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PERPETUITIES: REFORMING THE COMMON-LAW RULE—HOW TO WAIT AND SEE*

Ronald Maudsley†

I

THE NEED FOR REFORM OF THE COMMON-LAW RULE

In recent years, many attempts have been made to reform the common-law Rule Against Perpetuities. There is no need here to argue in detail the need for reform. That ground has already been covered.[1] The main thrust of the argument for reform is that application of the Rule arbitrarily causes otherwise reasonable and sensible family dispositions to fail. A gift under the common-law Rule is void unless it must vest, if at all, within the period of a life in being plus 21 years allowed by the Rule. Whether or not it does in fact vest within the period is irrelevant. It is void if there is any possible way in which it might vest outside the period.

It is this required certainty of vesting which wreaks havoc with otherwise sensible family dispositions. The matter can be demonstrated by comparing two simple examples. A gift "to the first child of *A* to attain the age of 21" is valid. *A*'s first child must attain the age of 21, if at all, within the permitted 21 years of *A*'s death —allowing, of course, a period of gestation in the case of a posthumous child. On the other hand, a gift to "the first child of *A* to attain the age of 25" is void. There is no assurance that *A*'s first child will attain the age of 25, if he ever does, within 21 years after *A*'s death or within 21 years from the death of any person or persons living at the time the instrument came into effect. This is so even if *A* has a child aged 24 at the date of the gift. That child might die under the age of 25, and *A*, before dying, might have

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[1] The leading article outlining the need for reform of the common-law Rule Against Perpetuities is Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721 (1952). *See also* Browder, *Future Interest Reform*, 35 N.Y.U.L. REV. 1255 (1960); Leach, *Perpetuities: Staying the Slaughter of the Innocents*, 68 L.Q. REV. 35 (1952); Lynn, *Reforming the Common Law Rule Against Perpetuities*, 28 U. CHI. L. REV. 488 (1961); Schuyler, *Should We Abolish the Rule Against Perpetuities?*, 41 CHICAGO BAR RECORD 139 (1959).

another child who might attain the age of 25 more than 21 years after the death of *A*, and of all other persons alive at the date of the gift. Other, and more dramatic, illustrations of absurd results include the well known cases of Fertile Octogenarians,[2] Precocious Toddlers,[3] Unborn Widows,[4] and Magic Gravel Pits.[5]

One searches, therefore, for ways in which these reasonable manifestations of intention by the settlor or testator can be upheld. That could of course be done by abolishing all restraints on future vesting, but most people would not support such a solution.[6] What is needed is a rule which permits all reasonable postponements of vesting but strikes down excessive restraints. The question is one of finding a proper balance. To what extent should the dead be able to control property in the hands of the living? Should a testator be entitled to delineate the future devolution of his property? Or should we say that the testator controlled it while he was alive, and that we make a sufficient concession to him by enabling him to determine who should take at his death even though we do not

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[2] *See* Leach, *Perpetuities in a Nutshell,* 51 HARV. L. REV. 638, 643 (1938).

Under the common-law formulation of the Rule females are conclusively presumed to be capable of childbirth until death. Thus, if *T* leaves property in trust to pay the income to his sister, *A*, aged 80, for life, then to pay the income to the children of *A* for their lives, and then to pay the principal to the children of such children, the gift over of principal is void. *Id.* By virtue of the presumption of fertility, after *T*'s death, *A* might have a child who obviously would not qualify as a life in being at the time *T*'s will took effect. Therefore, a gift over of principal to the child of such a child is too remote.

[3] *See, e.g., Re* Gaite's Will Trusts, [1949] 1 All E.R. 459 (Ch.). The gift was to such of the grandchildren of a Mrs. Gaite "living at [the testatrix's] death or born within five years therefrom who shall attain the age of 21 years . . . ." If the court had not construed the gift as being confined to legitimate grandchildren it would have been void. After the death of the testatrix, Mrs. Gaite might have another child, *X*. Then Mrs. Gaite might die and within the 5 years of the testatrix's death, her other children might die, and *X* might have a child who might attain the age of 21 more than 21 years after the death of any lives in being at the testatrix's death. This result could only happen if *X* reproduced within the 5-year period. The court held the gift valid on the ground that *X* could not marry under the age of 16.

[4] *See* Leach, *supra* note 2, at 644. Take the following example: *T* leaves property in trust "to pay the income to my son *A* (a bachelor) for life, and after his death to any wife he may marry, and after her death to pay the principal to such of their children as survive their parents." The gift to the children is void because the interest of the children may not vest until the death of the widow and that may, if she is unborn at the date of the gift, be more than 21 years after the death of persons then living. *See Re* Frost, 43 Ch. D. 246 (1889).

[5] The term sounds a bit whimsical but is nonetheless descriptive. Consider *In re* Wood, 3 Ch. 381 (1894). *T* was in the sand and gravel business. At the time of his death he owned gravel pits which in the normal course of use would have been productive for four years. *T* left the pits in trust to be operated until they were exhausted, at which time the pits were to be sold and the proceeds divided among *T*'s issue then living. The pits were actually exhausted within six years, but the gift to issue was held invalid since the pits might not have been exhausted within the 21 years allowed by the Rule. *See* Leach, *supra* note 2, at 645.

[6] *See* LAW REFORM COMMITTEE, FOURTH REPORT, CMND. No. 18, ¶ 5 (1956).

enable him to control the devolution of the property through future years?[7]

These are all good questions, and they are very relevant to any discussion of reform of the perpetuity rule. The period of a life in being plus 21 years, as permitted by the common-law Rule, had its origin in settlements of English ancestral land in the seventeenth and eighteenth centuries. A dynastic landowner could reasonably expect to be able to make a gift of land to be held by his son for life and then by his grandson on attaining the age of 21. Events moved slowly in eighteenth-century England; and land did not change hands as frequently as it does today. A life in being plus 21 years would not have seemed excessive then. Indeed the courts, always hostile to perpetuities, developed this rule as being a necessary and sufficient restraint upon future vesting. It is unlikely that any lawyer in the eighteenth century would be heard to argue that a period of life plus 21 years was too long a period to wait for a future interest to vest.

But times have changed. And there is much to be said at the present time for the view that the perpetuity period allows a testator to impose control for an unreasonably long period of time, and that the concept of the determination of the period by relating it to measuring lives is inappropriate. Perhaps a fixed period of years would be better as a perpetuity period,[8] or as a substitute.[9] Nevertheless, most reforms of the Rule have accepted the traditional perpetuity period as the only available period.[10] For purposes of the present discussion, therefore, it will be assumed that

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[7] *See generally* L. SIMES, PUBLIC POLICY AND THE DEAD HAND 1-82 (1955).

[8] *See, e.g.,* Perpetuities and Accumulations Act of 1964, c. 55, § 1 [hereinafter cited as English Act] which reads in part:

> [W]here the instrument by which any disposition is made so provides, the perpetuity period applicable to the disposition under the rule against perpetuities . . . shall be of a duration equal to such number of years not exceeding eighty as is specified in that behalf in the instrument.

[9] *See, e.g.,* CAL. CIV. CODE § 715.6 (West Supp. 1974), which reads:

> No interest in real or personal property which must vest, if at all, not later than 60 years after the creation of the interest violates Section 715.2 [which codifies the common-law Rule] of this code.

