PERPETUITIES REFORM: APPROACHES & REPROACHES

I. Introduction

Many jurisdictions have recognized the harshness with which the common law rule against perpetuities operates and have attempted to reform that rule either through judicial or legislative action. Nevertheless, a majority of the states retain the common law rule with its inherent inequities.

This note will briefly examine the criticisms aimed at the common law rule, then critically evaluate and compare past legislative and judicial reform in an effort to determine the effectiveness of the tools thus far employed. Where these tools are found to be inadequate—notably in the area of legal future interests—other means of reform will be proposed.

Particular attention will be given to problems posed by the two most popular reform doctrines: "wait-and-see" and cy pres. Additionally, special consideration will be given to the measuring lives question under the various "wait-and-see" statutes.

II. General Statement of the Rule

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.

The common law rule against perpetuities, intended to invalidate interests vesting too remotely, had its inception in the Duke of Norfolk's case in 1682. The purpose of the rule was to prevent property from being tied up in perpetuity. It sought to strike a balance between the wishes of present and future generations regarding the use and enjoyment of property. The rule is not without merit today, but in its original form it has outgrown some of its usefulness. When the rule was laid down it was intended to limit the extent to which an estate owner could project that estate into the future. The modern estate owner can usually see little benefit in tying up an estate for generations to come. With the advent of income tax and death duties, perpetuities violations are usually due to poor draftsman rather than "poor" intent. Twentieth century cases involving perpetuities problems do not reveal evil testators attempting to control their property far into the future. Instead, these cases usually concern reasonable intentions being snuffed out due to shortsighted drafting.
III. Basic Criticisms of the Rule

The common law rule has been subject to three basic criticisms:

1. The rule is applied as of the date the instrument was created and often assumes highly improbable, and sometimes actually impossible, future events in determining whether or not an interest is certain to vest within the period, if it does vest at all.

2. In many jurisdictions the rule operates with undue harshness in that, if a contingency violates the rule, any interest preceding the invalid one will be construed as being void as well. The instrument will not be rewritten so as to make it partially valid and thus better conform with the testator's intent. This is known as the doctrine of "infectious invalidity."

3. The rule does not apply to possibilities of reverter or powers of termination—future interests which may fall outside of the period and are at least as objectionable as those interests the rule strikes down.

Most reform to date has tended to liberalize the common law rule with the emphasis on the mitigation of the first two criticisms listed above. This last criticism, however, deserves far more attention than it has thus far received. It should have by now paved the way for change beyond that change inherent in perpetuities reform.

IV. "Wait-and-See"

A. Generally

The "wait-and-see" doctrine is intended to reform the common law rule in the manner implied by its name. At common law, if an interest is to be declared valid, it must be certain to vest, if it vests at all, within lives in being plus twenty-one years. Under wait-and-see, rather than make an immediate determination on the validity of the gift based on this requirement of certainty of vesting, the interested parties just wait and see whether or not the gift actually vests within the period allowed. The first legislative enactment of a "wait-and-see" statute


7 Situations familiar to any who have grappled with the rule come quickly to mind. The cases of the precocious toddler, the unborn widow, the fertile octogenarian, and "magic gravel pits" all symbolize situations where nearly impossible events may cause a gift to fail. See Leach, Perpetuities in a Nutshell, 51 HARV. L. REV. 638 (1938).

8 This criticism is not valid in England or several of the states which have done away with the doctrine of "infectious invalidity." In England there is no such doctrine except insofar as a subsequent limitation, which is ulterior to and dependent upon the prior interest, may be void.
came in Pennsylvania in 1947. The relevant portion of the statute provided that:

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.

This statute seemed particularly vulnerable to criticism when it came to the problem of ascertaining the measuring lives. Massachusetts was the next state to enact a “wait-and-see” statute. This statute was not quite as broad as its predecessor in Pennsylvania. It confined the application of “wait-and-see” to only those cases where future contingent interests were limited to take effect either after one or more life estates or after the passing of specifically named measuring lives. The statute had no effect on any executory limitation not restricted to take effect after the life estate of a life in being.

Vermont and Kentucky then followed suit. Vermont essentially enacted a Pennsylvania “wait-and-see” statute as the primary tool for reform but combined with this a cy pres power. Kentucky did the same but purported to provide a test for determining who the measuring lives were. According to the statute, they were restricted to those lives which had a “causal relationship” to the vesting or failure of an interest. Other jurisdictions have since enacted statutes with “wait-and-see” provisions and at least two and possibly three states have adopted “wait-and-see” by judicial decision.

“Wait-and-see” statutes prevent many of the harsh results inherent in the common law rule. Even so, they have been subject to severe criticism. Probably the most fundamental criticisms of “wait-and-see” statutes surround the problem of ascertaining who are the appropriate measuring lives.
Accordingly, the great bulk of this section will deal with that area. A further criticism is that since these statutes permit the courts to wait and see if contingent future events actually occur before declaring a gift void, the state of the title in the interest is uncertain for the waiting period. Professor Simes has even gone so far as to say that the "wait-and-see" doctrine is a major shift towards the inalienability of property. Another objection is that it is unclear whether or not "wait-and-see" reform solves the problems posed by the doctrine of "infectious invalidity." Finally, it is not readily apparent what effect the reform will have on provisions that can be made for an expected beneficiary under the theories of maintenance and advancement.

B. Measuring Lives

There are three basic approaches to the problem of ascertaining measuring lives for the purposes of a "wait-and-see" statute. First, it may be argued that there is a causal relationship test implied at common law. Another suggestion is to ascertain the measuring lives by resorting to a causal relationship test invented for the purpose of the statute. Lastly, it is suggested that a causal relationship test does not carry with it the needed certainty so a statutory list should be used.

