W.16 - Perpetuities and accumulations

This web-entry is concerned with the 'rule against perpetuities and accumulations'.

In Chapter 16 there is a very brief summary of the "old" law relating to perpetuities and accumulations. That is the law that applies to will trusts where the will was made before 6 April 2010 and to other trusts that took effect before 6 April 2010. Here the old rules are considered in far greater detail. Trusts operating under these rules will continue for some time to come, so it will be vital for practitioners to continue to understand them. Also, if you are asked whether the new rules have improved the law, you will need to understand the difficulties that arose under the old rules.

16.1 The old rules

16.1.1 Introduction

Common law has always disliked uncertainty in relation to future interests in land, for such uncertainty tends to make the property inalienable for some time, and common law has always opposed any arrangement which restricts free alienation. For example, should a settlor, who as yet has no children, wish to settle land upon 'the first of my great-grandchildren to obtain a law degree', it could easily be 70 or 80 years before the great-grandchild who is to take the gift can be ascertained. For that period of time there would be no one absolutely entitled to the property and, certainly under the older trusts rules, no one with a power to dispose of it. As a result, the courts developed rules ('against perpetuities') which invalidated certain objectionable future interests. Unfortunately, the rigid application of these rules frequently led to ridiculous results (as we will see below), and finally statutory amendments were made by the Law of Property Act 1925 (to a limited extent) and the Perpetuities and Accumulations Act 1964. As the changes are only modifications of the earlier rules, it is still necessary to understand those rules and accordingly these are considered first. For convenience, I will call them the 'common law rules', but throughout this section that phrase denotes the rules applied in both law and equity, in contrast to the later amendments made by statute.

16.2 The common law rules

16.2.1 Contingent and vested interests

The common law rules against perpetuities are concerned only with *contingent* (or conditional) future interests. Such an interest is a gift under a trust which is to take effect in the future but is conditional, either because the person who is to take it has not yet been identified or because some other requirement has to be fulfilled before he is entitled to the interest. Thus, in the example of a gift over on a specified event (for example, the death of a specified person) 'to the first of my great-grandchildren to obtain a law degree', there is no way of knowing who, if anyone, will eventually qualify for the gift. Even when several great-grandchildren have been born, the interest will remain contingent until one of them is awarded the necessary degree. When the person who is to take the future interest has been identified and all necessary conditions fulfilled, he will be said to have a future interest which is 'vested in interest'. That person now has an interest in the property, an immediate right to future possession, and can sell or mortgage that right (Victorian novels are full of characters who waste their future interests in this way), and pass it to successors on death. By contrast, a contingent future interest, though called an 'interest', does not give any right to the property: even if the person who may

be entitled can be identified, he or she has nothing more than a hope or chance of acquiring an interest if the condition is fulfilled.

In the trusts considered in the book, if Mary Brown (No. 9 Trant Way - see para 14.2) makes the will she envisages, on her death her widow and daughters will also have interests vested in interest. Her widow will have a current interest, while her daughters will have future interests. All the daughters will have to do is to wait for the end of the previous interest (which will occur on the death of Mary's widow). When that happens, the interest of the daughters will be said to be 'vested in possession', and they will be entitled to the actual enjoyment of the property.

Some further examples may help to clarify the point. If a settlor grants land *inter vivos:*

> to A for life, then to A's first child to reach 21 for life, then to B absolutely

the interests of A and B are not covered by the rule, for they both have interests which have vested. Their interests are vested, because the person who is to obtain an interest is *ascertained* and no condition which has yet to be fulfilled is attached to the gift. A's interest is vested in possession, entitling him to immediate enjoyment of the property, and B has a future right, vested in interest. However, the gift to A's child has not vested, unless A already has a child who is aged 21 or more. Even if A has a younger child (e.g., aged 5) the gift is still contingent upon that child reaching 21. It is quite possible that this child may yet die, and that another child of A will be the first to reach 21, or, a further possibility, that no child will ever qualify. If a grant is made:

> to C but if C ever becomes a doctor then to D,

C has a vested interest but D has a contingent interest, because he will get the property only if C becomes a doctor.

16.2.2 The rule

As said above, the rule against perpetuities is concerned with contingent interests and with the period of time within which they vest in interest. The rule is sometimes described as a rule against remoteness of vesting, for it prescribes a limited period within which a contingent interest must vest (in interest, not in possession) and invalidates any interest which may vest outside that time. It should be noted that the rule is not about the length of time that a trust can last, but the operation of the rule can sometimes look as though this is the case.

In *In re Peel's Release* [1921] 2 Ch 218, a charitable gift of land was made to a school 'for ever thereafter', but the document creating the trust also provided for what was to happen should the purposes of the charitable trust ever fail. This part of the document said that, in such a case, the land should revert to the person making the grant and his heirs. You will realise that a charitable trust could continue for a very long time. It was also theoretically possible that the charitable trust would never fail. Thus, it was possible that the heirs of the grantor who were intended to take the property could be born many years in the future (perhaps hundreds of years). Accordingly, the provisions about the reversion were contrary to the rules against perpetuities because the gift over to the successors might take effect outside the permitted period (which we cover in more detail below). As a result the gift over (the provision for reverter) was void.