Note the distinction between this provision and the English provision at note 8 *supra.* Section 715.6 substitutes the 60-year perpetuity period in all situations where it will validate a gift of a future interest. There is no requirement, as in the English Act, that the instrument creating the interest actually specify the period of years which will determine the validity of the bequest. Thus, while the English Act merely permits a draftsman to designate a different period if he so wishes, the California statute effectively substitutes a 60-year period for the common-law period in all situations where a 60-year period will serve to validate a future interest.

[10] *See, e.g.,* notes 11 & 13 *infra.*

the common-law period of a life in being plus 21 years will be retained. The principal focus of this Article, therefore, will be on how the harshness of the Rule may be ameliorated while at the same time adhering to the general validity of the common-law period as an appropriate yardstick.

II

Approaches to Reform

A. *Patching Up*

Nearly all of the problem situations created by the common-law Rule can be identified and specific solutions can be provided. For example, one of the most common reasons for failure of a future interest under the common-law Rule is that the vesting of the gift is postponed to an age in excess of 21 years. The simplest form of this is a gift "to the first child of *A* to attain the age of 25 years." If *A* is alive at the date of the gift and has no child aged 25, the limitation is void. This situation could be remedied, however, by a provision such as that found in the New York Estates, Powers and Trusts Law, which states:

> Where an estate would, except for this section, be invalid because made to depend, for its vesting or its duration, upon any person attaining or failing to attain an age in excess of twenty-one years, the age contingency shall be reduced to twenty-one years as to any or all persons subject to such contingency.[11]

There was a similar provision in England[12] and in other jurisdictions.[13]

Other situations which have been identified as hazards to validity can be dealt with in like fashion. Thus, limits can be placed upon the age at which a person can be deemed to be capable of reproduction;[14] the "all-or-nothing" rule of gifts to classes can be

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[11] N.Y. Est., Powers & Trusts Law § 9-1.2 (McKinney 1967).

[12] Law of Property Act of 1925, 15 & 16 Geo. 5, c. 20, § 163 (repealed by English Act § 4(6)).

[13] *See* Conn. Gen. Stat. Ann. § 45-96 (1970); Me. Rev. Stat. Ann. tit. 33, § 103 (1964); Md. Est. & Trusts Code Ann. § 11-103 (1974); Mass. Ann. Laws ch. 184A, § 2 (1969).

[14] The usual bounds are a lower limit of age 14 (and no upper limit) for males and limits of age 12 to age 55 for females. *See* N.Y. Est., Powers & Trusts Law § 9-1.3 (McKinney 1967); English Act § 2(1); Ontario Rev. Stat. c. 343, § 7(1)(a) (1970). *See also* Idaho Code § 55-111 (1957).

Provision should also be made for persons who produce children at ages at which they are deemed incapable of reproduction. Of the above enactments, only the English statute

changed;[15] and the "unborn widow" can be deemed to be alive.[16] Rules can be established to deal with vesting upon the happening of various contingencies, such as the completion of the administration of an estate,[17] the exercise of an option or the occurrence of other commercial transactions.[18] And other questions such as the application of the Rule to possibilities of reverter and to powers of termination might also be treated by statute.[19] Such statutory provisions can be said to "patch up" faulty dispositions.

Statutory "patching" provisions along these lines are often stated to be examples of the exercise of a *cy-pres* principle. As a matter of terminology, this is not correct; "patching up" ought not be confused by "*cy-pres*." *Cy-pres* is a doctrine which has its origin in the law of charitable trusts.[20] The doctrine authorizes the courts,[21] in certain cases, to apply funds for charitable purposes other than those specified by the testator. The funds are applied for other charitable purposes as near as possible to the original purposes of the testator. The application of the *cy-pres* doctrine involves an exercise of discretion by the courts in determining what these purposes shall be. On the other hand, the practice of "patching up" by statute entails the provision of specific solutions for specific problem situations. Once a statutory cure for a faulty disposition is enacted, the saving provision is automatically applied pursuant to

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provides expressly for such a problem. Under § 2(2) of the Act, the High Court has the power to make an order placing the beneficiaries in the position in which they would have been had the presumption not applied.

[15] *See* English Act §§ 4(3), (4). These sections provide, in effect, that those members of the class whose interests vest by the end of the period may take; others are excluded.

[16] *See* CAL. CIV. CODE § 715.7 (West Supp. 1974); N.Y. EST., POWERS & TRUSTS LAW § 9-1.3(c) (McKinney 1967).

[17] *See* ILL. ANN. STAT. ch. 30, § 153a (Smith-Hurd 1969); N.Y. EST., POWERS & TRUSTS LAW § 9-1.3(d) (McKinney 1967):

> Where the duration or vesting of an estate is contingent upon the probate of a will . . . it shall be presumed that the creator of such estate intended such contingency to occur, if at all, within twenty-one years from the effective date of the instrument creating such estate.

Id.

England relies upon its general wait-and-see provision. English Act § 3.

[18] *See* ILL. ANN. STAT. ch. 30, § 194(a)(7) (Smith-Hurd Supp. 1974); English Act §§ 9, 10.

[19] *See* KY. REV. STAT. ANN. §§ 381.218-.219 (1969); MASS. ANN. LAWS ch. 184A, § 3 (1969); English Act § 12.

[20] For a general discussion of the origin and use of the *cy-pres* power, see G. BOGERT & G. BOGERT, HANDBOOK OF THE LAW OF TRUSTS 524-31 (5th ed. 1973).

[21] In England, the *cy-pres* authority was originally wielded by the Crown. The arbitrary nature of the Crown's powers prevented American acceptance of the *cy-pres* doctrine for many years. *See* Jackson v. Phillips, 96 Mass. (14 Allen) 539 (1867).

the statute, and independent of the sort of judicial intervention required for an application of *cy-pres*.

B. *Cy-pres*

Some critics have taken the view that the best method of reform of the perpetuity rule is to give to the court a general *cy-pres* power which would enable the court to alter a void disposition so as to make it comply with the perpetuity rule but in terms still consistent with the intention of the testator. In this situation, the adjustment of the disposition is not an interference with the true intention of the testator; for he presumably intended a valid disposition. What is being altered is the incompetent way in which the lawyer drafted it. If the lawyer had been capable of meeting the testator's true intention, he would have produced a document which complied with the perpetuity rule. The court's power enables it to provide for the testator what the testator's lawyer should have provided for him in the first place.

Cy-pres provisions of one kind or another now exist in fourteen states.[22] In four of them,[23] the *cy-pres* power follows a wait-and-see provision, and is only to be exercised after the wait-and-see period has expired. In the other jurisdictions, the court's discretion can presumably be exercised at the moment at which the instrument comes into effect. That may be the best time to apply it, unless compelled to wait and see, for the power is applied immediately

[22] CAL. CIV. CODE § 715.5 (West Supp. 1974); CONN. GEN. STAT. ANN. § 45-96 (1960); IDAHO CODE § 55-111 (1957); ILL. ANN. STAT. ch. 30, § 194 (Smith-Hurd Supp. 1974); KY. REV. STAT. ANN. § 381.216 (1969); ME. REV. STAT. ANN. tit. 33, § 103 (1964); MD. EST. & TRUSTS CODE ANN. § 11-103 (1974); MASS. ANN. LAWS ch. 184A, § 1 (1969); MO. ANN. STAT. § 442.555 (Vernon Supp. 1975); N.Y. EST. POWERS & TRUSTS LAW § 9-1.3 (McKinney 1967); OHIO REV. CODE ANN. § 2131.08(C) (1968); TEX. REV. CIV. STAT. art. 1291b (Supp. 1974); VT. STAT. ANN. tit. 27, § 501 (1967); WASH. REV. CODE § 11.98.030 (1967).

