

## VICTORIAN PERPETUITIES LAW IN A NUTSHELL<sup>1</sup>

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The Perpetuities and Accumulations Act 1968<sup>2</sup> has reformed the rule against perpetuities in Victoria. The purpose of this article is to set out in summary form<sup>3</sup> the rule as reformed.

The rule in question is of course that which is sometimes described as the 'modern' rule against perpetuities or the 'rule against remoteness of vesting'. Its function is to ensure that the period between the creation of a contingent future interest and the time at which it will cease to be contingent is not too long. The policy behind the rule is not satisfied merely by the free circulation of property. It is true that the existence of a contingent future interest in a particular piece of property may inhibit the alienation of the property and prevent it being used to the best advantage. But nowadays contingent future interests are more often found in trusts of funds consisting not of one specially prized asset but of a 'pool' of mixed assets which are regarded simply as investments. In these trusts the trustees usually have wide powers to vary the form of the investments, that is to say, they have the power to sell any particular asset and purchase another in its stead. It is obvious that in these trusts the existence of contingent future interests in some of the beneficiaries does not inhibit the alienation of the trust assets; yet the rule applies to any such interests. Nor is the policy behind the rule simply one of limiting large concentrations of capital in private hands. It is true that the rule does force the dispersal of large concentrations of capital, but that purpose is much better implemented by taxation on death. The chief purpose which is now served by the rule is to prevent testators and settlors from projecting their control over property for too long a time after they have ceased to be owners. In other words it is a rule which favours the living in the enjoyment of property as against the dead hand of the past.<sup>4</sup> It also reduces the uncertainties of title which can arise when the dispositions of persons long since dead continue to govern rights to property.

The Victorian Act (like the legislation of Western Australia, England and New Zealand which has reformed the rule in those jurisdictions) does not abolish the common law rule. The Act is rather a gloss on the rule and it is unintelligible to anyone who does not understand the common law rule.

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<sup>1</sup> Cf. Leach, 'Perpetuities in a Nutshell' (1938) 51 *Harvard Law Review* 638.

<sup>2</sup> Cf. Law Reform (Property, Perpetuities and Succession) Act 1962 (W.A.); Perpetuities and Accumulations Act 1964 (Eng.); Perpetuities Act 1964 (N.Z.).

<sup>3</sup> Like Professor Leach we observe Lord Macnaghten's comment on Lord Thurlow's attempt to put the Rule in *Shelley's* case in a nutshell: 'But it is one thing to put a case like *Shelley's* in a nutshell and another to keep it there.' *Van Grutten v. Foxwell* [1897] A.C. 658, 671.

<sup>4</sup> Simes, *Public Policy and the Dead Hand* (1955) 58 ff.

Our method of exposition therefore is to state the elements of the common law rule in a series of enumerated propositions, explain the meaning of each proposition with the help of examples, and explain the principal changes effected by the new Act as and when they are relevant. It should be remembered however that the Act applies only to instruments taking effect after 10th December 1968: the common law continues to apply to instruments taking effect before that date.

### 1. The rule at common law

Professor Gray stated the rule as follows:

'No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.'<sup>5</sup>

### 2. The rule is concerned with remoteness of vesting

The rule is concerned with the length of the interval which may elapse between the creation of an interest and the vesting of that interest. When does an interest become vested? The word 'vested' carries several meanings.

(i) Sometimes when an interest is possessory it is described as vested in possession.

#### EXAMPLE 1:

T holds Blackacre in fee upon trust for L for life then for X in fee.

*While L is alive he is in actual enjoyment of the trust property. L's interest is then possessory or vested in possession. While L is alive X's interest is not possessory but postponed; it is not vested in possession although it may be vested in another sense accorded to that word. In the following treatment the word 'possessory' will be used to describe present enjoyment; the expression 'vested in possession' will be avoided.*

(ii) Another meaning of the word 'vested' developed in connection with real property. To understand this meaning it is necessary to recall the common law doctrine of estates in land. The primary conception in that doctrine is the estate in fee simple (or the fee) with its incidents of power of alienation *inter vivos* and descent to the tenant's heir if the tenant died holding the estate without disposing of it by will. Lesser estates might be carved out of the fee, that is to say, term of years, life estate, estate *pur autre vie* or estate tail. The incidents of these lesser estates were such that they did not exhaust the incidents of the fee. When such a lesser estate was created there was a balance of the fee in some person, hence reversions and remainders.

#### EXAMPLE 2:

At a time when estates tail could be created A, the holder in fee, limits an estate tail to B, with remainder to X in fee.

*X has the balance of the fee. While the preceding estate tail continues X does not have a possessory interest but he has an estate. The conception was that he was invested with portion of the fee. X's interest was said to be vested in interest.*

<sup>5</sup> Gray, *The Rule Against Perpetuities* (4th ed. 1942) s.201.

*If the limitation had given an estate tail to B with remainder to X in fee when he marries, X could not be regarded as having portion of the fee before he married. Until he married his interest could not be described as vested in interest. The contrast to vested in interest is contingent. Until he married X's interest would be described as contingent.*

The foregoing relates to those future interests in realty which are regarded as carved out of the fee. What of other future interests in realty which were introduced into the common law after the Statute of Uses and the Statute of Wills, namely, executory limitations and executory devises?

**EXAMPLE 3:**

T by will devises Blackacre to B in fee but if B cohabits with Z to X in fee.

*Historically, this is derived from the shifting use. Since Blackacre is first given to B in fee there can be no suggestion that X's interest is carved out of the fee. Until B cohabits with Z, X cannot be regarded as having part of the ownership of Blackacre. An executory limitation or executory devise in this form cannot be vested in interest before it becomes possessory. In other words, it is either contingent or possessory.*

To sum up, a future interest will be vested in interest if

- (a) the identity of the person who is to take is ascertained; and
- (b) there is no condition precedent to its becoming possessory (in the case of a remainder, no condition precedent other than the regular termination of the prior estates).

(iii) In a third sense an interest is vested if on the death of the person interested his interest is transmissible to his estate. A remainder interest which is vested in interest (meaning (ii) above) is clearly transmissible. But it is possible for an interest to be contingent in the sense that it is not vested in interest and yet be transmissible. Put another way and using the word 'vested' to mean transmissible, it is possible to have a vested contingent interest. A contingent interest which is transmissible may be disposed of by will.<sup>6</sup> If not so disposed of, it will devolve as on an intestacy. Not every contingent interest will be transmissible.

**EXAMPLE 4:**

T by will gives property to trustees upon trust for L for life then for X if he marries.

*X's interest while he remains unmarried is contingent. If he dies unmarried it is obvious that nothing can come to his estate. Of course, if X marries and dies before L's death, his interest will become vested in interest and on L's death the principal will be payable to X's estate. Now contrast the case where trustees hold property upon trust for L for life, then for L's children, but if L has no children living at his death, then to X. Suppose that this is construed as making X's interest contingent on L having no children living at L's death, and suppose X dies before L and L has not had children before X's death. When X dies his contingent interest is transmitted to his estate unless the terms of the gift require him to survive L in order to take. If the terms of the gift do not import a survival contingency, the only remaining contingency is that L should*

<sup>6</sup> Wills Act 1958, s.5.