The rule is that: *a contingent interest is void unless it must vest in interest, if it vests at all, within the perpetuity period*. The period consists of the lifetime of a life or lives in being at the date at which the disposition takes effect, plus 21 years (plus any necessary period of gestation).

When applying the rule, you will need to know when the disposition you are considering took effect. Settlements made *inter vivos* (during the lifetime of the settlor) take effect from the date of the grant,

and those made by will take effect from the death of the testator (*not* from the date when he made the will).

16.2.3 The period

The rule against perpetuities operates by invalidating contingent future interests which may fail to vest in interest within a prescribed period. This period is expressed by the formula: 'a life in being plus 21 years'. The 21-year requirement is quite straightforward, and has its origin in the days when one reached majority at that age and accordingly became capable of holding a legal estate in land. It has not been amended even though the age of majority has for many years been reduced to 18. It is the first portion of the formula, the 'life in being', which tends to cause difficulties.

16.2.3.1 A life in being

The 'life in being' may be that of any human being who is alive at the date at which the grant becomes effective. The use of the lives of animals has been ruled out (*Re Dean* (1889) 41 ChD 552; *Re Kelly* [1932] IR 255), which is eminently sensible when one considers the great age which some beasts (e.g., tortoises) can attain. Because it is impossible to ascertain the names and dates of death of all human beings who were alive on a particular date, the common law rule requires that the persons who are to be regarded as the relevant 'lives in being' should be identifiable from the grant. They may be identified expressly, or by implication. Thus, should I make a gift to:

> the first child of my son A to reach the age of 21,

A would be a relevant life in being. A settlor might, however, choose to identify a particular group of people (preferably those who are expected to be long-lived and easy to identify), solely to serve as lives in being. Such people need not have any connection with the trust. Thus, often a 'royal lives clause' has been used which (today) might identify as the class of lives in being 'all the lineal descendants of George V' who are living at the date of the grant. Such clauses provide a large group of persons to act as lives in being, who are sufficiently in the public eye to be readily identified (see *Re Leverhulme (No. 2)* [1943] 2 All ER 274; also, on 'descendants of Queen Victoria', *Re Villar* [1928] Ch 471).

Some examples of the rules on lives in being may illustrate:

> To A for life and thereafter to the first child of A to reach 21.

In this example A is a relevant life in being. The perpetuities rule is satisfied, for the gift to A's child must vest, if it vests at all, within 21 years of the death of A.

> To B (who is not married) and then to any widow of B.

In this case B is a relevant life in being and the gift to his widow will be valid, for it must vest, if it vests at all, within 21 years of B's death because it vests on his death.

> A gift by will to such of the settlor's grandchildren who reach 21.

In this case the settlor's children will be relevant lives in being, for even if he had no children when he made the will, any child he may have in the future must have been born by the date of his death, which is when the gift takes effect. The grant is valid if the gift must vest within 21 years of the death of the settlor's last living child (which it must).

16.2.3.2 *Addition of a period of gestation*

It may have occurred to you that in the last example it is not quite true to say that all the settlor's children must be lives in being at his death, for it is possible that the settlor's wife was pregnant at his death and gave birth to his last child after his death. Similarly, the last of the settlor's children to die

might be a son who dies leaving a pregnant wife. The child thus born would reach the age of 21 more than 21 years after his father's death. As a result of such possibilities, the common law has always accepted that any relevant gestation period should be included in the perpetuity period. Thus, the settlor's posthumous child is regarded as a life in being, and the last grandchild also is regarded as receiving a vested gift in time, because his period of gestation is added to the 21-year period. Any foetus in this position of being between its conception and birth at a relevant time is commonly referred to as being *en ventre sa mère* (in the womb of its mother).

It is perhaps worth mentioning that the development of methods of freezing semen, ova and embryos could cause considerable difficulties for the law in the realm of perpetuities. Thus far, no case has been brought which depends on the possibility of a 'test-tube baby' forming a relevant life in being, but one can imagine the problems that might result. (Sections 27–30 of the Human Fertilisation and Embryology Act 1990 illustrate the problems of defining 'father' and 'mother' today and there have been instances in which children have been born several years after their father's death, as the result of the use of frozen sperm or embryos).

16.2.3.3 A rule about possibilities not probabilities

The common law rule renders void any gift which *might* vest outside the period, however unlikely it is that this will occur. An example may illustrate the problem: assume a gift to:

> the first child of X to become an accountant.

In this example X is a life in being. The gift is invalid, because it is possible that X may have a child born after the date of settlement (and who is not therefore himself a life in being) and who qualifies as an accountant more than 21 years after the death of X. It is not relevant that, at the date of the grant, X has a son Y, who is due to qualify as an accountant in a year's time. The common law will not wait and see whether the gift does in fact vest within the perpetuity period. It insists on considering the position at the date of the grant. If at that date there is *any possibility*, however remote, that the gift could vest outside the period, it will be void. It is possible (even if not probable) that Y might die before qualifying as an accountant, that X might then have a further child, Z, who would not be a life in being, and that Z might become an accountant more than 21 years after X's death. Thus, there is a remote possibility that this gift may vest outside the perpetuity period, and accordingly *the grant will be void*. The rule is about possibilities not probabilities.