[23] Kentucky, Ohio, Vermont, and Washington.

The Vermont statute, VT. STAT. ANN. tit. 27, § 501 (1967) (emphasis added), reads:

> Any interest in real or personal property which would violate the rule against perpetuities shall be reformed, within the limits of that rule, to approximate most closely the intention of the creator of the interest. In determining whether an interest would violate said rule and in reforming an interest the period of perpetuities shall be measured by *actual* rather than *possible* events.

The Kentucky provision, KY. REV. STAT. ANN. § 381.216 (1969), and the Ohio Provision, OHIO REV. CODE ANN. § 2131.08(C) (1968) are virtually identical to that of Vermont. However, the Washington statute, WASH. REV. CODE § 11.98.030 (1967), deals with reformation of trusts only:

> If, at the expiration of any period in which an instrument creating a trust or any provision thereof is not to be rendered invalid by the rule against perpetuities, any of the trust assets have not by the terms of the trust instrument become distributable or vested, then such assets shall be then distributed as the superior court having jurisdiction shall direct, giving effect to the general intent of the creator of the trust.

and the question is settled forthwith.[24] If it is not raised until a later time, the solution selected might be different. Thus, the nature of the *cy-pres* solution may depend upon the happenstance—or the tactical choice—of the time at which the question is presented to the court.

The pros and cons of the *cy-pres* solution will not be argued here. My own choice of method of reform is the application first of a wait-and-see provision with a *cy-pres* power in reserve, to be applied at the end of the perpetuity period. Those who see no merit in the wait-and-see solution therefore need read no further, for the remainder of this discussion will focus upon the wait-and-see solution.

C. *Wait-and-See*

Much of the criticism against the wait-and-see solution is directed to the defective ways in which wait-and-see has been enacted. Improperly implemented, wait-and-see can store up endless problems for decision at some distant date. Properly designed, wait-and-see can produce the much desired result of upholding gifts which vest within the period, and striking down those which do not. Best of all, it can do so with a minimum of technicality and esoteric learning.

There are two main types of wait-and-see legislation presently in force.

1. *Limited Wait-and-See*

First, there is the partial wait-and-see based upon the Massachusetts statute,[25] and enacted also in Maine,[26] Maryland,[27] and Connecticut.[28] This provides, in short, that where there are future interests limited to take effect upon the termination of a life estate

[24] *See generally* Browder, *Construction, Reformation and the Rule Against Perpetuities,* 62 MICH. L. REV. 1, 5-8 (1963).

[25] MASS. ANN. LAWS ch. 184A, § 1 (1969) reads:

> In applying the rule against perpetuities to an interest in real or personal property limited to take effect at or after the termination of one or more life estates in, or lives of, persons in being when the period of said rule commences to run, the validity of the interest shall be determined on the basis of facts existing at the termination of such one or more life estates or lives. In this section an interest which must terminate not later than the death of one or more persons is a "life estate" even though it may terminate at an earlier time.

The Maine, Maryland, and Connecticut statutes (*see* notes 26-28 *infra*) are virtually identical in substance to the Massachusetts provision.

[26] ME. REV. STAT. ANN. tit. 33, § 101 (1964).

[27] MD. EST. & TRUSTS CODE ANN. § 11-103 (1974).

[28] CONN. GEN. STAT. ANN. § 45-95 (1960).

or upon the death of a living person, the validity of the future interest shall be determined on the basis of facts existing at the date of termination or death. There is much to be said for this solution. In the case of future interests following life estates, the matter often does not arise for trial until after the death of the life tenant, for it may not be until that time that it is known who the contestants will be. It makes no sense to determine such a matter after the life tenant's death on the basis of facts which might have happened before his death, but did not, *e.g.*, children who might have been born to a life tenant but were not. Assume, for example, that a testator gave property in his will to his widow for her life and after her death to such of their grandchildren as shall attain the age of 25. Under the common-law Rule that gift would be tested as of the date of the testator's death, and, even if there were a grandchild aged 25 at that time, the gift to the grandchildren still would be void.[29] But the litigation would not take place at that time, for there would be no claimants ready to take. If the issue were to arise on the widow's death, 30 years later, by which time all her children had died and all the grandchildren had attained the age of 25, it would seem absurd to test the matter, as required by the common-law Rule, according to the facts existing at the testator's death, and to hold the gift to the grandchildren void. The Massachusetts statute would allow the matter to be determined on the basis of facts existing at the widow's death. The gift would be saved.

This is a beneficial but limited reform. It only applies where future interests are limited to take effect at or after the termination of a life estate or of the life of a living person. Other future interests are left to the mercy of the common-law Rule. To test the practical effectiveness of limited wait-and-see as a solution to the arbitrary nature of the common-law Rule, it would be necessary to know what proportion of perpetuity problems would be solved by it. It would have limited effect as a solution in England, where fiscal legislation discourages the use of life estates and the passing of property upon, or in relation to, a death.[30] It may be that visible

[29] *See* J. GRAY, THE RULE AGAINST PERPETUITIES § 205.2 (4th ed. R. Gray 1942). The leading case on the application of the Rule Against Perpetuities to class gifts is Leake v. Robinson, 2 Mer. 363, 35 Eng. Rep. 979 (Ch. 1817).

[30] From 1894 (Finance Act 1894, 57 & 58 Vict., c. 30 § 2(1)(*b*)) until 1975, estate duty was payable upon property passing on a death. There was no gift tax on inter vivos transfers. Finance Act 1975 created a new Capital Transfer Tax which imposes tax on all voluntary transfers of capital, charging inter vivos transfers and transfers on death at the same rate. Under each system, tax is payable on the capital value of a trust upon the death of a life tenant.

trends in American legislation, which threaten to impose estate tax liability upon the death of the life tenant, may similarly reduce the number of occasions upon which a statute of the Massachusetts variety will apply.[31] Clearly it cannot apply to an immediate gift to the grandchildren of a living person, nor to many situations which can arise in connection with discretionary trusts because there is, in such situations, no interest limited to take effect at or after the termination of a life interest or a life.

On the positive side, the inconvenience of the postponement of decision during the period of waiting and seeing is reduced. For those who oppose wait-and-see because it delays final decision as to a gift's validity until the end of some perpetuity period, partial wait-and-see represents a compromise.

2. *Full-Scale Wait-and-See*

The second kind of wait-and-see provision is one of general application to all future interests. If such a rule can be effectively applied, it will solve completely the problem of the arbitrariness of the common-law Rule. All future interests which do in fact vest within the period will be good, and those which do not vest within the period will be bad. It seems to be the ideal solution. Some jurisdictions have accepted this approach, one by judicial decision,[32] and several more by statute.[33] The solution is subject to a number of problems and difficulties; it has all those which the Massachusetts rule[34] has, with a number of others in addition. The purpose of this Article is to indicate these problems and suggest how they can be solved.