1. The Causal Relationship Test at Common Law

Dr. Morris and Professor Wade argue that there is no need to invent a causal relationship test for the purposes of "wait-and-see" because a test already exists at common law. They say that at common law:

The question is not whether the lives are expressly specified; it is whether, as a matter of causality they restrict the vesting period; and if they do, the next question is whether they restrict it sufficiently to satisfy the rule. But how can one be sure that this is the way measuring lives are ascertained at common law? It would seem that the validity of an interest at common law depends upon whether or not there is certainty of vesting. Therefore, it is submitted that at common law, because of the certainty of vesting requirement, only those lives that validate the gift are measuring lives. While it is possible that the rule asks which are the lives that can restrict vesting as a matter of causality, we cannot say for certain whether that question is posed. We know only that the rule asks which lives can restrict vesting sufficiently to satisfy the requirement.

The rule establishes only two categories of lives in being: those which

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Rev. 357 (1970); Mechem, supra note 10; Morris and Wade, Perpetuities Reform at Last, 80 L.Q. Rev. 486 (1964); Simes, Is the Rule Against Perpetuities Doomed? The "Wait-and-See" Doctrine, 52 Mich. L. Rev. 179 (1953); Simes, supra note 6.


22 Simes, supra note 21, at 184.

23 Morris and Wade, supra note 20, at 497.
satisfy the certainty requirement of the rule and those which do not. Thus, the
rule tells us only that a person is a measuring life if he restricts vesting sufficiently
to satisfy the certainty requirement and conversely, that a person is not a mea-
suring life if he does not sufficiently restrict vesting. The only lives in being at
common law are those that can assure us a contingency is bound to vest, if it
vests at all, within twenty-one years of the passing of their lives.

If, as asserted, the only measuring lives at common law are those which
satisfy the certainty requirement, then theoretically a “wait-and-see” statute is
a redundancy. As Professor Maudsley has explained: “If the gift must vest,
if at all, within the period, then it will vest, if at all, within the period.”24 Thus,
“wait-and-see” would apply only to gifts that are already valid and there would
be no reason to wait and see at all.

However, when these statutes were drafted, their authors assumed that
they changed the common law rule and that courts would give the statute such
an effect. But, because it is so difficult to say with certainty what lives the court
will use, those “wait-and-see” statutes which provide that the common law lives
are the lives to be used for determining the period of perpetuities are most
disturbing.25 There is no proper guiding standard that the court can use. More-
ever, even when a standard is suggested, its use does not guarantee fair results.

The problem becomes more apparent in a practical situation. Assume a
gift “to the grandchildren of A at twenty-one.” Assume further that at the time
of the gift A is alive and has two children, B and C, both of whom are childless.
This is a problem situation with which nearly all of the writers have dealt.26

At common law the gift is void because there are no lives that satisfy the
certainty of vesting requirement. The certainty requirement cannot be satisfied
because it would be possible for A to have another child D who in turn could
produce a child who attained the age of twenty-one more than twenty-one years
after the deaths of A, B, and C.

If this situation were to arise under any statute using the common law lives
as the measuring lives, it could be argued that the gift was void at its inception
regardless of the “wait-and-see” statute. A “wait-and-see” statute does not
change the length of the perpetuities period, it merely provides that the validity
of the gift may be determined at the end of the period. If the argument is ac-
cepted that the only implied lives at common law are those which validate the
gift, then there are no lives with which the period could be measured. It is, how-
ever, unlikely that any court would interpret a “wait-and-see” statute so nar-
rowly.

Dr. Morris and Professor Wade, of course, agree that at common law the
gift is void, but they contend that there do exist measuring lives, implied at com-
mon law,27 for the purposes of a “wait-and-see” statute. B and C, they say, are
measuring lives but only with respect to their own children and not one another’s
issue. This is because B and C can affect the period within which the gifts may

24 R. MAUDSLEY, DRAFT OF PROPOSED PERPETUITIES TEXT ch. 6, § iii (not yet published).
Law Reform Act 1962, 11 Eliz. 2, No. 83 (W. Austl.).
26 Allan, Perpetuities: Who Are the Lives in Being?, 81 L.Q. Rev. 106, 114 (1965);
Morris and Wade, supra note 20, at 498; Maudsley, supra note 20, at 362.
27 Morris and Wade, supra note 20, at 498.
vest in their own children, but they cannot affect the period within which the gifts will vest in each other's children. While there is no specific comment on the point, A would probably also be a measuring life under the Morris and Wade "common law lives" approach. This is because A could procreate another child who in turn could bear A a grandchild.

For purposes of comparison, assume now the birth of another child, D, to A after the date of the gift. Suppose that at A's death he has no grandchildren. Shortly thereafter, a child is born to D. Several years later a child is born to B. D's child will be the first to reach twenty-one, but will he have a valid interest in the gift?

If Morris and Wade were to decide this question under the Pennsylvania statute, D's child would not be able to take for there would be no life by which to measure the period. B's child, who attains twenty-one several years later, will take the whole gift (assuming no other children are born to B or C). That is because B is a measuring life for the purpose of his own children but not for the children of his brothers or sisters. The injustice here is great, and the logic of the wait-and-see concept is destroyed.

2. The Causal Relationship Test Invented by Statute

D's child would do well to have the matter litigated under the laws of Kentucky or Ontario. Again, the test would be a causal relationship test but with a critical difference. Morris and Wade talk of using the common law measuring lives. Again, it is submitted that there is no appropriate definition for measuring lives under the common law rule. The Kentucky and Ontario statutes do not have this same weakness because instead of looking to the common law, they invent a test of causal connection for the purpose of "wait-and-see."

Professor Dukeminier and Dean Leal agreed that it was not sufficient merely to say that the common law lives should be the measuring lives for a "wait-and-see" statute. Dukeminier drafted the Kentucky statute. A few years later, in 1966, the Ontario Perpetuities Act was penned by a committee chaired by Dean Leal. The Kentucky statute provided:

[T]he period shall not be measured by any lives whose continuance does not have a causal relationship to the vesting or failure of the interest.