A favourite illustration of this difficulty is that of the 'unborn widow', which arises in the following grant:

> to A for life and then to any widow of A for life and thereafter to the eldest of A's children then living.

If A is unmarried at the date of the grant, it is fairly easy to see what difficulties might arise, because there is a possibility that he might not marry for some time and might then marry a woman who was not born when the gift took effect. For example, if A were 25 at the date of the grant and 20 years later, at the age of 45, married a woman of 18, Mrs A would obviously not have been a life in being at the date of the grant. The grant to A's widow would, however, still be valid, because it must vest within 21 years of the death of A, the life in being. The problem arises with regard to the gift to the eldest of A's children living at the date of the death of A's widow. Imagine that Mr and Mrs A have a child, B, two years after their marriage and that one year later A dies. At the date of A's death, Mrs A will be 21 and B will be 1. If Mrs A lives until she is 43 (22 years after A's death) the gift to B will vest more than 21 years after A's death. (The gift cannot vest in interest before Mrs A's death, because B might die before his mother and therefore would not qualify as the eldest child of A 'then living'.) Accordingly, because events *might* fall out this way, the remainder to A's eldest child is void.

It might be thought that the position would be different if A were married at the date of the grant, for Mrs A would then be a life in being. In fact, this would make no difference at all, for it is still possible for Mrs A to die before her husband, and for him to remarry, taking as his second wife a woman who was not born at the date of the gift. The difficulties we have considered above, on the assumption that A is a bachelor, would then arise in relation to the second Mrs A. Therefore, the gift to the eldest child is void at the outset, even if A had a wife at the time of the grant.

All these 'but what if' forecasts may seem very far-fetched but the common law regards the unlikelihood of the events occurring as irrelevant. The remotest possibility of the gift vesting outside the perpetuity period will render it invalid.

16.2.3.4 Fertile infants and ancients at common law

The nightmarish and nonsensical quality of the common law rules on perpetuities is exacerbated by a number of decisions, which establish that, at common law, a person is deemed to be fertile however young or old he or she may be. Thus, in *Re Dawson* (1888) 39 ChD 155, Chitty J insisted that a woman aged 60 years and 3 months was to be regarded as still being capable of bearing children (see also *Jee* v *Audley* (1787) 1 Cox 324 and *Re Sayer's Trusts* (1868) LR 6 Eq 319), though in the light of recent developments in the field of *in vitro* fertilisation this attitude now seems more reasonable than it did in 1888. In recent years some women have, with medical assistance, given birth at what once would have been regarded as very advanced years in terms of fertility. In *Re Gaite's Will Trusts* [1949] 1 All ER 459a gift was held to be valid, not because a five-year-old could be presumed incapable of bearing a child but because a five-year-old could not marry and therefore could not bear a *legitimate* child. For dispositions after 1 January 1970 illegitimate children are included in the term 'children' but before that date were not: Family Law Reform Act 1969, s. 15. Thus, if the parents of the child in question have not married, you must check the date of the settlement. A similar change was made in relation to adopted children by s. 42 of the Adoption Act 1976, which led, in *In re Levy Estate Trust* [2000] CLY 5263, to the court having to grapple with the question of whether a lady aged 68 years and 11 months could be expected to adopt (this was a modern case and thus, under the statutory rules explained below, the question was whether everyone was obliged to wait to see whether this in fact happened).

16.2.4 Class gifts

It is quite common for settlors to make gifts to groups or classes of people rather than to a single person: e.g., to A's daughters. These class gifts can give rise to particular problems, for in their case there is a further requirement for vesting, namely, that the share to be taken by each person must be identified. This of course cannot be done until it is known how many people there are in the class, and in the example given above one cannot know with any certainty how many daughters A will have until he is dead. In this particular case, there should be no danger of the gift being void for remoteness, for A will be a life in being and so his daughters' interests must all vest within the perpetuity period. However, difficulties could be caused by the following gift:

> to A for life and then to B's grandchildren.

Here the gift in remainder is to a class of people, B's grandchildren. The problem in this case is that, for the gift to B's grandchildren to be valid, it must be shown that the interest of each grandchild must vest, if it vests at all, within the perpetuity period. If the interest of any one grandchild could vest outside the period, the gift to the whole class is void because it is impossible to determine within the perpetuity period how much each member should take. Obviously it is quite possible that one of B's grandchildren may be born more than 21 years after the deaths of A and B (lives in being). Therefore, this gift gives rise to difficulties and one might think that the whole gift to the grandchildren will be void.