*die without children living at L's death. This contingency is collateral to X. If L later dies without children living at L's death, the contingent interest of X's estate becomes possessory. This is an instance of a transmissible contingent interest.*

(iv) Finally, there is the meaning of the word 'vested' as it is used in connection with the rule against remoteness of vesting. The vesting which the rule contemplates will in many cases be that described in (ii) above. But there is one type of case in which an interest might vest in accordance with meaning (ii) above but yet not be vested in accordance with the rule against remoteness of vesting. This is where the future interest is given to a class. An interest will be vested for the purposes of the rule against remoteness of vesting when

- (a) the identity of the person who is to take is ascertained;
- (b) there is no condition precedent to its becoming possessory (in the case of a remainder, no condition precedent other than the regular termination of the prior estates); and
- (c) where the interest is included in a gift to a class, the *exact* fraction or quantum of interest of each taker is ascertained.

In the application of the rule against remoteness of vesting the difference between a *condition precedent* and a *condition subsequent* can be significant. If an interest is subject to a condition precedent (other than, in the case of a remainder, the regular termination of the prior estates), then it is contingent. If the condition precedent may happen outside the perpetuity period, then the interest fails. But if an interest is subject to a condition subsequent, then it is vested, although it is liable to be divested on the happening of the condition. If the condition subsequent may happen outside the perpetuity period, then the condition fails and the interest is indefeasibly vested.

**EXAMPLE 5:**

T by will gives property to trustees upon trust for L for life, then for such of L's children as marry.

*The marriage of L's children is a condition precedent to the gift to them. Their interest is therefore contingent. Assuming that L survives T, the condition is too remote. L might have a child after T's death, and that child might marry more than 21 years after lives in being at T's death. Since the condition is too remote, the gift to L's children fails. (We shall see that the new 'wait and see' rule introduced by the Perpetuities and Accumulations Act could save this gift in some circumstances.)*

*If L predeceased T, then the condition would not be too remote. In this event, there can be no after-born children. All L's children are therefore lives in being, and they must marry, if at all, within their own lifetimes.*

**EXAMPLE 6:**

T by will gives property to trustees upon trust for L for life and then for L's children, but if any child ceases to be an Australian citizen then his share for X.

*Ceasing to be an Australian citizen is a condition subsequent to the gift to*

*L's children. Their interests are therefore vested, although the interest of any one of them is liable to be divested on his ceasing to be an Australian citizen. The ending of the Australian citizenship of a child of L's is a condition precedent to the gift to X. His interest is therefore contingent.*

*Assuming L survives T, the condition is too remote. An after-born child of L's might cease to be an Australian citizen more than a life in being and 21 years after T's death. Therefore L's children take free of the divesting contingency, and X's interest fails.*

*Assuming L predeceases T, the condition is not too remote. L cannot have any more children; therefore his children are all lives in being at T's death; therefore they must cease to be Australian citizens, if at all, within their own lives; therefore X's interest must vest, if at all, within a life in being.*

The rule is not concerned with the *duration* of interests. A lease for 999 years does not violate the rule; nor does an estate in fee simple, which may last for ever. The rule is satisfied if an interest must 'vest' within the perpetuity period, even though the interest may last beyond it.

#### EXAMPLE 7:

T by will gives property to trustees upon trust for L (a bachelor) for life, then for L's daughters for their lives, then for X (a living person).

*The gift to L's daughters is valid. They are not lives in being, but their interests must vest, if at all, on or before the death of L, who is a life in being. The daughters' life interests will then probably last for longer than the perpetuity period. What about the gift to X? It is also valid because it vested immediately on the death of T. At that point, his identity was ascertained and there was no condition precedent to its becoming possessory other than the regular termination of the prior life estates. It is immaterial that X's interest may not become possessory within the perpetuity period. If, as is likely, X dies before L's children, his vested interest in remainder will be part of his estate and will pass under his will or on intestacy. When it becomes possessory it will be enjoyed by his successors.*

#### EXAMPLE 8:

T by will gives property upon trust for L (a bachelor) for life, then for L's daughters for their lives or until they marry, then for X (a living person).

*The gifts to L's daughters and to X are valid for exactly the same reasons as they were valid in example 7. It makes no difference that L's daughters' interests are terminable on marriage, and that the marriage may occur outside the perpetuity period. X's interest is vested in interest on the death of T. It is immaterial that it may not fall into possession until after the perpetuity period.*

*What is the difference between X's valid interest here, and X's void interest in example 6? In example 6, X's interest is contingent upon an event which may happen outside the perpetuity period; he is entitled to his interest only on the happening of that event which may or may not occur. In example 8, X's interest falls into possession on the termination of the previous life estates, whether that event occurs by the marriage of the daughters or their death. One way or another, the life estates must terminate, and so X's interest is not contingent on the happening of any one event—the marriage of a daughter merely affects the time at which his interest becomes possessory.*

*Reform:* remains true after the passing of the Perpetuities and Accumulations Act that the rule is concerned with remoteness of vesting.

### 3. The period begins to run at 'the creation of the interest'

In the case of an interest created by will, the period runs from the death of the testator, for it is only from that date that the will takes effect. In the case of an interest created by deed, the period runs from the time when the deed takes effect. In the case of an interest created by the exercise of (or the failure to exercise) a special power of appointment, the period runs from the time when the power was created. If, however, the power is general, the period runs only from the time when the power was exercised. (The application of the rule to powers is considered below, proposition 9 (b) (ii).)

#### EXAMPLE 9:

T by will gives property to trustees upon trust for such of his grandchildren as shall attain 21.

*This is valid. T's will does not take effect until he is dead. At that point he can have no further children. Therefore all his children are lives in being at the creation of the interests. Therefore the grandchildren must be born within lives in being, and their interests must vest, if at all, within 21 years of those lives in being.<sup>7</sup>*

#### EXAMPLE 10:

S by deed (effective immediately) gives property to trustees upon trust for such of his grandchildren as shall attain 21.

*This is invalid. S's deed is effective during his lifetime. Therefore he might subsequently have a child who would not be a life in being at the time of the creation of the interest. If that child survived the others and then had a child, the grandchild would attain a vested interest more than a life in being and 21 years after the creation of the interest.*

*This gift would be saved if a grandchild had attained 21 at the date of the deed. For in that case the class-closing rules (considered below) close the class to after-born children. No-one attains a 'vested' interest until all have attained 21, but when after-born children are excluded this must occur within the lives in being and 21 years.*

### 4. The period is a life or lives in being and twenty-one years

'Any number of lives may be taken, provided only that they are not so numerous as to make it impossible to ascertain the survivor.'<sup>8</sup>

#### EXAMPLE 11:

T by will postpones vesting of some interests for 'the period ending at the expiration of 20 years from the day of the death of the last survivor of all the lineal descendants of Her Late Majesty Queen Victoria who shall be living at the time of my death'. Shortly before his death there are 120 'lineal descendants' scattered throughout Europe.