The Ontario statute was very similar. Yet neither has completely taken the ambiguity out of the measuring lives problem under "wait-and-see."

According to Professor Dukeminier, there is a two-step test that should be employed to determine who the measuring lives are under a causality system. First the situation should be analyzed to find out what events can effect the

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29 Perpetuities Act 1966 (Ont.).
31 The relevant portion provides:
No 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 vesting of the interest may occur.
Perpetuities Act 1966, § 6 (Ont.).
vesting of the interest. Next, it should be determined what lives can affect those events.\textsuperscript{32}

The test in operation seems quite reasonable, and using it, the determination of measuring lives will usually be an easy matter. If, for example, a bequest is made "to the first grandchild of A to marry," then, according to Professor Dukeminier, the appropriate measuring lives will be determined in the following manner. First, it must be asked, when will the gift vest? The answer is, only when a grandchild of A is born and marries. Any person who can affect either of those events is a measuring life. Under the causality test, the future spouse is excluded as a measuring life because he or she comes from an unreasonably large class. The question then is, who can create a grandchild? All of A's children now living can create one and are, therefore, measuring lives. A can create a grandchild by having another child who bears him a grandchild, so A is a measuring life. Now it must be asked, who can affect the marriage? Any living grandchild of A. The measuring lives, therefore, are A and all A's children and grandchildren now living. In order to be a measuring life, it is sufficient that the life is causally connected to either the birth or the marriage; it need not be connected with both events.\textsuperscript{33}

Professor Dukeminier wrote of the statute:

In practically all cases the measuring lives will be one or more of the following as fits the particular facts: (a) the preceding life tenant, (b) the taker(s) of the interest, (c) the parent of the taker(s) of the interest, (d) a person designated as a measuring life in the instrument, and (e) some other person whose actions or death can expressly or by implication cause the interest to vest or fail.\textsuperscript{34}

As a means of comparing the causal relationship test implied at common law and the test created for the purpose of the statute, assume again the gift "to the grandchildren of A at twenty-one."

Dukeminier would argue that B and C are both lives in being with respect to the children of D because if they were both to die, they could close the class of beneficiaries. As long as they live, the class may stay open under the appropriate class closing rules. Thus, the continuance of their lives keeps the class open and thereby prevents vesting. The same result is even more certain in Ontario where the statute specifically provides:

A life that is a relevant factor for limiting the time for the vesting of any part of a gift to a class shall be a relevant life in relation to the entire class.\textsuperscript{35}

Surely, this is a just result and conforms more closely with the intent of A, but the certainty of the test in Kentucky is open to speculation. Is it possible

\textsuperscript{32} Dukeminier, \textit{supra} note 16. Professor Dukeminier maintains that, if the events can be affected by an unascertained person, selected from an unreasonably large class, that person may not be used as a life in being.
\textsuperscript{33} Letter from Professor Dukeminier to Professor Maudsley, November 8, 1971.
\textsuperscript{34} Dukeminier, \textit{supra} note 16, at 63.
\textsuperscript{35} Perpetuities Act 1966, § 6 (Ont.).
that the spouses of B and C should be measuring lives as well, based on the fact that they could procreate a grandchild who attains the age of twenty-one, thereby closing the class? Professor Dukeminier might reply that they are not measuring lives because they come from an unreasonably large class: B and C could have several different spouses in their lifetime. The argument is not completely convincing. B and C might both die, thereby closing the class, just as the spouses of B and C might procreate a child who in turn attains the age of twenty-one and closes the class. As there is no requirement of certainty in the first example, it seems unreasonable to impose a requirement of certainty in the second example.

While it will cause few problems, it does at times seem that the test in Kentucky is based not on a causal relationship but instead on a "casual relationship." The fact that an expert such as Professor Simes feels that this theory of causal relationships is not clear enough and will need the interpretation of the courts is, by itself, cause for some alarm.66

3. A Statutory List of Measuring Lives

There is a way to remove all of the doubt (although not all of the controversy) about measuring lives. In sections 3(4)37 and 3(5)38 of the English Perpetuities and Accumulations Act39 a statutory list of measuring lives was provided. The list immediately fell under heavy criticism because of its complexity and wide-ranging coverage, including supposedly inappropriate lives.40 The condemnation of the measuring lives clause, however, was not unanimous. In an article in 1970, Professor Maudsley said not only that the list was the right answer but that, if the list was to do all the good it possibly could, it should be amended to include more lives.41

36 Simes, supra note 6, at 25; Maudsley, supra note 20, at 357; Allan, supra note 26, at 108.
37 The section provides, in part:
(4) Where ['"wait and see"'] applies to a disposition . . . the duration of the perpetuity period . . . shall be determined as follows: — (a) where any persons falling within subsection (5) below are individuals in being and ascertainable at the commencement of the perpetuity period the duration of the period shall be determined by reference to their lives. . . .
Perpetuities & Accumulations Act 1964, c. 55 (Eng.).
38 The section 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 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 subparagraphs (i) to (iv) of paragraph (b) above, or any of whose children or grandchildren, if subsequently born, would by virtue of his or her descent fall within those subparagraphs; (d) any person on the failure or determination of whose prior interests the disposition is limited to take effect.
Id.
39 Perpetuities & Accumulations Act 1964, c. 55 (Eng.).
40 Morris and Wade, supra note 20, at 501-08.
41 Maudsley, supra note 20, at 376.
Without commenting on the "wait-and-see" doctrine in general, this is an appropriate time to treat the criticism levied at sections 3(4) and 3(5). Morris and Wade pointed to four flaws in the statutory list:

A first criticism is that the statute has cast its net so widely in order to cover every conceivable case that many quite inappropriate lives are included whose continuance has no relevance to the vesting whatsoever. The result is to extend the "wait-and-see" period beyond what anyone contemplated and beyond what wise policy would seem to dictate.42