III

THE WAIT-AND-SEE SYSTEM

The existing wait-and-see statutes have dealt with the various problems arising from wait-and-see in different ways. However, no

[31] *See, e.g.,* U.S. TREASURY DEP'T, TAX REFORM STUDIES AND PROPOSALS, pt. 1, at 116-17, 120 (House Comm. on Ways and Means & Senate Comm. on Finance, 91st Cong., 1st Sess. (Comm. Print 1969)). These and other proposals aimed at closing the "loophole" provided by "generation skipping" are summarized in CCH, THE STUDY OF FEDERAL TAX LAW, ESTATE AND GIFT TAX VOLUME 1974-75, at 15-16, 612, 616 (W. Pedrick & V. Kirby eds.).

[32] *See* Merchants Nat'l Bank v. Curtis, 98 N.H. 225, 97 A.2d 207 (1953).

[33] KY. REV. STAT. ANN. § 381.216 (1969); OHIO REV. CODE ANN. § 2131.08(c) (1968); PA. STAT. ANN. tit. 20, § 6104 (Spec. Pamphlet 1972); VT. STAT. ANN. tit. 27, § 501 (1967); WASH. REV. CODE § 11.98.030 (1967) (dealing only with trusts).

[34] *See* note 25 *supra*.

one statute has remedied all of these problems in the best possible way. This discussion may therefore be helpful to jurisdictions which contemplate reform by the adoption of a full wait-and-see principle, whether or not a *cy-pres* solution is made available at the conclusion of the period of wait-and-see. It is not the purpose of this discussion to argue the advantage of full wait-and-see over the Massachusetts statute, or wait-and-see over *cy-pres*, or even the advantage of wait-and-see over the common-law Rule. The message is that if wait-and-see is the selected method of reform, it is essential to get it right. Once the problems are properly understood and dealt with, a full wait-and-see approach can provide a simple, sound, and efficient solution for perpetuity problems.

A. *Property in Limbo*

One difficulty attributed to full-scale wait-and-see is the inconvenience which results from the uncertain validity of a disposition during the period of waiting and seeing. This is put forward in contrast to the supposed certainty of the common-law Rule. Granted, under wait-and-see, property remains in limbo for the perpetuity period. But how serious is this problem?

It is necessary to appreciate that uncertainty is not a new problem. It has always existed under the common-law Rule. The common-law Rule provides no certainty—unless it holds the gift void. The only certainty afforded by the common-law Rule is the certainty of giving the property to the "wrong" people—that is, the people who take in defiance of the donor's intent.

The common-law Rule is concerned with the vesting of contingent gifts. Every gift to which the Rule must be applied as a measure of validity—even one which is valid under the Rule—is "uncertain," in the sense that, as a contingent gift, it may vest or it may not. Until it does vest, it is uncertain whether it ever will vest. In the meantime, therefore, even under the common-law Rule, you must wait to see whether it will vest. There is nothing else to do. Take, for example, the simple limitation of a gift "to the first child of *A* to attain the age of 21." That is valid at common law. If, at the date of the gift, *A* has a child aged 21, there is no future interest problem—and no need to apply the Rule—because the gift is vested. But if *A*'s eldest child is aged 16 at the time, we have the problem of a future contingent gift which may never vest. What are we to do? We wait to see if any of *A*'s children attain the age of 21, and then pay the money to the first one who does. In that situation, we would wait 5 years to see if the 16-year-old child

reached the age of 21. If he dies before then, one of his younger brothers or sisters may reach the age of 21 at some future time. There again, we would have to wait and see which child takes. If all of *A*'s living children die, then it may be a future-born child of *A* who will first attain the age of 21 and we will be able, under the common-law Rule, to wait for his reaching the age of 21. He is certain to reach it, if he ever does, within 21 years of *A*'s death.

There are limits, however, to the common-law waiting period. The common-law Rule only permitted the waiting for contingencies which must occur, if at all, within the period of a life in being plus 21 years. So the longest period of doubt—of waiting and seeing—is a life in being 21 plus years.

Now, if a wait-and-see provision is enacted, how long do you wait and see? You wait and see for the period of a life in being plus 21 years. The situation, in terms of the time of waiting and seeing, is the same. The basic difference is not in the period of uncertainty; it is in the treatment of gifts which do vest within the period but which, at the effective date of the instrument, might have vested outside it. How should they be treated? Should they go to the donees intended by the settlor? Or should they be arbitrarily given to others who were not intended to receive them? A wait-and-see system does not permit waiting and seeing any longer than the common-law Rule did. It merely permits waiting and seeing, for that period, in situations where the common-law Rule would require holding a gift void at the outset.

It is necessary to make provision for the use of the property during the period of waiting and seeing. Every wait-and-see statute must provide for this. But, again, this is no new problem. The same question arises under the common-law Rule. Should the owner of a contingent future interest be able to have the benefit of income, or capital, from property to which he will become entitled if the contingency occurs in his favor at a future time? If *A*'s child is 16, should there be some provision to enable him to receive the benefit of the income before he attains the age of 21? If this is permitted, a risk is run that *A*'s child may never attain the age of 21. In that situation the taker in default may complain that money was wrongly spent upon the child because he never qualified for the gift. On the other hand, if *A*'s child has no means of support, it makes no sense for him to be starved for food, shelter, or education in his teens, if there is a fortune awaiting him at 21.

It seems reasonable that some system of maintenance and advancement should be established in order to provide for the

needs of contingent beneficiaries. This can be done by the use of powers given to trustees, or under an application by the trustees to the court, or through guardianship procedures. In England the income may be applied for the maintenance, education, or benefit of an infant contingent beneficiary.[35] On attaining the age of 18, the infant becomes entitled to the income of the fund, even though his interest in the capital may still be contingent.[36] Thus, if there is a gift to the children of *A* (deceased) at the age of 25, income may be applied for the maintenance, education, or benefit of children under 18 and a child who attains the age of 18 becomes entitled to his share of the income. He will become entitled to the capital at the age of 25. But capital, too, may be applied for his benefit under a statutory power of advancement.[37] Under the English statute, up to one-half of a contingent beneficiary's presumptive share may be so applied in the discretion of the trustees.[38]

What provision should be made for advancement and maintenance under wait-and-see? The answer is: the same provision as is made in connection with the common-law Rule. The problem is the same and the remedy the same. The English Perpetuities and Accumulations Act of 1964 does this by providing that the vesting of the gift outside the perpetuity period "shall not affect the validity of anything previously done in relation to the interest disposed of by way of advancement, application of intermediate income or otherwise."[39] Therefore, a taker in default will have no standing to complain that income was paid or the capital advanced to a party whose interest was found to be invalid after the expiration of the wait-and-see period.

B. *Measuring Lives*

The most difficult question which arises in establishing a wait-and-see system is that of determining who shall be the measuring lives. There is great divergence in the way in which the matter has been treated in recent statutes. The question is complex, but soluble; however, no statute has yet achieved what could be recommended as the best solution.

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[35] *See* Trustee Act of 1925, 15 & 16 Geo. 5, c. 19, § 31.

[36] *Id.* § 31(1)(ii). The age of majority at passage of the statute was 21 years but has since been lowered to 18 years.

[37] *Id.* § 32.

[38] *Id.* § 32(1)(a).

[39] English Act § 3(1).

