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SOME FURTHER THOUGHTS ON PERPETUITIES REFORM

THOMAS L. WATERBURY*

Ten years ago, the Pennsylvania legislature inaugurated a new era of interest in improving the common law rule against perpetuities. Since that time, the merits and demerits of the Pennsylvania "wait-and-see" doctrine have been widely discussed in periodicals, two general treatises, a treatise on the rule by Messrs. J. H. C. Morris of Oxford University and W. Barton Leach of Harvard Law School and a series of published lectures by Professor Lewis M. Simes of Michigan. Contemporaneously, some judicial support has appeared in New Hampshire and Massachusetts, and substantial legislative approval has been registered in Massachusetts.

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7. Sears v. Coolidge, 329 Mass. 340, 108 N.E.2d 563 (1952). This case can be rationalized on the orthodox ground (stated in the opinion, but not relied on) that the testator did not intend to include afterborns. See Simes, Is the Rule Against Perpetuities Doomed? The 'Wait-and-See' Doctrine, 52 Mich. L. Rev. 179, 181-82 (1953). There is also an earlier Florida decision which lends support to "wait-and-see." Story v. First Nat. Bank & Trust Co., 115 Fla. 436, 156 So. 101 (1934).
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Maine, and Connecticut. During 1956, the Lord Chancellor’s Law Reform Committee published a report, recommending an English version of wait-and-see. Most recently the Vermont legislature has enacted legislation combining wait-and-see with a *cy pres* doctrine.

Thus, in a decade, a prima facie case has emerged for widespread adoption of the Pennsylvania experiment. But during this period, as it happens, both Professor Leach, the most conspicuous wait-and-see proponent, and Professor Simes, the most conspicuous dissenter, have been cast in the role of advocates. And, since controversy has centered on the wait-and-see principle itself, less attention has been focused on its possible corollaries in the area of perpetuities reform. Perhaps, then, there is something to be gained by a general reappraisal, with some attention to the latter. This article is offered with that thought.

I. The Wait-and-See Doctrine

A. Genesis

An appropriate starting point is the Pennsylvania legislation itself. The Estates Act of 1947 seeks to improve upon the common law rule in two respects. First, via wait-and-see, to avoid the invalidation of contingent interests which ultimately vest within the permitted period of lives in being and twenty-one years, but are not, at their creation, certain to do so. Secondly, via a change in the disposition of invalid interests, to avoid tracing the beneficiaries of invalidity through lines of descent from the testator. The former of these “amendments” of the common law rule is stated as follows:

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.

A technical weakness of this statute, as critics were quick to point

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12. See note 23 *infra*.
14. Pa. Stat. Ann. tit. 20, § 301.5 (Purdon 1950), quoted in note 123 *infra*. Of course, some contingent interests are created by inter vivos transfers, but the bulk of them are created by will. In this article, the creator of the interest is referred to as the testator unless problems peculiar to inter vivos transfers are under discussion.
out, is that it requires, but omits to provide, some method other than the common law method of selecting measuring lives. As a result, the period during which actual events may be considered is uncertain. And, as a further and correlative result, the date, which must await the period's expiration, upon which a claimed violation of the rule can first be asserted is unascertainable. Thus, while the statute's broad objective—that of avoiding invalidity arising from extremely remote possibilities—has been generally approved, there have been few defenders of its technical adequacy.

The controversial aspect of the statute is that, at bottom, it is the conceptual antithesis of the common law rule. The common law conception is that a contingent interest may be valid only if, at the date of its creation, it is absolutely certain to vest within the permitted period. The statutory conception is that a contingent interest may be invalid only if, at the close of the permitted period, it has not vested.

More specifically, the Pennsylvania statute requires (1) a delayed determination of the validity of any contingent interest, and