This criticism is not valid. Before the Act came into being, the period allowed was a life-in-being plus twenty-one years. The Act has not changed that period but only allows that it be determined by actual, rather than possible events. What is the difference if there are a few lives that might be considered inappropriate? Those lives cannot lengthen the period to more than a life-in-being plus twenty-one years. At common law a testator could have the period measured by a reasonable number of express lives. It would seem that a gift to vest "twenty-one years after the death of the last lineal descendant of King George V, now living," or "twenty-one years after the death of the children of Mrs. X now living," would allow for a perpetuity period as long as any under the Act. With an express lives clause, any testator can assure that his bequest will not vest until far in the future, but because this is not what most testators intend to do, they do not provide for these period-lengthening clauses. Most testators desire only to make reasonable provision for the beneficiaries, but they get caught up in a legal technicality. Why should they not have the benefit of these "inappropriate" lives? The wise testator can always extend the period by expressly including inappropriate lives. Under the Act, the lives provided for are far more appropriate and far less limiting than these might be.

A second criticism is that relevant lives are sometimes excluded and the "wait-and-see" period unnecessarily restricted.43

This point is well-taken. A case may well arise where there is an implied life at common law, not expressly provided for and not included in the statutory list. For example, take a gift "to the first of my lineal descendants to shake hands with President Nixon." A gift of this nature would be valid at common law because the gift is certain to vest, if it vests at all, within President Nixon's lifetime. But, under the list, President Nixon's life is not included. It would be possible for one of my lineal descendants, now unborn, to shake President Nixon's hand more than twenty-one years after all of the lives provided for had passed. The list of lives should, therefore, be amended so as to include any life that would validate the gift at common law.

A third criticism is that the statutory list applies not only to family transactions but, also, to commercial transactions. But lives in being have no significance in commercial transactions.44

42 Morris and Wade, supra note 20, at 502.
43 Id. at 505.
44 Id. at 506.
This seems a valid argument, accepted by those who generally favor the list as well as those who oppose it. It has been suggested that the solution to this problem would be to eliminate any reference to lives in commercial transactions. This is a good answer to the problem, but great care must be taken in defining a commercial transaction. Otherwise, borderline situations may arise where the parties will wish to go to court to have their positions clarified. If more litigation is encouraged by making the list of lives unavailable for commercial transactions, the amendment would be at least a partial failure.

A fourth criticism is that if there are no ascertainable individuals under section 3(5), the perpetuity period is twenty-one years only under Section 3(4)(6). To meet this, it need merely be pointed out that, if the list is properly drawn up, every life which should be on it will be on it. For the list to do all that it might, it must, as nearly as possible, replace the common law. The English Act, as written, clearly provides that the common law certainty test is to be applied first, and if the interest fails under that, the statutory list takes over under "wait-and-see." It is submitted that the list, if properly drawn, will include every life that could be used at common law, thereby eliminating the need to resort to the certainty test except on rare occasions.

The operation of the rule against perpetuities is very complex. If a list of measuring lives can achieve a better result, then to the extent possible the old rule should be eliminated. It would be far better to make it a toy for the legal historian than to keep it as a trap for the unwary draftsman. To make the list more complete, a provision should be added that would make any life which would validate the gift at common law a measuring life for the purpose of the statute. With the addition of this provision, the statutory list would always be used first while the common law certainty test would only be used as a last resort. Even then, the test would be reached through the common law provision in the list.

C. Uncertainty of Title

Examine first the basic problem. Whether a contingent future interest is valid under common law or undecided under "wait-and-see," there is exactly the same chance that the interest will vest. Assume a bequest by A to "my first son to reach twenty-one." A's only son, B, is sixteen at A's death. At common law, the gift is a valid contingent future interest. Under a "wait-and-see" statute,

45 Maudsley, supra note 20, at 377.
46 Morris and Wade, supra note 20, at 507.
47 In the situation set out earlier in the text ("to the first of my lineal descendants to shake hands with President Nixon") the common law certainty test would be applied.
48 See R. Megarry & H. Wade, LAW OF REAL PROPERTY 229-31 (3rd ed.). Megarry and Wade suggest two situations where the provision would be needed. First, "To A's first grandchild to marry a woman born before my death." (A is alive at the testator's death); and second, "To A's first son to marry, but if there is no such son, to B." Professor Maudsley in his lecture suggests yet another situation: "To the first of my lineal descendants to shake hands with President Nixon." In the first and last situations an argument can be made that the gifts are valid under the statute as express lives.
the interest will not be valid until it vests on B's twenty-first birthday. But, in each case we wait to see if B attains twenty-one in order to determine whether or not the interest actually vests. Are there any reasons why it is a better policy to have valid contingent future interests as opposed to undecided contingent future interests?49

One possibility is that B will be in a position to protect his future interest in a court of law if he has a valid contingent future interest, but will not if that same interest is undecided.50 It is to be expected, however, that a court will consider his undecided interest a future interest similar to all others and give B standing to protect it; but because the position is somewhat dubious, simply incorporate into the general statute standing for a potential beneficiary to protect the interest.

D. Infectious Invalidity

Another problem arises in those jurisdictions where it appears that the insidious doctrine of "infectious invalidity" still lurks. The contention is put forward that there cannot be a statute preventing the determination of the validity of contingent future interests because under this doctrine, should the future interest turn out to be void when the period of waiting is up, then the prior interests before it were in fact void. The beneficial ownership will thus have been in the wrong hands.51 It is submitted that courts should consider the introduction of a "wait-and-see" statute to impliedly overturn any doctrine of "infectious invalidity" that may be in effect. Another possibility is, of course, to overrule the doctrine specifically by statute.