*This was held to be valid in a case where the instrument took effect in 1926.<sup>9</sup>*

<sup>7</sup> For present purposes a person attains a particular age on the day preceding the anniversary of the appropriate birthday. In *Re Shurey* [1918] 1 Ch. 263 the disposition was to such of three of the testator's sons 'as shall attain the age of twenty-five years'. The eldest son was born on 22 July 1891, and died on 21 July 1916. It was held that he had attained the age of twenty-five years at the time of his death. The rule is that the law does not take cognizance of a part of a day.

<sup>8</sup> Morris and Leach, *The Rule Against Perpetuities* (2nd ed. 1962) 60.

<sup>9</sup> *Re Villar* [1929] 1 Ch. 243.

## EXAMPLE 12:

T by will postpones vesting of some interests 'until the period of 21 years from the death of the last survivor of all persons who shall be living at my death'.

*This was held to be invalid for uncertainty.*<sup>10</sup>

If measuring lives are expressly specified in the instrument, then they will be the lives in being. They need not be beneficiaries or have any other connection with the interests created as, for example, the 'royal lives' in example 11 above. If no measuring lives are expressly specified in the instrument, then any lives which are necessarily involved in the limitations (and which are in being at the creation of the interest) will be the 'lives in being', for example the children in example 9 above. If in that example T was survived by children and grandchildren the grandchildren would not be measuring lives, for so long as there are children alive the class of grandchildren is a class capable of increase. Insofar as there is a reference to grandchildren it is not a reference confined to grandchildren alive at T's death either by the words of the will or the circumstances at the time the will takes effect. If no measuring lives are expressly specified in the instrument, and none is necessarily involved in the limitations contained therein, then the period is simply 21 years.

Actual periods of gestation are added to the period. In example 9, above, for example, it is possible for T to die, leaving a child *en ventre sa mère* who is born after his death; and it is also possible for that child (if male) to itself have a posthumous child. If this occurred, then T's grandchild would attain 21 at the end of a life in being and 21 years plus two periods of gestation. Nevertheless, the time of vesting is not too remote.

*Reform of the period:* The Perpetuities and Accumulations Act, section 6 (4), leaves the period as a life or lives in being and twenty-one years. It does, however, make two reforms.

The first reform is contained in the proviso to section 6 (4) which allows some persons to be reckoned as lives in being who would not be so reckoned at common law. The proviso is really a corollary to the 'wait and see' rule which is adopted by the Act and which is discussed below. In example 10, for instance, at common law none of S's children would be regarded as lives in being apart from legislation because of the possibility that S might subsequently have children who would not be lives in being. Under the proviso to section 6 (4) those of S's children who were in fact in being at the creation of the interest can be reckoned as lives in being. If all grandchildren in fact attain 21 within 21 years of the death of one of the survivors of those of S's children who were in fact in being at the creation of the interest, then the gift is valid. This example will be easier to understand when the 'wait and see' rule, considered below, is understood.

The second reform which is introduced by section 5 (1) of the Act (following the Western Australian, English and New Zealand Acts) is the

<sup>10</sup> *Re Moore* [1901] 1 Ch. 936.

provision of an alternative period of 'such number of years not exceeding eighty as is specified in the instrument as the perpetuity period applicable to the disposition'. At common law, if a life or lives in being was not expressly or impliedly available as a measure, then the perpetuity period was only 21 years. This led the draftsmen of discretionary trusts in particular to resort to such devices as 'royal lives clauses', such as that used in example 11 above, in order to provide the longest possible period. The period of 80 years now permitted is a simpler solution for the draftsman of a settlement who wishes to postpone vesting for a long time without reference to the lives of beneficiaries or their parents.

**5. At the time of the creation of an interest, the interest must be certain to vest, if at all, within the perpetuity period (the 'initial certainty' rule)**

At common law there are two exceptions to this rule: (1) gifts subject to alternative contingencies (proposition 8, below) and (2) appointments under special powers of appointment (proposition 9 (b) (ii), below).

At common law, apart from two exceptions, the 'initial certainty' rule requires certainty at the commencement of the period. The facts existing at that time must be examined to determine whether it is logically possible for vesting to occur outside the period. If it is logically possible to construct circumstances in which vesting would occur outside the period, then the rule is infringed. This is so even if the postulated circumstances are highly improbable and even if later events make them impossible. In other words, the rule is concerned only with logical possibilities open at the commencement of the period; it is not concerned with practical probabilities, or with actual later events. If a question about the validity of a future interest arises long after the commencement of the period it is still necessary to consider the question in the light only of those facts known at the commencement of the period.

**EXAMPLE 13 (The Unborn Widow):**

T by will gives property to trustees upon trust for L (a bachelor) for life, then for any wife he may marry for life, then for L's eldest son then living, and if there is no such son to X<sup>11</sup>

*The gift to the wife is valid, for she will be ascertained at the death of L who is a life in being. But the gifts to L's eldest son, and to X, are too remote. Those gifts will not vest until the death of L's widow. L might marry a woman who was not alive at T's death, and she might outlive L for more than 21 years. In these circumstances, the interests of L's eldest son and of X would not vest within a life in being and 21 years.*

**EXAMPLE 14:**

T by will gives property to trustees upon trust for L (a bachelor) for life, then for any wife he may marry for life, then to L's children.

*The gift to the wife and the gift to the children are valid in this case for the children attain a vested interest on L's death. They will be ascertained, their exact shares will be determined, and there is no condition precedent to be*

satisfied other than the regular termination of the previous estates. The difference between this example and example 13 is that in example 13 the existence of an eldest son living at the death of the wife depended upon which child in fact survived until that date. Vesting would not occur until this was known. But in example 14, all children alive at L's death immediately attain a vested interest. If anyone dies before L's widow, his share will be part of his estate and will pass under his will (or intestacy).

**EXAMPLE 15 (The Magic Gravel Pits):**

T by will gives his gravel pits to trustees upon trust to work them until the pits are exhausted, then to sell them and divide the proceeds among T's children then living. (If the pits were worked at the same rate as in the past then they would be exhausted in four years. In fact, they were exhausted in six years—before the matter came to court.)<sup>12</sup>

*The gift to the children is too remote. It does not vest until the pits are exhausted. This might take more than a life in being and 21 years. If the words 'then living' were deleted, the gift to the children would vest on T's death and there would be no problem.*

**EXAMPLE 16 (The Fertile Octogenarian):**

T by will gives property to trustees upon trust for his wife for life, then for such of the children of his brothers and sisters who attain 21. (At T's death, his father and mother were alive but both were aged 66. He had two brothers and two sisters, of whom the youngest was 32, and several nephews and nieces, of whom the eldest was 14.)<sup>13</sup>

*The gift to the nephews and nieces is too remote. In the application of the rule against remoteness of vesting there was at common law a conclusive presumption of fertility in respect of any man or woman, however young or however old.<sup>14</sup> T's parents might have a further child after T's death who might outlive the other brothers and sisters and then have a child. Such a child would attain a vested interest more than 21 years after any life in being.*

*This gift would have been saved if one of the nieces and nephews had attained 21 at the death of T. In that case, the class-closing rules (considered below) would have closed the class at the wife's death when that child (or his estate) would be entitled to call for distribution. In that event, only nephews and nieces who were born in the wife's lifetime would comprise the class. They must attain 21, and a vested interest, within 21 years of the wife's death (the wife being a life in being).*

<sup>11</sup> *Re Frost* (1889) 43 Ch.D. 246.