In such cases the gift may, however, be rescued by the 'class closing rule'. This rule was not invented to save gifts that might be void for perpetuity but rather to solve the problem of the size of share each member of a class is to receive. In our example it may be that on A's death there are living two children

of B, one of whom has two children. Accordingly, there are in existence two members of the class, 'B's grandchildren', but it is possible that more may be born later. If the gift is otherwise valid, B's two existing grandchildren are entitled to demand their shares immediately A dies. However, *if all* B's future grandchildren are to share in the gift, it is not possible to calculate at A's death the amount which each should take. This would prevent any distribution being made until B's children had both died, for until then there is still a possibility of further grandchildren being born. This is so even if B's children are both daughters and both clearly past the age of child-bearing (see above).

16.2.4.1 The class closing rule

Common law recognised the undesirability of this position, and accordingly, in *Andrews* v *Partington* (1791) 3 Bro CC 401, introduced a rule by which the list of possible members of a class is closed when the first member of the class is able to claim his interest in possession. In our example, B's two existing grandchildren will take interests in possession on A's death. Accordingly, the rule in *Andrews* v *Partington* closes the class of 'B's grandchildren' at A's death, and B's two existing grandchildren will each receive a half share in the property. Any later grandchildren are excluded from the gift and receive nothing. If a gift is contingent on members of the class reaching a certain age,

> to such of B's grandchildren as reach 21,

the class closes when the first of B's grandchildren reaches that age. Any other grandchildren existing at that date are presumed to be potential members of the class and a share should be allocated for them but they only receive that share when they reach 21. If any one of them should die before reaching that age, his or her notional share will be distributed between those members of the class who do reach the qualifying age. Thus *Andrews* v *Partington* enables a distribution of a minimum share to be made as each one qualifies, with a possibility that the size of the share may increase in future.

Any grandchildren who are born after the date on which the first grandchild reached 21 are excluded from the class by the rule in *Andrews* v *Partington*.

16.2.4.2 Effect of class closing

The operation of the class closing rules is very important because it can save a gift which might otherwise have offended the perpetuity rule. In the case of the gift:

> to C for life and then to D's grandchildren,

the class will close when C dies, if at that date D has at least one grandchild. You will recall that, unfortunately, common law will never wait to see what happens and so here it is not possible to wait until C dies in order to see whether the class closing rule will save the gift. The issue must be decided finally at the date of the grant. However, if at the date of the grant D already has a grandchild, E, it is clear that on C's death the class of 'D's grandchildren' will close immediately and that the interests of those grandchildren alive at C's death will vest in possession. This *must* be within the perpetuity period (C's life plus 21 years), and so in this case the class closing rule saves a grant which would otherwise be void.

The rule still works even if E dies before C, because E's successors will be entitled to E's share on C's death. This is because E has a future right which vested in interest as soon as he was born, and this is property which can pass under E's will or on intestacy. His position is different from that of B's grandchildren in the previous example, who have only contingent interests until they qualify by reaching 21. Although a notional share is allocated to them as soon as they are born, their interests do not vest in interest until they reach the specified age. Until then, they have no right to the property and therefore, if they die before meeting the condition, they have nothing to pass to their successors and their notional share enhances the amount taken by those who do qualify.

If, however, D has no grandchild at the date of the grant, one cannot be sure that such a child will be born before C's death so as to enable the class closing rule to operate. Thus in such a situation the grant will be void under the perpetuity rule. By the same principle if the gift is:

> to F for life and then to such of G's grandchildren as reach the age of 21,

then the gift will be saved if G already has a grandchild who is aged 21 at the date of the grant. Otherwise the entire gift to G's grandchildren is void.

16.3 Reforms made in 1925

The 1925 property legislation introduced limited reforms in relation to grants made in an instrument executed on or after 1 January 1926, or contained in the will of a testator who died on or after that date (LPA 1925, s. 163(2)). The reform introduced was aimed at the following kind of disposition:

> to A for life and then to the first of A's children to reach the age of 25.

If A has no child aged 25 at the date of the grant, this disposition would be void at common law because A might die leaving a child aged 2 who would not reach the age of 25 until 23 years after A's death and outside the perpetuity period (A's life plus 21 years).

The alteration made by s. 163 is that where a limitation is void because of an excess in the age of a beneficiary, or class of beneficiaries, then one may reduce the stipulated age to 21. Accordingly, the gift given above will be saved, because the age requirement will be reduced to 21 and obviously any child of A must reach 21 within 21 years (plus any gestation period) after A's death. Not only does this validate an otherwise invalid gift, it also will give A's child an interest vested in possession four years earlier than the settlor intended, so that the child will begin to enjoy the property at that earlier date.

The statutory amendment does not alter a disposition which was valid under the common law rules. Thus, a gift to:

> the first child of B to reach 25

produces different results depending on whether B is dead or alive at the date of the grant. If B was dead at the date of the grant, all his children are identifiable and can themselves operate as lives in being. In such a case the disposition would be valid at common law, since it must vest, if at all, during the lifetime of a life in being, and so would vest in possession in the first child to reach 25.

However, if B is still alive at the date of the gift, there is a possibility that all his existing children might die and that B would then produce a further child, who would not be a life in being and who would reach 25 more than 21 years after his father's death. The gift would therefore be void at common law, and s. 163 accordingly reduces the specified age to 21.