E. Maintenance and Advancement52

When speaking of the policy of deferring the determination of contingent future interests, the problem of maintenance and advancement must be reached. It does a potential beneficiary little good to know that he will come into a fortune at age twenty-one if he cannot afford to live comfortably before reaching the age of majority.

49 A question deferred to the end of this note is whether or not it is good policy to have legal future interests of any kind.

50 See Simes, supra note 21, at 185-86. Professor Simes makes this argument forcibly where he says:

The practical effect of the "wait-and-see" doctrine in this respect may be illustrated by the following case. A transfers securities to T on trust to pay the income to B for his life, and to hold until B has a son who has attained the age of fifty years, and then to transfer the corpus to such son, in default of any such son, then to transfer the corpus to C. B is alive and has a son, D, twenty-one years of age, who is in excellent health. T, the trustee, is attempting to embezzle the trust estate in collusion with B. Under existing legal doctrine, the limitation both to the son of B and to C is void under the rule against perpetuities. There would be a resulting trust in favor of A, who would be able to proceed against the trustee. But suppose we apply the "wait-and-see" doctrine. It would seem that neither C nor D could proceed against T. For when each brings his suit, the court will say: We cannot do anything for you, for your interest may be void ab initio under the rule against perpetuities; we must "wait and see."

51 Schuyler, supra note 21.

Whether maintenance and advancement should be allowed only by court order, or whether it should be discretionary power in the hands of the trustees, is a question that need not be reached. It is imperative, however, that provision be made to apply the intermediate income for the maintenance and education of the young. It must be made clear that while an interest is in limbo under a "wait-and-see" statute the beneficiary of that interest is entitled to intermediate income for his maintenance or the advancement of capital when appropriate.

F. "Wait-and-See"—A Limited Solution

These problems associated with "wait-and-see" emphasize that perpetuities reform by itself is not the whole answer to the problem of inalienability of land. The mere existence of legal future interests, by whatever name they are called, is at the heart of the matter.53

Even when the discussion is restricted only to matters that a perpetuities reform statute is designed to handle, "wait-and-see" by itself cannot prevent all injustice. Take, for example, a gift "to A for life and then to his spouse for his life with the corpus of the gift over to the surviving children." Assume that at the time of the gift A is single. The gift over to A's children will be void at common law, this being one of the classic "unborn widow" cases; it will possibly be void under "wait-and-see" as well.54 In such cases, another approach to reform may be more beneficial.

V. The Cy Pres Doctrine55

Cy pres, a doctrine first used by the New Hampshire Supreme Court in 1891,56 has in recent years become the most popular reform tool. Several jurisdictions have adopted cy pres either alone or as a supplement to a "wait-and-see" statute.57 This doctrine has usually been introduced through legislative en-

53 See text at VIII, infra.
54 See Cal. Civ. Code § 715.5 (West Supp. 1973); Perpetuities Act 1964, § 13 No. 47 (N.Z.). California and New Zealand have adopted provisions that solve this problem. Section 13 of the New Zealand Perpetuities Act provides: Unborn husband or wife—The widow or widower or a person who is a life in being for the purpose of the rule against perpetuities shall be deemed a life in being for the purpose of—
   (a) A disposition in favor of that widow or widower, and
   (b) A disposition in favor of a charity which attains, or of a class the members of which attain, according to the terms of the disposition, a vested interest on or after the death of the survivor of the said person who is a life in being and that widow or widower, or on or after the death of that widow or widower, or on or after the happening of any contingency during her or his lifetime.

For similar problem areas see note 7, supra.
55 "Cy pres comme possible" is a phrase of Anglo-French origin meaning "as near as possible." Down through the years the end of the original phrase has dropped off, leaving only "cy pres." See A. Scott, Trusts § 399 (2nd ed. 1956); G. G. Bogert & G. T. Bogert, Trusts and Trustees § 731 (2nd ed. 1967). Until recently the doctrine of "cy pres" was used almost exclusively in the field of charitable gifts. The doctrine permits a degree of departure from the literal language of a charitable gift to permit the main purpose of the donor to be carried out as nearly as possible.
actment, but in at least three and possibly four instances, it has been extended by judicial decision. Some commentators have gone so far as to assert that cy pres offers "a total and simple solution" to the whole perpetuities problem. Basically, the modern doctrine of cy pres operates as follows: In most instruments, there can be found a general intent coupled with a specific intent. For example, in a gift of a trust "to A for life and then to his first son to reach thirty" (A being a bachelor at the time of the gift), the general intent is obvious: to give the income of the trust to A for as long as he lives with the remainder going to his first son. The specific intent in this gift refers to the contingency that A's first son does not get the gift until he reaches thirty.

Now, under the cy pres doctrine, the validity of the instrument is determined as of the time of its creation. In this situation the courts should add a saving clause onto the original instrument to the effect that the first son will take when he reaches thirty, or twenty-one years after A's death, whichever comes first. Reform in this nature would ensure that the donor's specific intent was carried out unless it actually violated the rule against perpetuities, in which case the saving clause would take over so as to carry out the general intent.

There is no measuring lives problem with cy pres as there is under "wait-and-see." The doctrine of "infectious invalidity" does not affect the use of cy pres as it does "wait-and-see." Cy pres will appeal to those who are concerned about leaving the validity of the interest in limbo until the gift actually vests or fails to vest within the period. In addition to all of this, cy pres is no doubt an excellent reform measure. Professor Browder suggests that any case that can be saved under "wait-and-see" can be saved under cy pres without waiting. However, just as the "wait-and-see" doctrine brings problems with it, so does cy pres.

Before a court determines whether or not an instrument can be reformed, it first has to find a general intent in the instrument. It is argued that this will serve to invite litigation on the issue of the general intent of the testator and whether or not the instrument can be reformed consistent with that intent.