1. *Three Essentials*

A few preliminary points should be made before examining the way in which different jurisdictions have dealt with the matter.

a. *The Statute Must Lay Down Who the Measuring Lives Are.* It is essential for the statute to lay down who the measuring lives are to be. Otherwise there are many uncertainties and alternatives. As one observer has declared, "[i]t is just not good enough to throw this problem at the courts . . . ."[40]

Take the simple example of a gift "to the first child of *A* to attain the age of 25." Assume that *A* has a wife, a son and a daughter (both under 25), a father, a mother, and other relatives. If a wait-and-see provision is in effect in the jurisdiction, who, in the absence of express provision, would be treated as the measuring lives? Presumably *A* will be included. What of Mrs. *A*? Her life is obviously related to the vesting of the property. And what of *A*'s living children? If *A* or Mrs. *A* dies when a child, *X*, alive at the date of the gift, is aged two, it makes little sense to hold the gift to him, a living person, void for perpetuity, just because his parent died when *X* was under the age of four. If *X* is a measuring life in respect to the gift to himself, should he not also be a measuring life in respect to the gift to his parents' other children? Perhaps *A*'s father or mother could be used as a measuring life. Likewise, *A*'s brothers or sisters and their spouses, or even one of the neighbors living in the same street, may be viewed as measuring lives. It is tempting to make use of any life that will assist to validate the gift. But in practice the implications of so doing are horrific. The problem essentially is one which needs to be determined by the statute enacting wait-and-see. To leave this matter to the courts will give them a problem of a dimension which would have made Lord Nottingham tremble.[41]

The first of the wait-and-see statutes, that of Pennsylvania,[42] made no provision for measuring lives, and the first of the cases decided under the act evidences the total confusion which resulted. In *In re Pearson*,[43] the testator, a childless widower, set up a trust which was intended to benefit his collateral heirs. The income was

[40] Allan, *Perpetuities: Who are the Lives in Being?*, 81 L.Q. REV. 106, 110 (1965).

[41] Lord Nottingham, appreciating the open-ended nature of the Rule he had created, answered the question, "Where will you stop . . .?" by saying, "I will tell you where I will stop: I will stop where-ever any visible Inconvenience doth appear . . . ." The Duke of Norfolk's Case, 3 Ch. Cas. 1, 49, 22 Eng. Rep. 931, 960 (1682).

[42] PA. STAT. ANN. tit. 20, § 6104 (Spec. Pamphlet 1972).

[43] 442 Pa. 172, 275 A.2d 336 (1971).

to be divided equally among his brothers and sisters, their children to share equally their parents' share, and so on until there were no living collateral heirs, at which time the capital would go to charity.[44] The Pennsylvania statute reads:

> Upon the expiration of the period allowed by the common law rule against perpetuities as measured by actual rather than possible events, any interest not then vested and any interest in members of a class the membership of which is then subject to increase shall be void.[45]

This is wait-and-see in its simplest and crudest form. Unfortunately, this statute gave the *Pearson* court no guidance in deciding how long to wait and see. A further complication was that the gift was to a class, and the statute retained the common-law Rule that a class gift was void if new members could join it outside the period.[46]

The court directed its attention to determining which of the various classes could be used as measuring lives. They could only be so used if no members joined the class in the future; for only if the class did not increase would the gift to the next generation be certain to vest, if at all, within 21 years of the deaths of members of the class.[47] The testator's parents were dead, so there could be no

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[44] *Id.* at 177, 275 A.2d at 337-38.

[45] PA. STAT. ANN. tit. 20, § 6104(b) (Spec. Pamphlet 1972).

At the time *Pearson* was decided, § 6104 was codified at PA. STAT. ANN. tit. 20, § 301.4(b) (1950). According to the Pennsylvania Law Commission, the intention of the Act is "to disturb the common law rule as little as possible, but to make actualities at the end of the period, rather than possibilities as of the creation of the interest, govern . . . ." PA. STAT. ANN. tit. 20, § 301.4(b)(comment) (1950).

[46] *See* PA. STAT. ANN. tit. 20, § 6104(b) (Spec. Pamphlet 1972).

[47] 442 Pa. at 190-91, 275 A.2d at 344. At the time the instrument in question took effect the testator was survived by brothers, sisters, nephews, nieces, grandnephews, and grandnieces. In attempting to determine the measuring lives, the court said:

> First, if no additional nephews and nieces are born, not only do the brothers and sisters qualify as measuring lives *but also* the six nephews and nieces. Thus, the interest given to the grandnephews and grandnieces must necessarily vest within twenty-one years following the death of the last surviving nephew or niece since membership in the class of grandnephews and grandnieces could not, thereafter, increase. The gift to the charities, if contingent, however, would be valid only if all the grandnephews and grandnieces should produce no offspring.
>
> Secondly, if no additional nephews and nieces *and* grandnephews and grandnieces are born, not only do the brothers and sisters *and* nieces and nephews qualify as measuring lives *but also* the twenty-nine grandnephews and grandnieces. In this situation, the interest to great-grandnephews and great-grandnieces would be valid since that interest must necessarily vest within twenty-one years after the death of the last surviving grandnephew or grandniece. As before, the gift to charities, if contingent, would be invalidated if any of the great-grandnephews or great-grandnieces should produce offspring.

Id. (emphasis in original).

more brothers and sisters. Thus, the gift to the nieces and nephews was good.[48] But, according to the court, the gift to the following generations would only be good if there were no future-born members of the class of measuring lives. Future measuring lives would invalidate the gift to the next generation. Thus, future-born nephews and nieces invalidated the gift to grandnephews and grandnieces, and so on. Where it was uncertain whether a class of measuring lives would increase or not, it was permissible to wait and see.[49] In other words, the statute effected a wait-and-see rule with regard to the measuring lives, but not with regard to the time of vesting.[50] *Pearson* shows what difficulties courts will face if wait-and-see is inadequately enacted. The object of a wait-and-see provision surely is to enable the court to see whether or not interests vest within or without the period. To enable the court to do that, it is necessary to tell the court what the period is in terms which determine precisely what measuring lives shall be used.

b. *The Measuring Lives Must Be Determined With Precision at the Time When the Instrument Comes Into Effect.* Trusts have to be administered, and in a wait-and-see situation, someone must decide whether or not an interest vests within the period. In order to facilitate this determination, an orderly system of ascertainment of measuring lives is needed. Difficult problems can arise in a jurisdiction that has adopted wait-and-see, but has not provided a specific list of measuring lives. To have to determine the identity of the measuring lives under the terms of an instrument, as well as relevant dates of death, after some sixty or seventy years of waiting and seeing would be a Herculean task. The search for the date of the death of the last survivor would be much easier if a list of measuring lives had been compiled at the time when the instrument came into effect. Then steps could have been taken to keep

[48] *Id.*

[49] *Id.*

[50] At least this is the construction given to the statute by *Pearson.* The court apparently was concerned only with determining which persons would constitute the measuring lives (*see* notes 47-49 *supra*), with the implication that once those lives were determined, any interest which *might* vest more than 21 years after the death of the last measuring life would be invalid. A wait-and-see policy based on an ascertainable list of measuring lives would enable the court to decide that interests were valid which in fact vested within 21 years of the death of the last of the lives, and void if they did not. The court in *Pearson* had to work without a list of measuring lives.

Thus, in *Pearson,* if a new nephew or niece were born after the testator's death, the group of nephews and nieces could not serve as the measuring lives and the gift to the grandnephews and grandnieces would be void on the ground that persons might join the class outside the period. The gift would be void even if no new grandnephews or grandnieces were actually born outside the period.

in touch with the measuring lives, and to check upon their living and dying and marrying and changing names.