16. See Simes, Is the Rule Against Perpetuities Doomed? The 'Wait-and-See' Doctrine, 52 Mich. L. Rev. 179, 186 (1953); Comment, 48 Mich. L. Rev. 1158, 1167-70 (1950); Recent Statute, 60 Harv. L. Rev. 1174, 1175-76 (1947); cf. Note, 97 U. Pa. L. Rev. 263, 267 (1948). Though Professor Leach has never conceded more to this defect than the necessity for some judicial construction, Leach, Perpetuities Reform by Legislation: England, 70 Harv. L. Rev. 1411, 1415 (1957). But query? True, the only unique thing about measuring lives under the common law rule is the fact that they must be so connected with the happening of conditions precedent to vesting, that the conditions precedent are certain to occur, if at all, not later than twenty-one years after the lives terminate. Hence, the central problem presented to the judiciary is clear enough: that of broadening the common law method of selection so as to avoid nullifying the wait-and-see principle without opening the door to irrelevant lives, selected with the benefit of hindsight. But the problem will come to the courts piecemeal which probably means that judicial inquiry extending over a number of cases would be required to formulate a general rule. And this method of arriving at a workable body of doctrine will clearly involve a century or more of delay, because wait-and-see postpones the permitted date for litigation, in Pennsylvania, to the end of the permitted period. It is true, however, that this last fact cuts both ways. Arguendo, because delay is necessary, there is plenty of time for Pennsylvania to work out a legislative solution. The weakness of this lighthearted approach is, of course, that subsequently enacted legislation, if it is to be effective for the intervening period, must face difficult problems of retroactivity. For some statutory possibilities, see note 96 infra.

17. For an attempted defense see Note, 97 U. Pa. L. Rev. 263, 267 (1948). For possible legislative approaches, see note 96 infra.


19. Perhaps with this antithesis in mind, the Pennsylvania revisors declared that their statute "is intended to disturb the common law rule as little as possible." Commission's Comment, Pa. Stat. Ann. tit. 20, § 301.4(b) (Purdon 1950).

20. There is common law precedent for such delay, during the continuance of valid prior estates. See In re Miller, 351 Pa. 144, 40 A.2d 484 (1945); In re Lauck's Estate, 358 Pa. 369, 57 A.2d 855 (1948). For an exhaustive discussion of the Pennsylvania cases, see Phipps, The Pennsylvania
(2) that the actual events of the period of delay be considered in determining validity. These two obviously dependent ideas constitute the “wait-and-see” doctrine, and the nub of current controversy regarding perpetuities reform is the merit of this approach as opposed to the status quo, specific statutory amendments of limited scope,21 the extension of the rule against perpetuities to vested interests which do not become possessory within the period of the rule,22 the possibility of developing a cy pres doctrine to deal with invalid interests,23 and various combinations of the latter three.

B. Actual events versus possibilities

From one standpoint, proponents of the Pennsylvania experiment have labored against heavy odds. Pennsylvania’s premiere performance was technically defective. Wait-and-see is antithetical to a major premise of the common law rule, and previous departures

Experiment in Perpetuities, 23 Temp. L.Q. 20, 24-33 (1949). There is Massachusetts authority to the same effect. See B.M.C. Durfee Trust Co. v. Taylor, 225 Mass. 201, 89 N.E.2d 777 (1950). However, this doctrine is of uncertain scope and has not, in fact, prevented litigation in most states. See pp. 71-75 infra.


22. This is tentatively suggested by Professor Simes. Simes, Public Policy and the Dead Hand 80-82 (1955).

23. This was originally the suggestion of Judge Quarles. See Quarles, The Cy Pres Doctrine: Its Application to Cases Involving the Rule Against Perpetuities and Trusts for Accumulation, 21 N.Y.U.L.Q. Rev. 384 (1946). More recently, it has been seconded by Professor Leach, Perpetuities in Perspective: Ending the Rule’s Reign of Terror, 65 Harv. L. Rev. 721, 748 (1952), but disapproved by Professor Simes, The Policy Against Perpetuities, 103 U. Pa. L. Rev. 707, 736 (1955). This solution is also disapproved, on grounds of vagueness and uncertainty, by the Law Reform Committee. Law Reform Committee, Fourth Report, Cmd. No. 18, at 16-17 (1956). However, the Vermont Legislature apparently was persuaded of its merits this past session. Vt. Acts 1957, No. 177, § 1 provides:

"Rule against perpetuities; interest reformed to conform with intent. 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 first sentence, taken alone, would seem to contemplate the application of cy pres to cure invalidity under the possibilities test of the common law rule. This follows, prima facie, from the use of the phrase “which would violate” which seems to contemplate a prediction of compliance. But the second sentence makes it abundantly clear that the test in Vermont is to be wait-and-see. The net effect then, seems to be that Vermont has enacted a Pennsylvania style wait-and-see statute, but has substituted cy pres reform of interests which fail to pass the actual events test for the Pennsylvania solution of vesting invalid interests in those entitled to income at the end of the perpetuities period. For the Pennsylvania provisions dealing with invalid interests, see note 123 infra.
from those premises have been singularly unsuccessful, prompting a number of states to return to the common law rule.\textsuperscript{24} Further, in an area where predictability is revered, the common law rule, assisted by the formidable scholarship of John Chipman Gray,\textsuperscript{25} seemed comfortably precise in application.