16.4 Perpetuities and Accumulations Act 1964

The perpetuities rules were given a rather more thorough overhaul by the Perpetuities and Accumulations Act 1964, which applies to dispositions which came into effect after 15 July 1964. However, the Act amends rather than replaces the old rules and so the common law rules are still of importance. We will now consider the principal changes introduced by the Act.

16.4.1 Power to specify fixed perpetuity period

One of the problems of the common law rules is that one has a variable (and therefore unpredictable) perpetuity period, since calculation of the length of time involved will depend upon the imponderable question of how long the 'lives in being' will live. Accordingly s. 1 of the 1964 Act gives the settlor the alternative of stating a fixed period, which must not be more than 80 years, as the perpetuity period for

his settlement. This fixed period was generally used as a substitute for the old 'royal lives' clauses but, in some cases, the use of royal lives clauses continued.

16.4.2 Introduction of a 'wait and see' rule

As we have seen already, one of the major problems with the common law rule is that one is obliged to judge the issue of perpetuities at the outset and this leads to a consideration of every possibility, however far-fetched. This unsatisfactory position was altered by s. 3(1) of the 1964 Act. This section provides that where a disposition is void under the common law rule, it should be treated as though it was not subject to that rule, until such time as it becomes clear that it will vest, if at all, outside the perpetuity period. In other words, one can wait through the perpetuity period to see what really happens, rather than basing the decision on what *might* happen. Accordingly, the only type of disposition which is void *ab initio* is one which clearly *must* vest outside the perpetuity period and cannot possibly vest within it. If we consider again the grant:

> to the first child of X to become an accountant,

we will see that under the 1964 rule all we have to do is to wait and see whether any child of X does ever become an accountant within the perpetuity period. Similarly, in the case of the grant:

> to A for life and then to any widow of A for life and thereafter to the eldest of A's children then living,

we simply wait to see what happens. If A dies, leaving a widow who was alive at the date of the gift, she does constitute a life in being and it becomes clear that the eldest child's interest will vest, if at all, during the perpetuity period. If, however, A has married the 'unborn widow' (someone who was not alive at the date of the gift) then one waits again to see whether she dies within 21 years of A's death, leaving a child in whom the property can vest. If she outlives A by 21 years it then becomes clear that the gift must vest outside the perpetuity period. No more can be done to save the gift under the 'wait and see' provisions but all is not lost, for there are special statutory provisions designed to rescue such a disposition which we shall describe later.

It is important to note that s. 3(1) applies only where the disposition would be void at common law. Therefore, when dealing with perpetuity problems involving the old rules, one must first apply the common law rule, and explain why it invalidates the gift, before going on to apply the provisions of the section: it is not enough to adopt a general approach of 'wait and see' with regard to all contingent interests.

If the 'wait and see' principle does not save a gift, it may nonetheless be saved by one of the other amendments made by the Act, as we will see below.

16.4.3 Introduction of statutory 'lives in being'

A further amendment to the common law rules is that when we 'wait and see' we do not apply the same test for 'lives in being' as under the earlier rules. Thus, the 'wait and see' perpetuity period is calculated by reference to the lives that are prescribed by the statute for this purpose. These rules are contained in s. 3(4) and (5) of the 1964 Act. They provide that one calculates the period by reference to any of the following who are in being and ascertainable at the *start* of the perpetuity period:

> (a) the person making the disposition (settlor);
> (b) a person in whose favour the disposition is made (in the case of class gifts this includes all members and potential members of the class);
> (c) the parents or grandparents of any person in whose favour a disposition is made (basically any parent or grandparent of someone who falls into category (b)); or
> (d) any person on the failure of whose prior interest the disposition is limited to take effect.

It was thought that by increasing the categories of people who can be lives in being, a greater chance is given of the interest vesting in time.

No other persons may be used as lives in being for the 'wait and see' provisions. If there are no persons falling into this category at the date at which the disposition takes effect, then a fixed period of 21 years is imposed (s. 3(4)(b)).

16.4.4 Reduction of age

The 1964 Act repealed s. 163 of the LPA 1925 (but only in respect of dispositions made after 15 July 1964) and provided new age reduction rules, which apply where 'a disposition is limited by reference to the attainment by any person or persons of a specified age exceeding 21 years' (s. 4). These new rules apply only where the interest would be void at common law, and one should not apply them until one has waited (under s. 3(1)) to see whether the interest will vest within the period. Thus, if we take a disposition made after 1964 to:

> the first child of B to reach 25,

the first reaction must be to wait and see whether the gift vests within the common law period (B's life plus 21 years). If B dies leaving one child, C, aged 2, it will be clear that C can never hope to reach the age of 25 within 21 years of B's death. At this point we know that the 'wait and see' provisions have not helped. The next step will therefore be to apply s. 4, which requires that an age reduction should be applied in order to attempt to save the disposition. However, we do not simply reduce the qualifying age to 21 (as was the case under the 1925 Act). Instead we have to apply a two-stage process:

> (a) we decide whether the gift would be valid were the qualifying age 21 and, if the answer is yes, then;
> (b) we reduce the age 'to the age nearest to that age which would, if specified instead, have prevented the disposition from being... void'.