The courts, however, have not been overburdened with litigation in those jurisdictions that are operating under a cy pres statute. There are probably two reasons why this is so. First, in most cases the general intent of the testator is obvious; decisions on these cases can be handled quickly at a lower court with little chance for appeal. Second, many potential litigants will not bring offending


58 Edgerly v. Barker, 66 N.H. 434, 31 A. 900 (1891); Carter v. Berry, 243 Miss. 321, 140 So. 2d 843 (1962); In re Chun Quan Yee Hop, 469 P.2d 183 (Hawaii 1970); see In re Foster's Estate, 190 Kan. 498, 376 P.2d 784 (1962). Courts, however, are not always eager to deal with the problems of reform. See, e.g., Second Nat'l Bank v. Harris Trust & Sav. Bank, 29 Conn. Supp. 275, 283 A.2d 226, 231 (1971), where after considering the In re Chun Quan Yee Hop case, supra, the court refused to reduce the period of the trust to a maximum of twenty-one years, saying that any change in the established law should be reserved for the supreme court of the state.


60 Browder, supra note 59, at 6.

61 Id. at 5.
instruments to the court because they expect that the court will simply perform cy pres surgery validating the interest. 62

If a court cannot find a general intent, the common law rule is applied and the interest is declared void. It is not clear what a court will do when the general intent is ambiguous. Take the example of a gift "in trust for all of my descendants and, when the line of descendants runs out, then to the Notre Dame Law School Fund." Here, the question of general intent is indeed difficult. The court could find that the intended beneficiaries are the descendants, or it could declare the intended beneficiary to be the law school fund. A better result in this situation might possibly be achieved under "wait-and-see." If all of the descendants were to run out before the period had run, the law school could take in exactly the way the testator had described.

The contention has been put forward that cy pres interjects uncertainty into the law. 63 To illustrate, take a gift "to the grandchildren of A when they reach thirty." What is the proper means of reformation under cy pres? The court can either insert a saving clause that will allow for a reduction of age contingency or it can provide that the contingent interests of grandchildren not yet vested at the end of the period will be struck down.

It has been put forward that this uncertainty might be reduced by combining cy pres with the "wait-and-see" principle. Reformation, it is said, will be necessary only when a contingent interest actually fails to vest within the perpetuities period. The precise nature of the reformation will usually be obvious based on the existing circumstances. 64

Great care must be taken when discussing the reasons for a combination of "wait-and-see" and cy pres in an effort to find the obvious solution to the perpetuities problem. A cy pres saving clause can usually provide that the testator's original intent will be carried out, provided that it does not violate the period. If the period is violated, the court will know no more about the testator's intent at the end of the period than it knew at the beginning. The illustration used earlier is helpful. The donor may want the grandchildren to take even if they do not make thirty in time. On the other hand, he may have significant personal reasons for believing that no one should have anything before he is thirty and would rather have the gift fail than have it taken by A's twenty-nine-year-old grandson.

Those who suggest that it will be easier to ascertain the proper reform technique after a waiting period must be willing to face the argument that they are talking not of the testator's intent but simply of a reasonable solution. It might be said that if a court looks to this reasonableness at the end of the period, rather than to the testator's intentions, then that court is rewriting the instrument rather than reforming it. In the interest of the public policy, however, this argument should not be accepted.

Another concern is that cy pres at first glance appears to place almost unfettered discretion in the hands of the court. This concern is probably un-

62 For a discussion of the limited amount of litigation to date see Comment, 49 Tex. L. Rev. 181, 191 (1970).
63 See Dukeminier, supra note 59, at 84 (1962).
64 See Comment, 84 Harv. L. Rev. 738, 742 n.15 (1971).
founded. Two things should be remembered. First, before a court can reform an instrument, it must find a general intent by which to be guided. If a court cannot pick out this general intent, it cannot reform; if it can find one, this scheme will usually suggest the nature of the reform required. Second, cy pres only gives a court the power to reform an instrument so as to comply with the common law period of a life-in-being plus twenty-one years; it may not extend the period. 65

VI. Specific Statutes for Specific Situations

To avoid extensive perpetuities reform, or to at least add a measure of certainty to it, some jurisdictions have enacted statutes aimed specifically at the most common problem areas.

Often gifts fail under the common law rule because the donor requires that the intended beneficiary reach an age over twenty-one as a condition for vesting. In many of these cases, if the court were allowed to reduce this age contingency, the gift could be made valid under the rule. Several jurisdictions have responded to this problem by giving the court the power to reduce these age contingencies. 66 One of the possible benefits of such a statute is that there is no uncertainty. The court knows exactly what it must do in order to effect a reform. 67 On the other hand, cases may arise where reform is necessary but the one provided by the statute does not best effectuate the settlor's intent.

A closely related area is that of class gifts. At common law a gift to a class is totally invalid unless all of the members of the class or the ultimate size of the share of the gift that each member is to receive is determined during the period. This is the famous "all-or-nothing rule" of Leake v. Robinson. 68 Several jurisdictions have avoided this potential menace by class closing statutes designed to exclude from the class those persons who would cause a gift to fail for remoteness. 69

The case of the "unborn widow" has always presented special perpetuities problems. 70 Because at common law certainty of vesting requires that possible future events be considered, it is possible for an intended beneficiary to be deprived of a bequest. 71 This problem has been eliminated by statutes of varying degrees of effectiveness in California, New York, England, New Zealand, Ontario, and Western Australia. 72

65 Browder, supra note 59, at 15-32.
68 2 Mer. 363, 35 Eng. Rep. 979 (Ch. 1817).
70 Leach, supra note 7.
72 Cal. Civ. Code § 715.5 (West Supp. 1973); N.Y. Est., Powers & Trusts Law § 9-1.3(c) (McKinney 1957); Perpetuities & Accumulations Act 1964, c. 55 (Eng.); Perpetui-
At common law it is assumed that a person is able to have issue at any
time up until his death. This assumption probably dates all the way back
to the Old Testament where Isaac was born to a mother ninety and a father one
hundred years old. Based on this assumption, in 1787 the well known English
case of *Jee v. Audley* held that anyone was capable of having issue until he or
she died. The case further held that this was an irrebuttable presumption.