But this weakness was also an advantage. Because of the antithesis, supporters of wait-and-see could take the cherry in one bite—the case against the common law rule was, substantially, the case for wait-and-see. This dual case, advanced most ably by Professor Leach and his associates, and countered by Professor Simes and others, must now be examined in detail.

The end result of wait-and-see is to save some interests which would violate the common law test of possibilities. Obviously, such a change is justifiable only if the rigor of the possibilities test is not. Prima facie, a rigorous common law rule is harder to justify if the policy against perpetuities is of limited importance. Logically therefore, Professor Leach opened with an assault upon the importance of the rule.

1. Unimportance in the Atomic Age

In the eyes of Professor Leach, present day income and transfer taxes "have largely eliminated any threat to the public welfare from family dynasties built either on great landed estates or on great capital wealth,"\textsuperscript{26} so the proper function of the rule today is merely to curb "vain, capricious action by wealthy empire builders."\textsuperscript{27} But if taxation has solved the problem, whence come the empire builders? The fact is that our income and transfer taxes do not preclude the accumulation and transmission of large fortunes.\textsuperscript{28}

\textsuperscript{24} Professor Leach conceded all this, except the matter of antithetical premises, which he did not mention. Leach, \textit{Perpetuities in Perspective: Ending the Rule's Reign of Terror}, 65 Harv. L. Rev. 721, 724-25 (1952).

\textsuperscript{25} Gray, \textit{The Rule Against Perpetuities} (4th ed. 1952). In a recent California case, the court, in indirect but impressive tribute to the force of Gray's codification, felt obliged to point out that he had not authored the rule. \textit{In re Sahlender's Estate}, 89 Cal. App. 2d 329, 339, 201 P.2d 69, 75 (1948). Professor Leach has also contributed to the aura of perpetuities immutability, having described the rule as "all things to all men . . . to the troubled spirit, a blessed sheltering realization that lives-in-being-and-twenty-one-years have the same validity after two world wars and four Democratic administrations that they had when Queen Victoria ascended the throne." Leach, Cases and Text on the Law of Wills 203 (2d ed.; rev. 1955).


\textsuperscript{27} 6 American Law of Property § 24.11 at 43 (Leach and Tudor eds. 1952).

\textsuperscript{28} Some persuasive evidence of this is afforded by the Third National Trust Income Survey recently conducted by the Trust Division of the American Bankers Association. 35 Trust Bull. 2 (Feb. 1956). With about
On this matter of the rules importance, wait-and-see is saved, not by its friends, but by its enemies. It is Professor Simes who has pointed out with convincing clarity that the rule's traditional justification as an agent for maintaining the alienability of property

30% of the Division's membership reporting, the survey showed a total of over 21,000 private trusts producing annual income from $10,000 up. Over 7,000 of these produced incomes exceeding $25,000. True it may well be that these figures represent more than 30% of the large trusts administered by the Trust Division's membership, because the larger trust institutions may well have responded to the survey questionnaire more religiously than the smaller ones. But, on the other hand, there are doubtless a number of large trusts in the United States which do not employ a corporate trustee at all. Moreover, some of the trusts shown by the survey to have much smaller incomes may have been segments of large estates which were being administered as a series of separate trusts for tax or other reasons. A little mental capitalizing of income at the rate of 4% will convince the reader that some substantial accumulations of wealth exist in private trusts today.

On the income tax side, we have the testimony of the late Randolph Paul before the 84th Congress' Subcommittee on Tax Policy of the Joint Committee on the Economic Report, which points out that the effective income tax rate for 1951 on adjusted gross incomes of $100,000 to $150,000, allowing 10% for deductions and adding in excluded capital gains, was 43% of adjusted gross income. Indeed, according to Mr. Paul's figures, which were based upon official Treasury Department Statistics of Income, it is necessary to attain an adjusted income of $1,000,000 to $1,500,000 before the effective tax rate, thus computed, reaches 50%, and in the next highest bracket, $1,500,000 to $2,000,000, the effective rate thus computed declines to 37%. If it be argued that there are very few such people, the answer is that there were, at an arithmetical minimum, over 9,600 taxpayers in the $100,000 to $150,000 income bracket in 1951 (i.e., there would have been more than this unless each of them had, in fact, reported the maximum adjusted gross income of $150,000).