If we apply this rule to our example we will see that the disposition would have been valid had the age limit been 21. C will reach 21 within 21 years of B's death. However, since C was 2 at his father's death, it is not necessary to reduce the qualifying age to 21 in order to ensure that the disposition vests in the period, for C will become 21 only 19 years after his father's death. The effect of s. 4 is therefore to reduce the qualifying age to 23, because that is the age closest to the specified age of 25 which is capable of satisfying the perpetuity rule. Accordingly, if C lives until he is 23 he will obtain an interest vested in possession under the 1964 Act.

16.4.5 Introduction of presumptions about fertility

As well as allowing us to 'wait and see', the 1964 Act introduced certain presumptions about fertility, which help to remove some of the more ridiculous problems caused by the common law rules. Under s. 2 of the Act the following presumptions apply:

> (a) a male cannot be a father if he is aged under 14; and
> (b) a female cannot be a mother if she is aged under 12 or over 55.

There is no upper age limit presumed in respect of a man's fertility. It is obvious that these presumptions are not an entirely accurate reflection of physical possibilities, particularly as far as the lower age limits are concerned. As a result, s. 2(2) allows the court to make such order as it thinks fit to readjust the position should it later be discovered that a birth has in fact occurred outside the presumed fertility periods. In addition to making use of the statutory presumptions described above, it is also open to the court to receive evidence that a particular male over 14 or female aged 12–55 is in fact infertile (s. 2(1)(b)). This is most likely to be of assistance in the cases of women who have undergone hysterectomies. More care would have to be taken in the case of evidence relating to sterilisation

operations (e.g., vasectomy) as these can sometimes be reversed, rendering the individual fertile once more.

16.4.6 Amendment of rules on the 'unborn widow'

You will recall from 2.3.3 that a disposition:

> to A for life and then to any widow of A for life and thereafter to the eldest of A's children then living,

gives rise to considerable problems at common law, because of the possibility that the future Mrs A might not have been born at the date of the disposition and so is not a life in being. We have seen above how, under the 1964 Act, it is possible to 'wait and see' whether Mrs A is a life in being and, if she is not, whether she does in fact die within 21 years of A's death, leaving a child of A in whom the gift can vest. However 'wait and see' will not help in that case if Mrs A survives her husband by more than 21 years. Accordingly, in such cases, s. 5 of the 1964 Act provides that the disposition 'to the eldest of A's children' shall be treated 'as if it had instead been limited by reference to the time immediately before the end of [the perpetuity] period'. Thus, in our example, if Mrs A is not a life in being and outlives her husband by more than 21 years, the eldest child of A who is living at the end of the period (A's life plus 21 years) will obtain a vested interest at that date. If A dies leaving two children, B and C (B being the elder) and a widow who outlives him by 21 years, B will obtain a vested interest 21 years after his father's death. Should B then die *before* the widow, B's estate will retain a vested interest and C will *not* obtain any interest in the property, even though this is contrary to the express wishes of the settlor. Although the result is to alter the intended outcome slightly, this rule does have the merit that it prevents the gift over to A's eldest child being wholly void.

16.5 Summary of common law rules and legislation

In conclusion, you should remember that most of the statutory provisions are designed to rescue dispositions which are invalidated by the rule against perpetuities and do not, apart from the statutory 80-year period, provide any alternatives to it. This meant that, when drafting an "old" trust, regard had to be had to the common law rules. No modern trust should ever have been drafted in such a way as to be void under those rules. However, mistakes were possible and there is also the possibility of a "home-made" trust, drafted in ignorance of the rules. Accordingly you may find the following summary useful.

(a) *Dispositions coming in to effect before 1 January 1926*. Apply common law rules only.

(b) *Dispositions coming into effect between 1 January 1926 and 15 July 1964*. Apply common law rules but with the modification of the age reductions provided by LPA 1925, s. 163.

(c) *Dispositions coming into effect on or after 16 July 1964*. Apply common law rules, but with the modifications imposed by the Perpetuities and Accumulations Act 1964 and, in particular, take into account-

(1) whether the 80-year fixed period was used by the trust;
(2) 'wait and see' (including statutory lives in being);
(3) age reductions under s. 4;
(4) presumptions about fertility in s. 2; and
(5) special 'unborn widow' rules in s. 5.

16.6 To which other situations did the old perpetuities rules apply?

Thus far in this note we have been concentrating on the application of the perpetuities rules in relation to trusts. However, the rules apply not only to trusts but also to many other arrangements and interests. The rules originated in relation to wills and family settlements but over time they were extended to other property rights, some of which are commercial interests and in relation to which the

rules can seem unusual. In some cases the rules applied in full, whereas in other cases the rules applied only to a limited extent.