Several jurisdictions have recently done away with this presumption, but
the problem of what to do about cases of adoption still remains.

At least one jurisdiction has also handled the problem of the “administrative
contingency.”

VII. “Wait-and-See,” Cy Pres or Specific Statutes

Relying solely on specific statutes for specific situations creates far too in-
exible a system of perpetuities reform. Enacting all the statutes necessary under
such a plan is also unnecessarily complicated.

To a point, either “wait-and-see” or cy pres provides an excellent answer
to the problem of perpetuities reform. It is submitted that the choice between
the two should rest largely on the judicial philosophy of the courts in the jurisdic-
tion.

The English courts, for example, have chosen “wait-and-see,” and consid-
ering the basic reluctance of the English courts to rewrite an instrument, that is
probably the correct choice. In this atmosphere cy pres would very likely not
be used to its full potential thus severely restricting its value. “Wait-and-see,”
used in conjunction with only a few specific statutes, can handle nearly any
possible situation.

Many American jurisdictions, on the other hand, are more willing to reform
an instrument by tampering with existing language. This may account for the
recent popularity of cy pres in the United States.

In the opening sections of this article it was noted that there are three basic
criticisms leveled at the common law rule against perpetuities. Both “wait-and-
see” and cy pres can effectively counter the first two criticisms mentioned, but
neither reform doctrine by itself meets the third criticism, *viz.*, that the rule
does not apply to possibilities of reverter or powers of termination. Effective
perpetuities reform must deal with this problem as well.

VIII. Extending Reform to Other Interests

There can be no doubt that in the United States rights of entry and possi-
bilities Act 1964, No. 47 § 13 (N.Z.); Perpetuities Act 1966, § 16 (Ont.); Law Reform Act
1962, 11 Eliz. 2, No. 83 § 12 (W. Austl.).

73 29 Eng. Rep. 1186 (Ch. 1787).

74 N.Y. EST., POWERS & TRUSTS LAW § 9-1.3(e) (McKinney 1967); ILL. REV. STAT. ch.
30, § 194(c)(3) (Supp. 1973); IDAHO CODE § 55-111 (1957); Perpetuities & Accumulations
Act 1964, c. 55 (Eng.); Perpetuities Act 1964, No. 47 (N.Z.); Perpetuities Act 1966, § 7
(Ont.); Law Reform Act 1962, 11 Eliz. 2, No. 83 § 6 (W. Austl.).

75 Powell, supra note 67, at 692.

76 N.Y. EST., POWERS & TRUSTS LAW § 9-1.3 (McKinney 1967).

77 See text accompanying notes 7 and 8, supra.
bilities of reverter have not been subject to the policing effect of the rule against perpetuities. While the reason for their exclusion is not always clear, it is probably based on the theory that the original donor simply retains part of his ownership in the interest when the property changes hands. The use of these interests permits the dead to exercise a great deal of power over property, greatly affecting both that property's alienability and its proper use.

Take, for example, the hypothetical case of property given to the trustees of Holy Angels' Church, their heirs and assigns, "so long as services are conducted there every Sunday." The estate created would be a fee simple determinable with a possibility of reverter in the grantor. It is quite possible that when this restriction was placed on the land, there was some real social value to be served. Our society, however, is not a static one; and the restriction may have long since outgrown its usefulness. The complexion of the land around the church site may have changed drastically since the time of the original conveyance. If the area has become heavily industrialized, it might be far better for the community, both spiritually and economically, to develop the land; and with the money so obtained, build a better church in a more accessible part of town. That, however, is a path of action probably not open to the church, for to discontinue services on the land would mean the loss of the church's interest in the land.

Recently, several jurisdictions have noted that these interests are equally as objectionable as those interests which do fall under the operation of the rule. There have been two basic approaches to the solution of the problem. The first method is simply to provide expressly by legislation that these interests do fall under the rule. This can work only where "wait-and-see" has been adopted, at least for the purposes of these interests. The most popular method of handling the problem in the United States has been to adopt a statute declaring that the interests will terminate after a certain number of years.

The courts will probably find unconstitutional any attempt to apply these statutes retroactively, but even so they are a valuable tool with which to free land from the "hands of the dead."

Legislative reform in the future interest areas should not end with perpetuities reform but rather should only begin there. By subjecting all future interests to the rule against perpetuities, the alienability and prospects for the proper use of land are, of course, greatly enhanced; yet more needs to be done.

In the United States, future interests in land are legal interests. In order to furnish merchantable title to a piece of property, all owners of legal interests in the property must cooperate in the conveyance. As will be seen, even in

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79 Chaffin, supra note 78, at n.6.

80 COMMITTEE ON RULES AGAINST PERPETUITIES, PERPETUITY LEGISLATION HANDBOOK (3rd ed. 1967). Statutes to this effect have been enacted in England, New Zealand, Ontario and Western Australia.

81 Illinois, for example, has a forty-year period while Rhode Island allows only twenty years.

82 Biltmore Village, Inc. v. Royal, 71 So. 2d 727 (Fla. 1954); but see Trustees of Schools v. Batdorf, 6 Ill. 2d 486, 130 N.E.2d 111 (1955), (constitutionality of Illinois statute applying to interests existing at the time the statute was enacted, upheld).
cases where the cooperation of all involved would be to the definite advantage of everyone concerned, it may still be impossible to effectuate a good transfer. The four varieties of legal future interests that cause the most problems are: the possibility of reverter, the right of entry, the contingent remainder, and the executory interest.83

As noted earlier, a possibility of reverter is an interest held originally by the grantor. Most American jurisdictions permit this interest to be transferred by will,84 and many allow inter vivos transfer.85 For purposes of examination, we shall only consider what happens in the case of intestate succession.