The trustees could then determine perpetuity questions under wait-and-see in the same way in which they now determine them under the common-law Rule when measuring lives are expressly selected. England, of course, has a long experience with this type of situation because of the use of "royal lives clauses," which were, until 1964, included in all the books of forms and precedents. Such a clause would define the period as "the period ending at the expiration of 21 years from the day of the death of the last survivor of all the lineal descendants of King . . . who shall be living at my death."[51] The important thing is to pick a sovereign recent enough to have identifiable descendants, but sufficiently far away to have had the opportunity to establish a substantial brood.

The best way to administer a trust which is governed by a royal lives clause is to make a list of the measuring lives at the moment the instrument comes into effect. The perpetuity period, by the terms of the instrument, ends 21 years from the date of the death of the last survivor. The trustees must keep track of the deaths of the people on the list, and delete each name as that person dies. When the last one is dead, the date should be recorded and 21 years added to ascertain the termination of the period. The position and procedure is of course exactly the same with any case of expressly selected lives.

The same approach can be used in a wait-and-see situation whenever it is possible to make a list of the measuring lives at the moment at which the instrument comes into effect. What, indeed, is the system of selection of royal (or other) lives, but a wait-and-see situation created by the terms of the instrument with a list of measuring lives provided? The way in which wait-and-see should operate, therefore, is that the trustee should be able to write down a list of the measuring lives. He should keep a record of the dates of deaths, and add 21 years from the date of death of the last survivor. That is all there need be to perpetuities in the era of wait-and-see.

c. *If the Common-Law Rule Is Not Repealed When Wait-and-See Is Enacted, The Measuring Lives Must Include Everyone Who Would Be a Common-Law Life.* When a system of wait-and-see is introduced into a jurisdiction, one would think it obvious that the principle of

[51] Under such clauses, there has been some litigation regarding the excessive number of such lives and the difficulty of tracing them. *See, e.g., In re* Warren's Will Trusts, 105 Sol. J. 511 (1961); *In re* Leverhulme, [1943] 2 All. E.R. 274 (Ch.); *In re* Villar, [1928] 1 Ch. 471.

wait-and-see should apply *instead* of the common-law Rule rather than in conjunction with it. What is the point of retaining a rule which says that an interest is valid only if it *must* vest, if at all, within the period, when we are enacting a rule which says that it is valid if it *does in fact* vest within the period? A gift which must vest, if at all, within the period, will in fact vest, if at all, within the period. Wait-and-see, therefore, incorporates all the common-law valid gifts. And, as we have seen, one is waiting and seeing in the case of common-law valid gifts. Thus, there is no point in retaining the common-law Rule.

This proposition would appear to be self-evident, and would not even be mentioned here if it were not for the fact that the English Act retains the common-law Rule. Wait-and-see in England applies only to void gifts. Section 3 of the English Act provides that

> [w]here . . . a disposition would be void on the ground that the interest disposed of might not become vested until too remote a time, the disposition shall be treated, until such time (if any) as it becomes established that the vesting must occur, if at all, after the end of the perpetuity period, as if the disposition were not subject to the rule against perpetuities . . . .[52]

The commentators[53] tell us, first of all, to apply the common-law Rule, and if the gift is valid, all is well; but if it is void on the ground that it might vest outside the period, then wait and see.

Presumably, it was thought that there is some significance in knowing whether the disposition complies with the common-law Rule. This is not so. It makes no difference. The interests in issue are always contingent, and compliance with the common-law Rule does not make them any more certain to vest. What is the difference, under the English Act, between a gift to the first child of *A* to attain 21, where *A* has a child of 16 at the date of the gift, and a gift to the first great grandchild of *A* to attain the age of 21 when *A* has a great grandchild of 16? The former is valid, but so what? So you wait for 5 years to see if *A*'s child attains the age of 21. In the second case the gift would be void under the common-law Rule, so you must wait and see if *A*'s great grandchild actually attains the age of 21. Of course, on the whole, gifts which are valid under the common-law Rule are more likely to vest than those which are void. But this is not necessarily so. Compare a void gift to the first

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[52] English Act § 3(1).

[53] *See* G. CHESHIRE, THE MODERN LAW OF REAL PROPERTY 267-68 (10th ed. 1967); R. MEGARRY & H. WADE, THE LAW OF REAL PROPERTY 222 (3d ed. 1966); Morris & Wade, *Perpetuities Reform at Last*, 80 L.Q. REV. 486, 492 (1964).

child of *A* to attain the age of 25, when *A* has a son of 24 at the date of the gift, with a valid gift to the first of *A*'s lineal descendants to go to Mars within 21 years of the deaths of *X*, *Y*, and *Z*.

The message, therefore, should be clear: once wait-and-see is enacted the statistical likelihood of vesting becomes the important feature of a gift of a future interest since that is what gives value to the interest. Compliance with the common-law Rule is irrelevant.

If, however, for some reason not now discernible, the legislature decides to retain the common-law Rule, it is important to ensure that the lives which are available for use when waiting and seeing include all those which are available at common law. Thus, in a gift to such of the children of *A*, *B*, and *C* as shall attain the age of 21, the common-law measuring lives were *A*, *B*, and *C*; and it makes no sense to provide that for wait-and-see purposes the only lives which are to be used are *X*, *Y*, and *Z*. If that were so, then it would indeed be necessary to apply the common-law Rule to see whether the disposition was valid on the ground that it must vest, if at all, within 21 years of the death of the survivor of *A*, *B*, and *C*. In the case of a void gift, one would then wait and see whether it does in fact vest within 21 years of the death of *X*, *Y*, and *Z*. The better way to deal with this situation is to apply the wait-and-see rule, using *A*, *B*, *C*, *X*, *Y*, and *Z* as the measuring lives. Adoption of the latter approach ensures that any disposition which is valid under the common-law Rule will also be valid under wait-and-see.

Unfortunately, the English Act failed to incorporate this approach. The Act gives a list of measuring lives for the purpose of wait-and-see, and those lives, and no others, are to be used for wait-and-see.[54] The wait-and-see lives include nearly all those per-

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[54] English Act § 3(5) reads:

The said persons are as follows:—

(a) the person by whom the disposition was made;

(b) a person to whom or in whose favour the disposition was made, that is to say—

(i) in the case of a disposition to a class of persons, any member or potential member of the class;

(ii) in the case of an individual disposition to a person taking only on certain conditions being satisfied, any person as to whom some of the conditions are satisfied and the remainder may in time be satisfied;

(iii) in the case of a special power of appointment exercisable in favour of members of a class, any member or potential member of the class;

(iv) in the case of a special power of appointment exercisable in favour of one person only, that person or, where the object of the power is ascertainable only on certain conditions being satisfied, any person as to whom some of the conditions are satisfied and the remainder may in time be satisfied;

(v) in the case of any power, option or other right, the person on whom the right is conferred;

(c) a person having a child or grandchild within sub-paragraphs (i) or (iv) of paragraph (b) above, or any of whose children or grandchildren, if sub-

sons who could arguably be considered as common-law lives, but not every *possible* one. Thus, a situation is left in which it would theoretically be possible to have a gift which would be valid at common law (using common-law lives), but void under wait-and-see (using wait-and-see lives).[55] In that situation it would indeed be necessary to test the limitation both by the common-law Rule, and by the wait-and-see rule. This could be avoided if the wait-and-see lives included all the common-law lives. But, of course, a much simpler solution would be to repeal the common-law Rule when wait-and-see is enacted.