<sup>12</sup> *Re Wood* [1894] 2 Ch. 310; 3 Ch. 381.

<sup>13</sup> *Ward v. Van der Loeff* [1924] A.C. 653

<sup>14</sup> The conclusive presumption that a woman was never past child-bearing as applied in relation to the rule against remoteness of vesting did not apply in another context. Where trustees wished to distribute trust property among beneficiaries of full age who would be absolutely entitled but for the possibility of further children being born to a particular woman who was past child-bearing, the Supreme Court would authorize them as a matter of administration to make the distribution on the footing that at a certain age, normally in the middle or late fifties, a woman is past child-bearing. Such an order protected the trustees if the unexpected event should occur while leaving to the possible future children the right to claim the fund from those to whom, in the event, it had been wrongly paid. With the change in the status of adopted children brought about by the Adoption of Children Act 1964, s.32(1)(a) (under which the adopted child's relationship to the adopter is equated to that of a child born to the adopter in lawful wedlock) problems have arisen in the exercise of this power of the Court: see the discussion in *National Trustees Executors & Agency Co. of Australia Ltd v. Tuck* [1967] V.R. 847.

## EXAMPLE 17 (The Precocious Toddler):

T by will gives property to trustees upon trust for L for life, then for such of L's grandchildren living at T's death or born within 5 years thereafter who should attain the age of 21. (At T's death L was a widow aged 65; she had two children living and one grandchild aged 8.)<sup>15</sup>

*The gift to L's grandchildren is too remote. L's two children are lives in being, and their children therefore must attain 21 within a life in being and 21 years. But L might remarry and have another child, who would not be a life in being. That child might marry and have a child within five years of T's death, i.e., the child might marry and give birth before it was five years old!*

*The conclusive presumption of fertility is applied twice in this example. First to L, a woman aged 65, and second to the hypothetical child under the age of 5.*<sup>16</sup>

*In this particular case (Re Gaité's Will Trusts) the court upheld the gift, not because the possibility of the woman and the child having children was fantastic, but because a marriage between persons under 16 was illegal and void under English law. Therefore it was legally impossible for a child of L, born after T's death to have a legitimate child within five years of T's death. And only a legitimate child would be a 'child' on the true construction of the will. This ground of decision has been generally criticized because it overlooks the possibility that the child might have travelled to a foreign country where the legal age for marriage is less than 16, acquired a domicile and married there. It could not be assumed that the marriage would occur in Great Britain.*<sup>17</sup>

*Reform of the 'initial certainty' rule:* The Perpetuities and Accumulations Act, like its Western Australian, English and New Zealand predecessors, substitutes a 'wait and see' rule for the initial certainty rule. The validity of a limitation now depends not only on the facts which may possibly occur, but also on the facts which actually occur. Section 6 provides that an interest which was formerly void because it might have vested outside the perpetuity period is now to be regarded as valid until it becomes established that the vesting *must* occur, if at all, after the end of the perpetuity period. Under section 7, at any time, upon application, the court has power to 'make a declaration on the basis of facts existing and events that have occurred at the time the declaration is made, as to the validity or otherwise of the disposition in respect of which an application is made'; if the validity cannot be determined at that time, then the court is prohibited from making a declaration.

The 'wait and see' rule is sufficient of course to overcome the traps created by unborn widows, magic gravel pits, fertile octogenarians and precocious toddlers. But the 'wait and see' rule does suffer from the disadvantage that the ultimate validity of a disposition is in doubt until events place it beyond doubt. In the case of dispositions whose validity would be in doubt only because of the possibility of unborn widows, fertile octo-

<sup>15</sup> *Re Gaité's Will Trusts* (1949) 65 T.L.R. 194.

<sup>16</sup> There is data now available on the actual probabilities of this. In the United States of America, statistics of 20 million births between 1923 and 1932 showed that no children were born to women over 55. Against this is *The Bible* (Genesis, chapter 21, verse 2; and see chapter 17) which says that Sarah begat Isaac at the age of 90: see generally, Morris and Leach *op. cit.* 82-6.

<sup>17</sup> Morris and Leach, *op. cit.* 85.

genarians or precocious toddlers (but not magic gravel pits), the Act, by sections 8 and 10, has provided rules designed to provide certainty at the date of the disposition.

Presumptions of fertility or infertility are established by section 8 when a question arises on the rule against perpetuities as to whether a person is capable of having a child at a future time. The presumptions are that—

- (a) a male can have a child at the age of twelve years or over but not under that age
- (b) a female can have a child at the age of twelve years or over but not under that age
- (c) a female over the age of fifty-five years cannot have a child.

In the case of a living person evidence may be given to rebut a presumption. The evidence admissible is not limited to medical evidence.

In connection with other means of establishing the relation of parent and child, such as adoption<sup>18</sup> and legitimation, the Act, in section 8 (4), has had to adopt the same presumptions and to go further by making them irrebuttable. If, after it has been decided that a person is incapable of having a child at a particular time, he or she does so, the Supreme Court has power to adjust the rights of persons interested in the property.

Section 10 deals with the case of the unborn widow or widower by deeming the widow or widower of a life in being to be a life in being for the purpose of certain dispositions.

**EXAMPLE 18:**

T by will gives property to trustees upon trust for L for life, then for any widow who may survive L for her life, and then to the children of L living at the death of the survivor of L and his widow.

*At common law the gift to L's children would be void, if L survived T, because of the possibility that L might marry a woman who was unborn at T's death and that she might survive him by more than 21 years. Under section 10 in such a case the gift to L's children would be valid, because L's widow would be treated as a life in being for the purpose of the disposition in favour of L's children.*

Until the legislature intervened the most common cause of violations of the rule was the attempt by settlors and testators to postpone the vesting of a gift until the beneficiary attained an age greater than 21.

**EXAMPLE 19:**

T by will gives property upon trust for L for life, then for such of L's children as attain 25.

*Assuming L survives T, the gift to the children is too remote. A child of L might be born after T's death and might attain 25 more than 21 years after the death of L, the life in being. The gift would have been valid if the specified age were 21 instead of 25, because L's children must attain 21, if at all, within 21 years of L's death.*

*(The gift would also be valid, even with the age of 25 as the time of vesting,*

<sup>18</sup> Adoption of Children Act 1964 *supra* n. 14.

if L predeceased T. This would eliminate the possibility of after-born children. All of L's children would therefore be lives in being at T's death; and each must attain 25, if at all, within his own lifetime.)