16.6.1 Powers

Before going on to discuss other interests it is worth mentioning first the position in relation to the powers of trustees under the rules. The discussion earlier in this note has been largely about the *creation* of a trust; however, the exercise by trustees of their powers can in themselves give rise to issues in relation to perpetuities. Section 8(1) of the Perpetuities and Accumulations Act 1964 excluded from the perpetuities rules the *exercise of the administrative powers* of trustees and this provision has retrospective effect (ss. 8(2) and 15(5)). This prevents problems in relation to powers such as the power of investment or the power of sale, which are regarded as being 'administrative' in character. These are powers which do not affect the position in relation to the beneficial interests under the trust and the application of the rule is not really necessary because the period during which the powers will be available will be controlled by the perpetuity period for the trust itself. However, the 1964 Act did not exempt what are generally called 'dispositive' powers: that is, powers that do have an effect on the interests under the trust. The major powers that fall into this category are those of appointment and advancement, since their exercise will control what beneficiaries actually receive. Such powers are subject to the perpetuity rules and the power may be void if it could be exercised at too remote a time. In addition, the actual exercise of a valid power is in itself subject to the perpetuity rules (so that, if the trustees appoint in favour of someone, that disposition must itself take effect within the perpetuity period). To make matters worse, in relation to powers of appointment, the calculation of the period starts at a different time depending on whether the power is a 'general' or a 'special' power of appointment. A general power of appointment permits the trustees to appoint in favour of anyone they choose (including the settlor). In this case the perpetuity period in relation to that power starts when the power is exercised. However, in the case of a special power of appointment (which allows appointment in favour of persons other than the settlor), the period runs from the date of the instrument that conferred the power to appoint.

16.6.2 Options and rights of pre-emption

The perpetuities rules do apply to options to acquire or create interests in land. At one time an option could not be void for perpetuity as between the contracting parties but only as against third parties or successors (see *Borland's Trustee* v *Steel Bros & Co. Ltd* [1901] 1 Ch 279 at p. 289). However, s. 10 of the Perpetuities and Accumulations Act 1964 abolished this rule and thus widened the scope of the perpetuities rules. Nevertheless, some options are still excluded. At common law, the rules did not apply to a tenant's option to renew his existing lease (*Muller* v *Trafford* [1901] 1 Ch 54 at p. 61). Also, s. 9(1) of the 1964 Act provides that the rules do not apply to an option to acquire for valuable consideration an interest reversionary on the term of a lease, if it is exercisable before the expiration of one year after the end of the lease and if the option is exercisable by the lessee or his successors in title. Section 9(2) provides a perpetuity period of 21 years for options to which the rules apply, where they were granted for valuable consideration; this is a 'wait and see' period. (Note that s. 9(2) does not apply in some cases in relation to land used for religious purposes.) However, one could not use, in relation to an option, the fixed period of 80 years which applies to other cases under the 1964 Act.

Rights of pre-emption are in effect rights of 'first refusal'. They are in one sense a form of option but at common law it was never quite clear whether the options rules did apply. However, s. 9(2) of the 1964 Act contained an express exclusion for one type of right of pre-emption and this suggests that s. 9 must be intended to apply to any other cases. It appears that this was the view taken when the Act was debated by Parliament (*Hansard* (HL), 19 March 1964, vol. 256, col. 979 onwards).

A case, which illustrates the problems that could be caused due to unfamiliarity with the old perpetuities rules and particularly s. 9, is *Wilson* v *Truelove* [2003] 23 EG 136. Truelove Ltd sold a farm to Mr and Mrs Wilson and their son David in 1974 but included in the contract a term that the Trueloves

(who owned the company) had a right to re-purchase for £20,000 on the death of the second of David's parents to die. It was clear from surrounding evidence that the intention was that this right should not be limited in terms of time, one reason for the slightly strange agreement being that the parties were related by marriage. When the case came to court in 2003 it was held that the right to purchase was an interest in land, which arose at the date of the agreement in 1974. It was accordingly subject to the time limit imposed by s. 9(2) and since more than 21 years had passed since the date on which the interest was created (here the 'wait and see' rule was being applied), it was void. The court further held that no estoppel arose. This case therefore illustrated that the perpetuities rules could still be a source of problems in modern law and may well have had the effect of giving someone much greater rights to property than he or she might reasonably have expected. It is not surprising that the old rules were eventually extensively amended and in some instances abolished.

16.6.3 Easements and restrictive covenants

The grant of an easement to arise at some time in the future was subject to the perpetuity rules. Thus, if A tried to grant B rights to use any road that may be constructed over a field, that grant could be void for remoteness because the road may be constructed outside the perpetuity period (a right of way is a well recognised easement)—see *Dunn* v *Blackdown Properties Ltd* [1961] Ch 433, which related to future drains. This could prove difficult when one was building an estate in parts over time but often the problem was solved in practice by the operation of the 'wait and see' rule.

Restrictive covenants to take effect at some time in the future can give rise to the same difficulties as future easements.

16.6.4 Other applications of the rules

You should note that there are other circumstances to which the perpetuities and accumulations rules apply but which are outside the scope of this book. The main example in practice arises in relation to pension schemes. Interests that are **not** caught by the rules include the rights of re-entry by a landlord on a tenant's breach of covenant, by a mortgagee for default on a mortgage, for non-payment of a rentcharge (see LPA 1925, s. 121(6)), the purely administrative powers of trustees and a joint tenant's right of survivorship (this is about co-ownership, not leases).