Assume that the example of the Holy Angels' Church, discussed above, took place in a jurisdiction where all possibilities of reverter terminate after forty years. The grantor, a widow, dies intestate and the property passes to her four children, all of whom survive their spouses and die intestate leaving four children. The legal ownership of the possibility of reverter is now vested in the grantor's sixteen grandchildren. It would be quite possible for this entire chain of events to take place before the expiration of the forty-year period. Yet in order for any person to purchase the fee simple in the property after a breach of the condition by the church, each of the sixteen grandchildren would have to cooperate in the sale. As expected, similar problems can arise in connection with rights of entry.

Legal contingent remainders and executory interests can bring about equally damaging results. These interests may be owned by unascertained or unborn persons, whose cooperation is not only unlikely but impossible.86

The English have met this problem in a most satisfactory manner with the Settled Land Acts of 188287 and 1925.88 The basic philosophy of these acts is to create future interests as beneficial interests under trusts rather than legal interests. The legal estate is in the tenant for life in the case of settled land, or the trustees for sale in the case of a trust for sale.89 The party with the legal estate has the power to sell the entire fee simple. Any future beneficial interests are "overreached."90 At the heart of the theory of settled land is the idea that there is equality in value between land and money. A beneficial interest in a fund of $100,000 is worth exactly the same as an equal interest in land worth $100,000.

Under the English legislation, an interested party can purchase a merchantable title from a life tenant or the trustees for sale even if the beneficiaries of the

84 L. Sims & A. Smith, supra note 78, at § 1903.
85 Id. at § 1860.
86 Fratcher, supra note 83, at 528.
87 Settled Land Act, 45 and 46 Vict. c. 38 (1882).
88 Settled Land Act, 15 and 16 Geo. 5, c. 18 (1925).
89 It should be noted that, as an alternative to strict settlement, it is possible to set up a trust for sale under the Law of Property Act, 15 and 16 Geo. 5, c. 20 (1925). A trust for sale may specifically provide that the consent of two persons is necessary before the interest may be sold. Thus, by using the trust for sale, it may be possible to make property virtually inalienable simply by making sure that it will never be to the beneficial interest of both parties to sell. For a comparison between the strict settlement and the trust for sale as methods of settling family property, see Hanbury, supra note 52, at 523.
90 Not all interests can be overreached. For example, legal mortgages, leases, and most land charges will not be overreached. All of these things may be protected by registration. See Settled Land Act, 15 and 16 Geo. 5, c. 18, § 72 (1925).
contingent interest following the life estate are as yet unascertainable. This system should work to the benefit of most persons holding interest in property and the community in general, as land realizes its highest income when it is being properly used. Under this system the owner of the legal estate has the option to direct the land to its proper use even if that involves the sale of the land and conversion of the family capital into money or other interests. It is, of course, possible for a bad decision to be made. The life tenant may sell a piece of land for $10,000 that in six months' time is worth twice as much. An occurrence of this nature, however, should properly be classified as a bad investment rather than a flaw in the system. Surely, it is better that the decision-making powers be in the hands of a presently interested party who can assess the situation logically using current information. There are safeguards to prevent a life tenant from making an investment that will assure him of a high income for the duration of the trust to the detriment of the capital, just as there are safeguards to prevent trustees for sale from looking out only for the interest of future beneficiaries by attempting to trade a low income for capital growth.91

There is a strong possibility that legislation such as the Settled Land Act could not be retroactive and still pass the test of constitutionality, but there does exist some authority to the contrary.92 Regardless of that fact, there is little to be gained from delay. Using the English legislation as the guiding light, property law should be reformed so that future interests may be created only as beneficial interests under trusts. If the courts were to allow the legislation to be applied retroactively, the process of land transfer would be immediately improved and simplified. Land would be more alienable and available for proper use. Even if retroactivity is denied, however, there is no reason such action should not be taken quickly. Aside from the problem of constitutionality in the case of retroactive application, there are few practical difficulties to be encountered.93

While it is true that legal remainders will not be completely eliminated until the period of perpetuities has run its course, this problem must be kept in proper perspective. The period for these already existing interests does not run from the date the new law is enacted; it runs from the date of the creation of the interest. Thus, with the passing of each year, the legal interest problem becomes less acute.

Such reform is aided by the fact that in recent years many attorneys have seen the benefits of the English legislation and have created future interests as beneficial interests under trust even though not required by law to do so.94 Because of this trend, many of the interests that could linger the farthest into the future have already complied with the spirit of the new law.

91 For a more complete picture of the English legislation see R. H Maudsley & Burn, Land Law ch. 3 (2nd ed. 1970).
92 See note 8 supra; J. Scurllock, Retroactive Legislation Affecting Interests in Land ch. 4 (1933).
93 See Fratcher, supra note 83, at 550. But consider the case of a testator who leaves all of his personality to A and all of his real property to B. After the future legal interests are converted to beneficial interests under trust, they will be personality rather than real property. There appears to be a danger that this could frustrate the donor's intent by having all of the property pass to A and none to B. This should not pose a major problem, however, since retroactivity will probably not be permitted in the United States.
94 Id. at 549.
IX. Summary

Property interests should not be controlled by the dead, nor should they tie up property to the point that land cannot be put to its best use. In those jurisdictions still subject to the common law rule against perpetuities, reform should be undertaken to eliminate the inherent inequities of the rule. Reform should extend farther than the liberalization of the common law rule; possibilities of reverter and rights of entry should be considered as well. Depending on the method of general reform the jurisdiction chooses, these interests should be included under the rule or restricted to a term of years, as appropriate.

Perpetuities reform should lead to other reform in the field of future interests. Note should be taken of the English example, and all future interests created as beneficial interests under trust.

_Drew Brown_