienation — sale by an owner. The relevant rights are wholly legal, not equitable. And although the Court of Chancery may have been prepared, historically, to make orders to protect L, it is by no means clear how competing, and different, legal rights arising from different sources would be protected at the present day.

A PROPOSED SOLUTION

This leaves us with the life tenant as constructive trustee. It is suggested that of the possible modes, this, in an appropriate case, is by far the most attractive alternative: it more certainly enables the testator's presumed intention to be fulfilled;

it avoids many problems associated with the identity of unascertained beneficiaries; and it is the most administratively convenient. In addition, the law as to constructive trusteeship is relatively certain, whereas the law as to executory bequests and usufruct interests is comparatively uncertain.

By treating L (or L for the time being) as a constructive trustee, the interests of all parties in the chattel would not only be equitable but, in fact, equitable proprietary interests. They could severally be defeated only by the sale of the chattel to a bona fide purchaser for value without notice. In this event, of course, beneficiaries having subsequent interests would enjoy appropriate equitable remedies against the wrongdoer. By this mode of operation, L would be a trustee for himself or herself for life, and then for R. Exactly the same would apply if L were not a single individual but a series of successive intermediate interests represented by, say, L1, L2 and L3 (always subject to the rule against perpetuities). Each would in turn hold the chattel upon a similar constructive trust. By this mode, there would be no difficulty in identifying L or R because this question would now be relevant only at the time when that person's interest became vested. If L were an infant, or lacking capacity and unable to act as trustee, then application could be made to the Supreme Court for orders for the alternative administration of trust properties in the normal way.

It is suggested that to treat the life tenant as a constructive trustee would be to treat the case analogously to the manner in which the testator should have dealt with it in the first place, namely by way of express trust. It will be objected that there is little in the modern law of constructive trusts to suggest that a legatee of a chattel for life is, ipso facto, a fiduciary vis-à-vis each and all of the persons given future interests therein by a will. This is undoubtedly true, and might be seen by a court as an insuperable objection. It is also true that the authorities in favour of this view in Anglo-Australian law are relatively few and ancient.[50] In the view of the present writer, in such an uncertain area of the law legislative reform is desirable. The point is that to treat the life tenant as a constructive trustee, in the absence of a clear provision to the contrary in the will, is the most legally appropriate way to give effect to the testator's presumed intention.

LEGISLATIVE DESIDERATA

No Anglo-Australian jurisdiction has legislation directly relevant to the matters canvassed in this article. Both Queensland and Western Australia have legislation indirectly relevant to these matters,[51] but in both jurisdictions the legislation

50. See supra pp 207-208.
51. Trusts Act 1973 (Qld) s 73; Trustees Act 1962 (WA) s 72.

seems partial and unsatisfactory — it applies only to the relationship between a trustee (including a deceased's personal representative) and a beneficiary, including a legatee. It does not apply to the relationship between legatees inter se. Essentially, the Queensland and Western Australian provisions adopt the old Chancery practice noted previously, especially in *Conduitt v Soane*,[52] of requiring the life tenant to sign an inventory of the chattels and deliver the same to a trustee (including a deceased's personal representative) as a condition of the trustee's delivering the chattels in specie to the life tenant.

This is the extent of the Queesland legislation, but its Western Australian counterpart goes further. By section 72 of the Trustees Act 1962 (WA), a trustee[53] may (not 'must') make two copies of an inventory of the chattels. One copy is to be signed by the life tenant and re-delivered to the trustee. The other copy is required to be delivered to the life tenant, although the precise meaning of this is unclear. Upon receiving the signed copy the trustee may deliver the chattel to the life tenant upon such terms and conditions as the trustee thinks fit. Thereafter, the trustee is absolved from any further responsibility with respect to the chattel. Further, the signed inventory is deemed to be a bill of sale, and is to be registered as such, and kept registered, under the Bills of Sale Act 1899 (WA). An inventory is not required where the chattels comprise articles of household furniture (and so would not apply to the examples considered above); but the trustee is nevertheless entitled to the protection of the section. The section does not apply where the life tenant is an infant.

The policy of these provisions is to provide a regime which a trustee of any description may adopt in order to minimise his or her duties and potential liabilities. As such it greatly favours the trustee, possibly at the expense of persons having future interests in the chattels.

The point to be noticed here, however, is that these provisions do not apply to the relationship between persons having successive *legal* interests in chattels; they only apply where a trust arises. They would therefore not apply to the beneficiaries of an executory bequest inter se, nor of a bequest creating usufructuary interests.

It is suggested that, in all Australian jurisdictions including Western Australia, legislation is required, first, to resolve the problems identified in this article by deeming any of these persons to be a trustee of the chattel for subsequently interested parties,[54] and secondly, to provide an appropriate regime governing the

52. Supra n 11.
53. Including a deceased's personal representative and any 'implied' or constructive trustee.
54. It is submitted that, in Western Australia, a simple amendment to the Trustees Act 1962 (WA) s 72 would achieve a desirable balance between the natural responsibilities of a life tenant of chattels and reasonable administrative convenience, bearing in mind that any

administration of chattels bequeathed to persons in succession other than by way of express trust.

CONCLUSION

Because the common law recognises no limited ownership interests in chattels it follows that a non-trust disposition by will of a chattel in successive interests can only create a regime which is sui generis. Historically, the English courts enforced such a disposition, independently of equity, either as an executory bequest, or as a usufructary interest (or, in equity, by imposing a constructive trust upon the life tenant or, possibly, upon the testator's personal representative).

It is suggested that to treat such a disposition as valid at law is, essentially, anomalous — it is to salvage it by recourse to the dubious application of principles derived, on the one hand, from the common law of real property or, on the other, from Roman law. In either case, the legal and practical difficulties inherent in such a salvage operation significantly exceed the benefits.

The case is one requiring legislative reform under which the life tenant for the time being would be fixed with duties of trusteeship of the chattel.[55] Such a regime would create a framework of accountability in which the rights of life tenants and remaindermen, and also third parties, would be clearly determined under the supervision of the Supreme Court in accordance with established equitable principles.

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trustee, including a constructive trustee or a person deemed to be such by statute, is ultimately under the supervision of the Supreme Court. Such an amendment might take the following form:

'Section 72 is amended by adding the following subsections:

(5) Unless a will provides to the contrary, a bequest of tangible chattels in successive interests other than by way of express trust shall be deemed to give rise to a trust in which a tenant for life or for any other limited interest holds the chattels upon trust for himself for the duration of that interest and then for the person subsequently entitled.

(6) A trustee pursuant to subsection (5) of this section shall be accountable in all respects to the person subsequently entitled as though such trustee were an express trustee of the chattels, save to the extent to which he shall have taken advantage of the protection provided by subsections (1) to (4) inclusive of this section.

(7) A trustee pursuant to subsection (5) of this section who has caused a signed inventory to be made of the chattels, and who has registered the same as a bill of sale and has otherwise complied with the provisions of subsection (3) hereof, and who retains possession of the chattels in accordance with his entitlement thereto, shall be deemed to have delivered them to himself for the purposes of this section, and shall be entitled to the protection afforded by subsection (2) hereof.'

55. See the provisions of the Trustees Act 1962 (WA) s 72, together with the amendments thereto suggested in supra n 54, for a possible model for this type of legislation.