2. *Who Are, or Should Be, the Measuring Lives?*

The discussion thus far has shown that, for the operation of a wait-and-see system, the statute should state who the measuring lives are; that they should be ascertainable with accuracy and precision at the time the instrument comes into effect so that a list of them can be made; and that, if, for some reason, the common-law Rule is not repealed, the wait-and-see lives must include everyone who would be a measuring life at common law. How are these requirements best fulfilled? How should the lives be selected? Three possible answers, taken from recent enactments, will be considered.

a. *Common-Law Lives.* The Western Australian statute[56] provides that the measuring lives for the purposes of wait-and-see shall be the same persons as would be measuring lives at common law. Presumably, this is also what is intended by statutes that are silent on the matter. In this situation, it becomes necessary to determine who are the measuring lives at common law.

The measuring lives at common law are those persons within 21 years of whose death the interest must vest, if it vests at all; that is to say, the lives which validate the gift. Thus, a gift "to such of the children of *A* as shall attain the age of 21" is valid because the interest must vest, if at all, within 21 years of *A*'s death. *A* is the measuring life. Compare this with a gift "to such of the grandchildren of *A* as shall attain the age of 21." If *A* is alive, that limitation is void because there is no person within 21 years of whose death

sequently born, would by virtue of his or her descent fall within those subparagraphs;

(d) any person on the failure or determination of whose prior interest the disposition is limited to take effect.

[55] *See* text accompanying notes 70-71 *infra*.

[56] Law Reform (Property, Perpetuities and Succession) Act 1962, § 7(3) (W. Austl.). *See also* Allan, *supra* note 40, at 109-10.

the interest must vest, if it vests at all. Hence, there is no validating measuring life. But if the only lives who may be used for wait-and-see are those who have already validated the gift, we "would never wait and see at all."[57]

It has been suggested, however, that the common law included as measuring lives some lives which did not validate the gift; that it included any persons who "as a matter of causality, restrict the vesting period."[58] Is any such category established by the common law? Take the example used in the previous paragraph: "to such of the grandchildren of *A* as shall attain the age of 21." Assume that *A* and Mrs. *A* are still alive and that they have three married children, *X*, *Y*, and *Z*, and infant grandchildren. Who is causally connected with the vesting? *A* is only connected in the sense that he is the father of *X*, *Y*, and *Z*; the date at which the grandchildren attain the age of 21 is independent of *A*'s death. If *A* is included, presumably so is Mrs. *A*. Presumably also, *A*'s and Mrs. *A*'s parents are included, if living. What of *X*, *Y*, and *Z*? They are causally connected with the date at which their own children attain the age of 21, but not with the date at which their nieces and nephews do.[59] What of the living infant grandchildren? Their lives are obviously related to the date at which their own interests will vest, but not to the date at which the interests will vest in their brothers and sisters and their cousins,[60] unless the possibility that any one of them might be the first to attain the age of 21 and thus close the class is a sufficient causal connection. The truth is that the common-law Rule was concerned with such causal connection as made it possible to postulate that an interest was certain to vest, if at all, within the period. No other form of causal connection could arise at common law, and no category such as that contended for could ever have been established.

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[57] *See* Allan, *supra* note 40, at 110.

[58] *See* Morris & Wade, *supra* note 53, at 497.

As has been said in the text, the common definition of a measuring life at common law is: a living person within 21 years of whose death the interest must vest, if at all. If one assumes this definition, then all measuring lives will necessarily validate gifts of future interests. But Morris and Wade present a different view of those who constitute measuring lives at common law. In their view, the perpetuities question is a twofold inquiry. First, one must select lives which "restrict the vesting," and then, "the next question is whether they restrict it sufficiently to satisfy the Rule." *Id.* The clear implication here is that there are some lives which "restrict the vesting" and therefore are common-law measuring lives, but which do not restrict the vesting, if there will be one, within the perpetuity period.

[59] *See* Morris & Wade, *supra* note 53, at 500.

[60] *Id.* at 498.

The common-law lives will not do, even if it were possible to delineate a category of common-law lives, including some who did not validate the gift. There is no assurance that they will be the *right* lives for wait-and-see. Wait-and-see is a new concept in the law of perpetuities. There is no reason to suppose that common-law lives would be appropriate to this new era. One needs to take a fresh look at the whole situation and ask: Who ought to be a measuring life under wait-and-see?

This is a policy decision. The introduction of the principle of wait-and-see is an attempt to avoid the invalidation of a disposition which does in fact vest within 21 years of the death of a person in being at the date of the gift. Anyone can be chosen to serve as a measuring and validating life. Clearly, some people other than those who have validated the gift under the common-law Rule are needed; otherwise, we would never wait and see at all. They should include all the persons who were measuring lives at common law in order to prevent some gifts being void under wait-and-see which have been valid at common law. We must not have a group so large that it is impracticable to keep in touch with them in order to ascertain the date of death of the survivor. It is convenient to have persons who are in some way connected with the disposition. And it is essential to have a group of persons who are ascertainable at the date the instrument takes effect. The problem then is to decide how to select such a group. The simplest way to do so would be to lay down a formula, and include all the required persons described by it. This possibility will be examined but it probably is not the right answer for no formula will give as precise a list as is needed. Failing a formula, one needs to have a list of the individual lives who will be used.

b. *Selection by Formula.* A formula which provides an exact and precise selection of measuring lives would be ideal. It is not, however, satisfactory to have a formula which provides a general working rule while still leaving doubtful situations to be determined by the court. The statute should do better than that. We should not accept a situation which invites litigation a generation hence. None of the formulae yet suggested offers the necessary precision.

The best formula is that which provides that the measuring lives shall be those which have a "causal relationship" to the vesting. That formula, however, is not sufficiently self-evident to produce the required precision. Indeed, it appears to have differ-

ent meanings in England,[61] Kentucky,[62] and perhaps Ontario.[63] To provide a satisfactory definition, the formula must be explained and illustrated as Professor Dukeminier has done in his commentaries upon the Kentucky statute.[64] However, the definition should be in the statute, and the formula will only be satisfactory if the language of the statute gives it the necessary precision. It may be that this could be done but it seems to be safer, simpler, and more reliable to provide a list in the statute.[65]

c. *A List of Lives.* The best attempt made so far to achieve the proper selection of measuring lives is the list in the English[66] and New Zealand Acts.[67] Strangely enough, the Law Reform Committee, on the basis of whose report[68] the English Act was passed, overlooked the need to make any provision relating to measuring lives. But the draftsman picked up the point. The commentators have been almost exclusively hostile to the list or to any reference being made in the Act to measuring lives. The subsections enacting the list have been described as being of "formidable complexity."[69] This description is both wrong and discouraging. Certainly, the list is much simpler than the concept of measuring lives under the common-law Rule. Nonetheless, some have found it difficult to apply.[70]

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[61] *Id.* at 497.

[62] *See* Dukeminier, *Kentucky Perpetuities Law Restated and Reformed,* 49 KY. L.J. 1, 63 (1960) (footnotes omitted, emphasis added):

> At common law the measuring lives had to have a causal relationship to vesting which insured vesting within the period. Under wait-and-see, absolute certainty ab initio is not required, and hence the measuring lives are those in being at the beginning of the period whose continuance *might* affect vesting. These are lives which "play a part in the ultimate disposition of the property"; these are lives with a causal relationship to vesting.