Clauses of this kind were so common in wills and settlements, and led so frequently to invalidity, that many jurisdictions removed the trap by legislation. The Victorian provision was contained in section 162 of the Property Law Act 1958 which provided that, where the vesting of an interest depended on the attainment by the beneficiary of an age greater than 21, and the gift was void for that reason, then the age of 21 was deemed to be substituted for the greater age actually specified in the instrument.

The 'wait and see' rule introduced by the Perpetuities and Accumulations Act would have the effect of validating most gifts which depend on the beneficiary attaining an age greater than 21, without any need to reduce the specified age. Of those which are not validated by waiting and seeing, many could be validated by reducing the specified age only so far as is necessary to save the provision from invalidity. Suppose, for example, that in example 19 above, at the end of the perpetuity period (21 years after the death of L), three of L's children are alive and aged 29, 26 and 23 respectively. At common law, this gift would be too remote and would have been void *ab initio*. Under a 'wait and see' rule the gift would also be too remote. Under the Property Law Act 1958, section 162, the gift would be valid because the age of 21 would be statutorily substituted for the specified age. But after waiting and seeing it is apparent that the gift can be saved without such a large reduction in the age contingency. A reduction of the specified age to 23 will be nearer to the testator's intention, and will suffice to save the gift. This is the effect of section 9 (1) of the Perpetuities and Accumulations Act, which replaces section 162 of the Property Law Act 1958. Under section 9 (1), the first remedy for a provision which may be too remote by reason of an attempt to postpone vesting beyond 21 is to wait and see. If this does not establish validity, the second remedy is the statutory reduction of the specified age to the age nearest that age which, in the light of the facts disclosed by waiting and seeing, would have prevented the disposition from being too remote.

6. Where an interest is created in favour of a class, the interest is not 'vested' in any member until it is vested in all members (the 'all or nothing' rule)

The 'all or nothing' rule amounts to a requirement that the exact share of each member of a class of beneficiaries must be ascertained within the perpetuity period. In this respect, as we have seen, the meaning of 'vesting' for the purpose of the rule against perpetuities differs from the meaning of the word in all other contexts.

EXAMPLE 20:

T by will gives property to trustees upon trust for L for life, then for such of

L's children as attain 25. (L survives T. At T's death four of L's children are living and a fifth is born thereafter.)

*The gift to the children is wholly invalid at common law. The gift to the four children living at T's death must vest within their own lives and would therefore be valid on its own. The gift to the fifth, however, may vest more than 21 years after persons in being at T's death. This possibility, which only affects the fifth child, invalidates the whole gift. The gift would be equally invalid even if there were no fifth child, because at T's death there is a possibility of a fifth child.*

*(We have already seen that this situation was formerly cured by section 162 of the Property Law Act 1958, and is now cured by section 9(1) of the Perpetuities and Accumulations Act.)*

EXAMPLE 21:

T by will gives property to trustees upon trust for the grandchildren of A. (A survives T. At T's death three of A's children are living, and a fourth is born thereafter.)

*The gift to the grandchildren is wholly invalid. A gift to any children born to the three children who were alive at T's death would be valid if it stood alone because they must be born within the life of one of L's children who is a person in being at T's death. A gift to any children born to A's fourth child, however, might vest outside the period because a child could be born more than 21 years after the death of any of the persons in being at T's death. This possibility, which only affects the children of A's fourth child, invalidates the whole gift. The gift would be equally invalid even if L in fact had no fourth child, because at T's death there is a possibility of a fourth child.*

In example 20, the gift by way of remainder would have been valid if L had predeceased T. This would eliminate the possibility of L having after-born children who would not be lives in being at T's death. The class of beneficiaries would 'close' (*i.e.*, there could be no new members) at T's death. In example 21, the gift to the grandchildren would have been valid if A had predeceased T. In that event, the class would close at the death of the last of A's children, all of whom would be lives in being.

There are rules of construction which have the effect of closing classes of beneficiaries, and which sometimes have the incidental effect of saving a class gift which would otherwise be too remote. The class-closing rules (sometimes called 'rules of convenience' or 'the rule in *Andrews v. Partington*')<sup>19</sup> have been summed up as follows:

Wherever a testator or settlor directs that a fund shall be divided among members of a class at a time when the class is still capable of increase, the class closes if at that time any member is entitled to call for distribution of his share. It will then include all members born before that date of distribution, even though they are not yet entitled to call for payment of their share; but it will exclude all born after that date, as their inclusion would be inconsistent with making a distribution at that time.<sup>20</sup>

In example 21, for instance, if any grandchild of A is alive when T dies, the class will close then because that child is entitled to call for distribution at birth. This would save the gift from remoteness because it would

<sup>19</sup> (1791) 3 Bro.C.C. 401.

<sup>20</sup> *Re Wernher* [1961] 1 W.L.R. 136; [1961] 1 All E.R. 184.

eliminate the possibility of after-born grandchildren whose parents were not lives in being at T's death. The class-closing rules could not, however, save the gift by way of remainder in example 19. The earliest time at which any of L's children might be entitled to call for distribution is L's death. The class closes then in any event, and the class-closing rules cannot close the class at any earlier time. (Under the Perpetuities and Accumulations Act this gift would be saved, of course, either by 'wait and see', or by reduction of the age contingency.) In some circumstances, however, the class-closing rules will save a gift which follows a life interest. They could save the gift to the nephews and nieces in example 16, above, for example. If a nephew had attained 21 at T's death, then it would be certain at that time that the class must close at the death of the wife when the nephew (or his estate, if he predeceased the wife) would be entitled to call for distribution. This would exclude children born after (but not before) the wife's death, and would ensure that every member of the class attained a vested interest within a life in being (the wife) and 21 years.

The class-closing rules are rules of construction, designed to give effect to the intention of the settlor or testator. They assume that he would prefer to exclude some of the class altogether, rather than keep those who are entitled to call for distribution waiting indefinitely for payment. The rules are excluded by indications of a contrary intention on the part of the settlor or testator. They are not part of the rule against perpetuities, and they have not been changed by any of the new legislation on perpetuities.

*Reform of the 'All or Nothing' Rule:* The 'wait and see' rule provided by section 6 (1) will obviously save many class gifts which would be invalid under the 'initial certainty' rule. The reduction of age contingencies provided by section 9 (1) will save some of the class gifts which are not saved by waiting and seeing. For instance, see example 20 above (which would also have been saved even before the Act by section 162 of the Property Law Act 1958). If, after applying both these remedies, some members of the class still do not attain vested interests within the perpetuity period, section 9 (4) deems those members to have been excluded from the class. Section 9 (4) thus abolishes the 'all or nothing' rule and allows a class gift to take effect in favour of those members of the class who have in fact attained a vested interest within the perpetuity period.

Different results may be produced according to the order in which these remedies are applied. The correct order is that given above, that is, (1) wait and see; (2) reduction of age contingencies; and, as a last resort, (3) exclusion of members.