16.7 Accumulations

16.7.1 Restrictions on the accumulation of income

The rules we have set out above are about the creation of estates and interests and their validity. There was, however, a related set of rules which relate to the accumulation of income in trust. In essence the issue addressed in this rule was the case in which the trustees, rather than expending income as it arises in favour of the beneficiaries, accumulated that income and added it to the capital investment. The rules prevented such an accumulation for periods in excess of those prescribed by statute. This rule has always been statutory and does not arise from either common law or equity. In *Thelluson* v *Woodford* (1799) 4 Ves 227 it was held that at common law the trustees could be directed by the settlor to accumulate for the whole period for which the trust could exist (the perpetuity period in relation to the trust itself). The aim of the settlor in this case seems to have been to attempt to amass the largest possible sum with a view to the considerable enrichment of only a few of his descendants (three were specified). In fact, it appears that bad investment wrecked this grand plan but the approach was held to be acceptable at law. However, the case produced considerable concerns, it being believed (apparently) that such a power to accumulate could produce trusts with greater financial power than the State itself. Accordingly, in 1880 the first Accumulations Act was passed.

16.7.1.1 The old rule

The modern law on accumulations was to be found in s. 164 of the LPA 1925 and s. 13 of the Perpetuities and Accumulations Act 1964. The rules applied to powers to accumulate whether they were express or implied. Section 164(1) said:

No person may by any instrument or otherwise settle or dispose of any property in such a manner that the income thereof shall, save as hereinafter mentioned, be wholly or partially accumulated for any longer period than one of the following, namely:

> (a) the life of the grantor or settlor;
> (b) a term of twenty-one years from the death of the grantor, settlor or testator; or
> (c) the duration of the minority or respective minorities of any person or persons living or *en ventre sa mère* at the death of the grantor, settlor or testator; or
> (d) the duration of the minority or respective minorities only of any person or persons who under the limitations of the instrument directing the accumulations would, for the time being, if of full age, be entitled to the income directed to be accumulated.

Section 13(1) of the 1964 Act added two more periods to those in s. 164. The 1964 Act provision permitted accumulation for:

> (a) a term of 21 years from the date of the making of the disposition, and
> (b) the duration of the minority or respective minorities of any person or persons in being at that date.

The creator of the settlement that authorised the accumulation could pick any of the periods set out above but in *Re Cattell* [1914] 1 Ch 177 at p. 186 it was said that one could not choose to select two or more as alternatives (or cumulatively). If the accumulation was to be solely for the purpose of purchasing land, the sole permissible choice was period (d) under s. 164 (see s. 166). If the settlor did not actually select a period, in any case other than accumulation for the purpose of acquiring land, the court had to go through a very artificial exercise of working out which of the statutory periods appeared to have been impliedly selected, by looking at the other provisions in the instrument (see *Re Ransome* [1957] Ch 348 at p. 361 for a comment on how realistic this approach is).

16.7.1.2 Permitted extensions

As well as the period selected under the rules set out above, the period permitted for accumulation could be extended if at the end of the statutory period a minor (person under 18) was entitled to a vested or contingent interest (LPA 1925, s. 165). In such a case the accumulation could continue until that person reached 18. Thus if the 21-year period were selected but the beneficiary were to be aged 8 at the end of that period, the accumulation would in fact continue for 31 years.

16.7.2 Excessive periods

If a disposition broke the old perpetuities rule as well as the accumulations rule, that provision would be void, as explained above in relation to the perpetuities rule. However, if the accumulation provision was acceptable under the perpetuities rule but the period selected broke the accumulations rule, the accumulation provision had effect for the permissible statutory period but was void in so far as it exceeded that period: *Eyre* v *Marsden* (1838) 2 Keen 564 at p. 574. It is not clear whether the 'wait and see' rule applied. After the authorised period expired, the trustees had to pay the income to the person or persons who would have been entitled to it in the absence of the accumulation provision.

Note that s. 14 of the 1964 Act applied the presumptions as to fertility to accumulations and this sometimes assisted in determining when an accumulation would end.

16.7.3 Exceptions

The accumulations rule did not apply (s. 164(2)) to provisions: for the payment of anyone's debts; to raise 'portions' for the settlor's issue or the issue of a beneficiary under the settlement (for example to provide a dowry for a granddaughter); or for the accumulation of the produce of timber or wood. Note also that the rule did not bar the type of arrangement under which trustees simply adjust the application of income from year to year to iron out peaks and troughs: this is sometimes called

'administrative retention'. In the case of *Re Earl of Berkeley* [1968] Ch 744 the law on this point was considered and this arrangement was said to be acceptable as being simply an administrative precaution against future deficiencies.

Finally, we must mention that, in relation to both the old perpetuities rules and accumulations, we have concentrated on stating the general principle and giving a few examples of its application. Those who want information about the authorities from which the principle was derived, or the many other detailed rules which we have not mentioned, should refer to one of the old specialist texts on perpetuities and accumulations.