[63] *See* ONTARIO REV. STAT. c. 343, § 6(1) (1970), which reads in part:

> [N]o life shall be included other than that of any person whose life, at the time the interest was created, limits or is a relevant factor that limits in some way the period within which the conditions for the vesting of the interest may occur.

[64] *See, e.g.,* Dukeminier, *supra* note 62.

[65] It is not the purpose of this Article to argue the merits of one method over another. The comments here apply to whichever method is adopted. My preference is for a statutory list. If, however, the advantages of a list can be matched by those of a formula, then there should be no quarrel with that method.

[66] *See* note 54 *supra.*

[67] N.Z. STAT. 1964, No. 47, § 8(5), which is very similar to English Act § 3(5). The text of the latter appears at note 54 *supra.*

[68] LAW REFORM COMMITTEE, FOURTH REPORT, CMND. No. 18 (1956).

[69] *See* Morris & Wade, *supra* note 53, at 501.

[70] In the leading article on the English Act, many of the examples in the text determine the measuring lives improperly by failing to consider the inclusion of the spouses. *See* Morris & Wade, *supra* note 53, (particularly example 4 at 493, example 8 at 503, example 11 at 505, examples 14 & 15 at 509, and examples 16 & 17 at 511).

A large number of points can be raised upon the detail of the list of lives in the English Act, but they will not be discussed here. The present discussion will be confined to an explanation of the pattern of the list and to one criticism of it.

The list includes a number of persons connected in one way or another with the disposition. The question to ask, when considering a candidate for inclusion is: if the interest vests within 21 years of that person's death, would I wish to uphold the gift? It is important to get this question right, and to get away from outdated concepts of including only lives who were "relevant" in the context of the common-law Rule. Initially, we ask, "If a settlor creates a future interest which vests within 21 years of his death, is there any need to hold that disposition void?" Clearly not. Therefore, we should include the settlor in the list of lives. He is alive, ascertainable, and appropriate. Similarly, living beneficiaries in the case of trusts in favor of beneficiaries or objects of a power in the case of an appointment under a power of appointment should be included. If there is a gift over on the termination or failure of a prior interest in favor of a living person, that person should be included. It is necessary also to deal with gifts to descendants, such as "the grandchildren of *A*." Living grandchildren will be included as beneficiaries, but they may die more than 21 years before other grandchildren are born. Such grandchildren will be born of living children of *A* or of future-born children of *A*. So we should include the living grandchildren and their living parents and grandparents, and make any of these lives applicable to the claim of any one of the beneficiaries.

That, in short, is the manner in which the list contained in the English Act was arrived at. The list provides a finite, ascertainable group. The trustees could record the names of the measuring lives on a piece of paper at the moment the instrument comes into effect. Arguably, other lives could have been included in the English Act; some, perhaps, could have been excluded. There is no a priori qualification for inclusion since the selection of the statutory lives is a matter of policy. Overall, the list in the English Act is thought to be a good list, subject to one qualification: the list does not expressly include all persons who would be common-law measuring lives with respect to a disposition.[71] It could happen, therefore, that a disposition would be valid under the common-law Rule (using the common-law validating life) but void under wait-

[71] *See* text accompanying notes 52-53 *supra*.

and-see if the vesting does not occur within 21 years of the death of the survivor of all the *statutory* lives. Consider, for example, a disposition "to the first of my lineal descendants who shall shake hands with Mr. *X*." That would be valid at common law, because it must occur, if at all, during the lifetime of Mr. *X*. But it might be void under the Act because Mr. *X* is not a statutory measuring life, and the hand-shaking might take place more than 21 years after the death of the survivor of the statutory measuring lives. That situation could theoretically arise whenever a disposition is limited to vest in relation to the lifetime of a living person who is not on the statutory list. To reach the correct answer to such a disposition in England, therefore, it is necessary to apply the common-law Rule. The same is true where the vesting is to take place in relation to the dropping of selected lives—usually, in England, royal lives.

These situations arise in England because the Act retained the common-law Rule as well as enacting wait-and-see; and a disposition is valid if it complies with either. It was argued above that it would have been much better to have abolished the common-law Rule when enacting wait-and-see.[72] The point now is that this would have been done *in effect* if the list of statutory lives had included *all* those who would have been common-law lives. Of course, the present list includes most of the common-law lives, but not all. If the list had included all the common-law lives, the common-law Rule, even though not abolished, could have been disregarded[73] for, as explained above, every interest which must vest, if at all, within 21 years of the death of a measuring life, will vest, if at all, within 21 years of the death of that life.

The criticism in principle of the English list, therefore, is that it failed to include *all* persons who could in any circumstances be measuring lives at common law. This criticism is not of general significance with respect to lists of statutory measuring lives. It should be emphasized that it is relevant only to the special circumstances created by the English Act. The problem would not, of course, arise if the Act had abolished the common-law Rule at the time of the introduction of wait-and-see.

Conclusion

From the foregoing discussion, it is possible to draw a number of conclusions concerning the reform of the common-law Rule

[72] *See* notes 52-54 and accompanying text *supra*.

[73] *See* Maudsley, *Measuring Lives Under a System of Wait-and-See*, 86 L.Q. Rev. 357, 372 (1970).

Against Perpetuities. Taken together, these conclusions form the basis of a workable means of ameliorating the most objectionable aspects of the common-law Rule. Briefly stated, these conclusions are as follows:

1. Full-scale wait-and-see provides an excellent solution to the perpetuity problem. Properly enacted, it meets the objective of upholding gifts which do vest within the period, and striking down those which do not.

2. A *cy-pres* power, operating at the conclusion of the wait-and-see period, should also be provided. Such power increases the likelihood that the testator's intent will be fulfilled as nearly as possible.

3. The inconvenience of waiting and seeing has been much exaggerated. The position under wait-and-see is exactly the same as it was with valid gifts at common law. The "trade-off" is between treating as valid for the perpetuity period gifts which would be void at common law, and holding them void initially.

4. It is essential to know the duration of the wait-and-see period. That can only be done if the measuring lives can be easily ascertained. Those lives are not self-evident. Therefore, the statute must say who they are. The best way to do that is to provide a list. Such a list must enable a precise selection to be made at the time the instrument comes into operation.

5. The wait-and-see statute should replace the common-law Rule. There is no point in retaining the latter. But, if it is retained, then the statutory measuring lives should include all the common-law lives. Then, since a disposition which must vest, if it ever does, within the period, *will* vest, if it ever does, within the period, every case can be determined on the basis of wait-and-see. Resort to the common-law lives would be unnecessary.

6. Once a "list of lives" approach to wait-and-see is adopted, the perpetuity question is reduced to one sheet of paper on which the lives are written, dates recorded, and 21 years added to the date of death of the last survivor.

Of course, if the trustee can say for certain that the disposition must vest, if it vests at all, within 21 years of the death of a measuring life—*e.g.*, a gift "to *A*'s first child to attain the age of 21"—then there is no need even to keep a list. He will then be relieved of the need to write down names on a piece of paper. But I suggest that the logic of the "must vest" situation, so satisfying to the old common-law perpetuity lawyers, will be lost on future generations. They will never know what they missed.