#### 7. Limitations which follow and are dependent upon void limitations are themselves void.

If an ulterior interest is dependent upon the same remote contingency as the prior interest, then the ulterior interest may not vest within the perpetuity period, and it is therefore void at common law.

## EXAMPLE 22:

T by will gives property to trustees upon trust for the first son of A to be bred a clergyman in the Church of England, but if he has no such son, then for B.<sup>21</sup> (A survives T.)

*A might have a son after T's death who is 'bred a clergyman' more than 21 years after the death of any person in being at T's death. The gift to the son is therefore too remote. But the ulterior limitation to B is dependent upon exactly the same contingency. It is therefore also too remote.*

If the ulterior interest is either vested or certain to vest within the perpetuity period, then it should not matter that a prior limitation is invalid. The subsequent interest should simply be accelerated. In some cases, however, ulterior limitations have been held to be 'dependent' on void prior limitations, and to be void for that reason, even where the ulterior interest was either vested or certain to vest within the perpetuity period.<sup>22</sup>

*Reform of the 'dependency' rule:* Section 11 of the Perpetuities and Accumulations Act makes clear that an ulterior interest shall not be void for remoteness by reason only that the prior interest is void for remoteness. This will not save the first situation described above (although 'wait and see' might save it), where the ulterior limitation is dependent upon the same remote contingency as the prior limitation, but it will save the second situation described above.

## EXAMPLE 23:

T by will gives property to trustees upon trust for L for life, then for L's grandchildren for their lives, then for X.

*The gift to the grandchildren is too remote at common law (see example 21, above) and might be too remote after waiting and seeing for 21 years after L's death. But the gift to X is vested on T's death. Section 11 makes clear that it is valid.*

8. Where an interest is subject to alternative contingencies, one of which may occur outside the perpetuity period and the other of which must occur within the period, the interest is void if the first contingency actually occurs and valid if the second contingency actually occurs

In this situation, at common law the court must 'wait and see'. This is the first of the two exceptions to the common law rule of 'initial certainty' (proposition 5, above). It is only a limited form of 'wait and see', however, because if the first contingency in fact occurs within the perpetuity period, the interest is still void; only if the second contingency in fact occurs is the gift saved.

*Reform of 'alternative contingency' rule:* The generally applicable 'wait and see' rule laid down by the Perpetuities and Accumulations Act, section 6, makes the alternative contingency rule obsolete.

<sup>21</sup> *Proctor v. Bishop of Bath and Wells* (1794) 2 H.Bl. 358.

<sup>22</sup> The cases are criticized by Morris and Leach, *op. cit.* 179 ff.

## 9. The Application of the Rule to Particular Interests

### (a) *Charities*

The rule against remoteness of vesting applies to dispositions in favour of charities, with one exception. A gift to a charity followed by a gift over to another charity upon a contingency which may not happen within the perpetuity period is wholly valid. The exception does not apply unless both donees are charities.

#### EXAMPLE 24:

T by will gave property to the Corporation of Reading upon trust for the poor of Reading, but if the corporation should neglect to perform the trust for one whole year, then to the Corporation of London on trust for Christ's Hospital. More than two centuries after T's death the Corporation of Reading neglected to perform its trust for one whole year.

*The gift over was held to be valid.*<sup>23</sup>

This exception to the rule against perpetuities is not affected by the Perpetuities and Accumulations Act.

The rule against perpetuities, which is concerned with remoteness of vesting, must not be confused with the rule against indestructibility, which provides that a purpose trust may not last longer than the perpetuity period. The latter rule does not apply to charities at all. It is not affected by the Perpetuities and Accumulations Act except to the extent that the perpetuity period has been altered, and if the non-charitable purpose trust is not otherwise void<sup>24</sup> property may be applied for the purposes of the trust during the perpetuity period but not thereafter.<sup>25</sup>

### (b) *Powers of Appointment*

The key to the application of the rule to powers of appointment is that, for the purposes of the rule, the donee of a *general power* (which permits appointment to anyone, including the donee) is regarded as being the owner of the property as soon as the power is exercisable. The donee of a *special power* (which permits appointment only to a defined person or class of persons) is not so regarded.

#### (i) *Validity of Power*

A general power is valid if it is exercisable within the perpetuity period. It does not matter if the power is also exercisable outside the perpetuity period.

A special power is valid if it must be exercised, if at all, within the perpetuity period. If it is exercisable outside the perpetuity period, it is void.

#### (ii) *Validity of Appointment*

An appointment under a general power is treated as a disposition of the

<sup>23</sup> *Christ's Hospital v. Grainger* (1849) 1 Mac. & G. 460.

<sup>24</sup> That is, if, as one of the anomalous and exceptional trusts for the maintenance of animals, graves and monuments it is considered to be valid despite the absence of individual beneficiaries who can enforce the trust and despite its not being a charitable trust: *Lewin on Trusts* (16th ed. 1964) 17-19.

<sup>25</sup> S.19.

donee's own property for the purpose of the rule. Therefore the perpetuity period for interests so created runs from the date of the appointment, not the date of creation of the power.

An appointment under a special power is 'read back' into the instrument creating the power. The perpetuity period for interests so created runs from the date of creation of the power. But the 'initial certainty' rule is not applied in its full rigour. In considering whether or not the interest must vest within the perpetuity period, it is permissible to look, not only at the facts existing at the commencement of the period (the date of creation of the power), but also at the facts existing at the date of the appointment. This is known as the 'second look' doctrine, and it is the second exception to the common law rule of 'initial certainty' (proposition 5, above). It applies to gifts in default of appointment as well as to appointments.

EXAMPLE 25:

T by will gives property to trustees upon trust for L for life, then for such of L's children as she should appoint. L appoints the property by her will to each of her children equally at 25. (At L's death there are two children living, aged 6 and 8.)

*If this appointment were simply 'read back' into the power, without applying 'the second look' doctrine, the appointment would be invalid at common law; at T's death a child of L might attain 25 more than 21 years after L's death. Application of 'the second look' doctrine saves the appointment without recourse to section 162 of the Property Law Act 1958 allowing reduction of age contingencies.*

*Reform:* The new Act defines general and special powers of appointment in section 4, and see also section 3. None of the other provisions of the Act is directed specifically to powers of appointment: the difference in the rules applicable to general and special powers therefore remains unchanged. However, the general provisions of the Act apply to the creation and exercise of powers of appointment in the same way as they apply to other 'dispositions': see section 2. The statutory 'wait and see' rule, for example, makes the 'second look' doctrine redundant; and the other statutory provisions considered above will save some powers which would have been invalid at common law.

(c) *Contracts and options*

Generally, the rule against remoteness of vesting is concerned only with dispositions of property and not with contracts as such.

EXAMPLE 26:

The X Insurance Company Limited for value promises to pay the Y Corporation the sum of \$100,000 if the Y Corporation's building on Blackacre is ever destroyed by fire.

*This contract is not affected by the rule even though the contingency is one that could occur beyond the perpetuity period. The rule does not apply because the contract creates a mere personal obligation and does not give to the*

*Y Corporation any rights in any particular property in the hands of the X Insurance Company.*

Although the rule against remoteness of vesting does not apply to contracts generally, it has some operation in relation to certain options to purchase property. It does not affect options for renewal of leases.

EXAMPLE 27:

The Y Corporation, the owner in fee simple of Blackacre, gives to the Z Corporation for value an option to purchase Blackacre for \$200,000. The option is to remain open indefinitely.

*The option is invalid for remoteness as against purchasers of Blackacre from the Y Corporation although it is enforceable against the Y Corporation.*

In example 27, while the Y Corporation remains the owner of Blackacre its promise to transfer the estate to the Z Corporation on the Z Corporation electing to purchase remains enforceable at the suite of the Z Corporation or any assignee claiming through the Z Corporation. The right to enforce the contract against the Y Corporation by way of either damages or specific performance is not affected by the rule against remoteness of vesting.

If, however, the Y Corporation disposes of its estate different considerations apply. The Z Corporation's right to exercise the option against the successor to Y Corporation depends on whether the option contract created in Z Corporation an equitable interest in Blackacre. If it did so and if the successor to Y Corporation did not acquire the legal estate as or through a *bona fide* purchaser for value without notice, the option will be enforceable against the successor. The holder of an option given for value for the purchase of a freehold or leasehold interest in land has a contingent interest in the land when the option contract is one which would be specifically enforced in equity.<sup>26</sup> The same rule applies to options for the purchase of other forms of property where the option contract is specifically enforceable in equity.<sup>27</sup> If, however, the option is created in terms which would permit it to be exercised beyond the perpetuity period the option is invalid under the common law rule against remoteness of vesting as against a successor to the giver of the option: the equitable interest is contingent upon the exercise of the option. The holder of the option could, however, sue the original grantor of the option for damages. At common law the rule applied equally to options given to a lessee of land to acquire the reversion and other options for purchase (later referred to as options in gross).

<sup>26</sup> *Moreland v. Hales* (1910) 30 N.Z.L.R. 201; *Oppenheimer v. Minister of Transport* [1942] 1 K.B. 242; *C. of T. (Old) v. Camphin* (1937) 57 C.L.R. 127, 132, [1937] A.L.R. 401, 403; *Re Armstrong* [1943] 2 All E.R. 537.

<sup>27</sup> Shares in a company: *Duncuft v. Albrecht* (1841) 12 Sim. 189; *Poole v. Middleton* (1861) 4 L.T. 631. Share in the goodwill of a business: *The Trustees Executors and Agency Co. Ltd v. F.C.T. (Milne's case)* (1944) 69 C.L.R. 270, [1944] Argus L.R. 315 overruled on another point in *Perpetual Executors and Trustees Assn of Aust. Ltd v. F.C.T. (Thomas's case)* [1954] A.C. 114; 88 C.L.R. 434, [1954] A.L.R. 252.

*Reform:* The Perpetuities and Accumulations Act, section 15, substitutes new rules about options but only in respect of options relating to land. Sub-section (1) deals with options to acquire an interest reversionary on the term of a lease. The rule is not to apply if the option is exercisable only by the lessee or his successors in title and it ceases to be exercisable at or before the expiration of one year following the determination of the lease. Thus, for example, a lease for 999 years could be accompanied by the grant of an option exercisable during the lease to acquire the reversion and that option would be enforceable against successors in title to the lessee. Sub-section (2) deals with other options to acquire an interest in land or rights of pre-emption other than those conferred by will and other than options for renewal in leases. Any option within the sub-section which by its terms is exercisable more than 21 years from the date of its grant shall after 21 years from that date be void. This provision not only prevents the option being exercisable by any person after that period but also denies any remedy in damages or otherwise even as between the immediate parties to the option contract.

An option to purchase the reversion of a lease is treated differently from an option in gross because it is thought socially useful to encourage lessees to develop land by allowing them and their successors to have an option to purchase even at a remote time, whereas an option in gross is a clog on the title of the owner for the time being and there is no public interest to be served in permitting it to continue for longer than 21 years.

Options to acquire property other than land which would be too remote at common law will be given the benefit of the 'wait and see' rule under section 6 (3). Options in gross in respect of land which exceed 21 years and which are limited to 21 years by section 15 (2) are apparently not given the benefit of the 'wait and see' rule.

An option to purchase conferred by will is excluded from the 21 years restriction in the belief that such options are usually non-commercial<sup>28</sup> and they should be left to the operation of the common law rule against remoteness of vesting, subject to their being saved by the 'wait and see' rule.<sup>29</sup>

#### (d) *Possibilities of reverter and analogous interests*

A possibility of reverter is the interest left in the grantor after he has conveyed a determinable fee simple, *e.g.*, to the tennis club in fee simple for so long as the premises are used for club purposes. A right of entry for condition broken is the interest left in the grantor after he has conveyed a fee simple subject to a condition subsequent, *e.g.*, to the tennis club in fee simple, but if the premises cease to be used for club purposes, then the grantor and his heirs may re-enter. The difference between the two is that a

<sup>28</sup> As to whether an option conferred by will creates an interest in the property, see *O'Neill v. O'Connell* (1946) 72 C.L.R. 101, [1946] A.L.R. 173.

<sup>29</sup> Note that in addition under the Companies Act 1961, s.68 an option to take up unissued shares in a public company is void if it could last for more than five years from the date of grant. This does not apply to options given to debenture-holders to take up shares by way of redemption of debentures.

determinable fee comes to an end automatically on the happening of the specified contingency, while a fee simple subject to a condition subsequent does not come to an end until the grantor (or his heirs) asserts his right of re-entry. These terms are usually confined to legal interests in land, but analogous equitable interests may be created in personalty as well as realty which take effect as resulting trusts.

The authorities are in conflict as to whether the rule against perpetuities applies to these interests.<sup>30</sup> The weight of authority for Australia seems to support the view that the rule does apply to rights of entry for condition broken (and analogous equitable interests), but does not apply to possibilities of reverter (and analogous equitable interests). The rule was applied to a possibility of reverter in *Hopper v. Corporation of Liverpool*<sup>31</sup> but the decision seems contrary to the weight of authority. It is inconsistent with *In re Chardon*<sup>32</sup> which concerned an analogous equitable interest by way of resulting trust.

One reason why there is some doubt about the application of the rule to these interests is the technical one that any interest which remains in the grantor cannot depend upon a contingency for its creation and therefore must be a vested interest.<sup>33</sup> However, for the purposes of the rule against perpetuities, this has not been generally accepted by the courts—at least in relation to rights of entry for condition broken.

It is perhaps worth pointing out that a gift over, that is, a limitation to someone other than the grantor, after either a determinable fee or a fee simple subject to a condition subsequent, would always create a contingent interest which would be subject to the rule.<sup>34</sup> The application of the rule is obvious in the case of an interest which is limited after a fee simple subject to a condition subsequent, for the 'remainder' is clearly subject to a condition precedent. It is less obvious in the case of an interest which is limited after a determinable fee simple, for in that case it could be argued that the 'remainder' is not subject to any condition precedent other than the regular termination of the prior estate. This is the reason why a remainder which is limited to a living person after a determinable *life interest* is treated as a vested interest: see example 8 above. The better view is, however, that the same reasoning does not apply to an interest limited to a living person after a determinable fee simple. The distinction is as follows. A life interest is bound to determine at some time; the happening of the event upon which it is determinable only affects the *time* when the remainder falls into possession. A determinable fee, by contrast, may never determine; the happening of the event upon which it is determinable is the only way in which the 'remainder' can become possessory. It is therefore more accurate to describe the interest which is limited after a determin-

<sup>30</sup> See Morris and Leach, *op. cit.* 209-19.

<sup>31</sup> (1944) 88 Solicitors Journal 213.

<sup>32</sup> [1928] Ch. 464.

<sup>33</sup> Jackson, *Principles of Property Law* (1967) 171.

<sup>34</sup> Note however that the validity of such a gift over is doubtful quite apart from the rule against perpetuities: Morris and Leach, *op. cit.* 210. The discussion in the text assumes that such a gift over would be valid.

able fee simple as subject to a condition precedent other than the regular termination of prior estate and therefore as contingent, and, as such, subject to the rule against perpetuities.

*Reform:* Section 16 provides that the rule now applies to rights of entry for condition broken following a conditional fee simple (and analogous interests in personalty) as well as to possibilities of reverter following a determinable fee simple (and analogous interests in personalty).

In the case of a conditional fee simple, section 16 provides that if the right of entry is not exercised within the perpetuity period the fee simple shall continue as a fee simple absolute. In the case of a determinable fee simple, the section provides that if it does not determine within the perpetuity period the fee simple shall continue as a fee simple absolute. It deals also with the possibility of a resulting trust on the determination of a determinable equitable interest in property by providing that if the determining event does not occur within the perpetuity period the interest shall continue as an absolute interest.

Where the prior determinable or conditional interest is given to charity<sup>35</sup> the same provisions apply except that the rule against perpetuities is not to apply to a gift over from one charity to another.<sup>36</sup>

(e) *Legal contingent remainders*

In Victoria those relics of feudalism, the old technical rules of the common law which applied to legal contingent remainders in land,<sup>37</sup> have not been wholly abolished. The rule in *Purefoy v. Rogers*<sup>38</sup> and one of the four principal rules have however been modified.<sup>39</sup> The present position is that the remaining rules do not apply to legal future interests created *inter vivos* by a grant to uses (which are executed by the Statute of Uses); nor do they apply to legal or equitable future interests created by will;<sup>40</sup> and nor do they apply to equitable future interests created *inter vivos* by means of a trust. The only future interests to which the rules do now apply are legal interests in land created *inter vivos* without the interposition of a use. It is now unusual for future interests to be created in this last way, and so limitations to which the rules apply are, happily, very rare.

This rare class of legal contingent remainders is, it seems, subject to the rule against perpetuities as well as the rule affecting legal contingent remainders. In order to be valid, such interests must satisfy the requirements of both types of rules. Ironically, one of the legal contingent remainder rules, which required vesting during or at the determination of a prior estate, occasionally validated an interest which would have been void under the rule against perpetuities if that were the only rule which applied.

<sup>35</sup> *Re Randell* (1888) 38 Ch.D. 213; *Re Bowen* [1893] 2 Ch. 491.

<sup>36</sup> *Supra* n. 23.

<sup>37</sup> Megarry and Wade, *The Law of Real Property* (3rd ed. 1966) ch. 5.

<sup>38</sup> (1671) 2 Wms. Saunders 380.

<sup>39</sup> Property Law Act 1958, s.192.

<sup>40</sup> *Will of Malin* [1912] V.L.R. 259, 263. Cf. *Barrett v. Barrett* (1918) 18 S.R. (N.S.W.) 637.

The details<sup>41</sup> need not trouble us because the legal contingent remainder rule which produced this result is the one which has been abolished in Victoria.<sup>42</sup>

*Reform:* Regrettably, the new Act does not take the opportunity to abolish the legal contingent remainder rules. It would be more satisfactory if legal contingent remainders were subject only to the same rules as other future interests. The Act does however apply to legal contingent remainders. The present position is, therefore, that in order to be valid, legal contingent remainders must satisfy the old common law rules as well as the requirements of the Perpetuities and Accumulations Act.

(f) *Superannuation funds*

Some superannuation schemes involve the maintenance of a trust fund and the trusts on which it is held may contemplate that certain classes of beneficiaries could obtain vested interests beyond the perpetuity period. The Perpetuities and Accumulations Act, section 17, exempts superannuation funds from the rule against perpetuities.<sup>43</sup>

(g) *Limitations to Unborn Children*

Before its repeal by statute, the rule in *Whitby v. Mitchell*<sup>44</sup> applied to legal and equitable remainders in land (but not to interests in personalty). The rule prohibited the limitation, after a life interest to an unborn person, of a remainder to an unborn person. This rule would strike down some limitations which would be valid under the modern rule against perpetuities. It was abolished in Victoria in 1928.<sup>45</sup>

(h) *Administrative Powers of Trustees*

At common law the rule against remoteness of vesting not only invalidated dispositions but also administrative powers of trustees which might be exercised outside the perpetuity period. For example a power of sale or leasing could be held invalid. Even before the Perpetuities and Accumulations Act Victorian legislation validated a number of administrative powers. Section 14 of the Perpetuities and Accumulations Act now exempts administrative powers of trustees from the rule against perpetuities.

(i) *Accumulation of Income*

The rule against perpetuities applies to dispositions of income as well as capital. Although the rule is not directed specifically to accumulations of income, there are indirect restraints on accumulations for too long a time: (1) the accumulation must vest within the perpetuity period; and (2) when a person (or persons) is absolutely entitled to income being accumulated,

<sup>41</sup> Discussed by Morris and Leach, *op. cit.* 203 ff. Jackson, *op. cit.* 181 ff.

<sup>42</sup> Property Law Act 1958 s.192.

<sup>43</sup> This legislation was first enacted in 1953. Before that the legislature had on occasion passed special Acts validating particular superannuation schemes.

<sup>44</sup> (1889) 42 Ch.D. 494.

<sup>45</sup> See now Perpetuities and Accumulations Act 1968, s.12.

he may bring an end to the accumulation under the rule in *Saunders v. Vautier*,<sup>46</sup> notwithstanding a contrary direction in the trust instrument.

Despite these considerations, England passed the Thellusson Act in 1800 to impose more stringent restrictions on accumulations, and similar legislation was enacted throughout Australia. These Acts created a 'rule against accumulations' which was distinct from the rule against perpetuities. In Victoria the statutory limits on accumulations were in sections 164, 165 and 166 of the Property Law Act 1958.

*Reform:* Section 19 (1) of the Perpetuities and Accumulations Act repeals sections 164, 165 and 166. The result is that accumulations of income are now governed simply by the general considerations mentioned above.

<sup>46</sup> (1841) 4 Beav. 115.