Further on the income tax side, we have the well-publicized list of generally available loopholes for the high-bracket income taxpayer, e.g., tax exempt municipal bond interest, percentage depletion on mineral deposits, a capital gains maximum rate of 25%, the income tax revaluation of property at death under Int. Rev. Code of 1954, § 1014, etc. And we also have the special interest loopholes, of which Int. Rev. Code of 1954, § 1240, the so-called "Louis B. Mayer amendment," is perhaps the most dramatic recent example. For a discussion of § 1240, see Cary, Pressure Groups and the Revenue Code: A Requiem in Honor of the Departing Uniformity of the Tax Law, 68 Harv. L. Rev. 745, 747-48 (1955). For a current discussion of the special interest problem, citing much of the literature, see Surrey, The Congress and the Tax Lobbyist—How Special Tax Provisions Get Enacted, 70 Harv. L. Rev. 1145 (1957).

On the estate and gift tax side, there is also plenty of evidence that substantial transmission of wealth is not precluded by our transfer taxes. See Eisenstein, The Rise and Decline of the Estate Tax, Federal Tax Policy for Economic Growth and Stability: Papers Submitted by Panelists Appearing Before the Subcommittee on Tax Policy, Joint Committee on the Economic Report, 84th Cong., 1st Sess. 819 (1956); Casner, Property Disposition Under the Federal Estate and Gift Taxes, id. at 847; Harriss, Economic Effects of Estate and Gift Taxation, id. at 855; Bittker, Recommendations for Revision of Federal Estate and Gift Taxes, id. at 864; DeWind, The Approaching Crisis in Federal Estate and Gift Taxation, 38 Calif. L. Rev. 79 (1950). Eisenstein, op. cit. supra at 840, points out that, since enactment of the marital deduction, the effective tax rate on a taxable estate of $1,000,000 has declined from 27.0% to 23.3%. 
must be vastly qualified for the reason that "whether in England or America, nearly all future interests are, or may become, future interests in a trust fund, which may be invested and reinvested." Thus the existence of future interests is most unlikely to withdraw specific property from commerce and render it unproductive. True, Professor Simes would still invest the rule with a broad purpose, that of fostering control of wealth by the living rather than the dead. But how much broader is this interest than that of the testator's successors, who would prefer to succeed to his property outright? The interest of the general populace would seem decidedly peripheral.

Specifically, Professor Simes points out that the modern future interest in a fund, while not rendering property unproductive, results in commitment of wealth to conservative capital investments rather than consumption. Conceding this, it is difficult to convert the point into a broad perpetuities rationale. After all, within the rule, such commitment may be secured for a century, more or less, and there is no apparent reason to suppose that distribution day will tie in with the investment and consumption needs of our economy. And even on distribution day, what will occur? The recipients may purchase consumers goods, or buy uranium stock, but they also may continue with the same sort of investments, or, insofar as the rule is concerned, forthwith re-constitute the trust for a succeeding century. Moreover, there seem to be no reliable statistics on the total wealth held in private trusts in the United States, to say nothing

30. Id. at 723.
31. A choice to which our current transfer tax structure lends some encouragement via the tax free life estate, with or without a special power of appointment. See pages 49-50 infra.
32. So says Mr. Mills, President of the Trust Division of the American Bankers Association. Mills, Meeting the Challenge of Expanding Trust Fields, 96 Trusts & Estates 213 (March 1957), who further states that, "The Committee on Statistics appointed in the Trust Division is working on methods to collect and compile industry-wide statistics about personal trusts." The accounting problems here are formidable. Many trust institutions apparently inventory both real estate and securities at market value at the date of acquisition. Hence the resulting book values suffer from all of the infirmities of balance sheet fixed asset valuations. Then there is the matter of appraising real property holdings accurately for survey purposes.

The most helpful statistics known to this writer are contained in the Third National Trust Income Survey, reported in 35 Trust Bull. 2 (Feb. 1956). This survey dealt with the income produced by inter vivos and testamentary private trusts, including insurance trusts, held by 30% (862) of the member institutions of the Trust Division of the American Bankers Association. Apparently, this association counts virtually all corporate fiduciaries who engage in private trust business among its members. The survey showed 13,911 trusts producing annual incomes of $10,000 to $25,000, the
of multi-generation private trusts. So the significance of this source of institutional investment as compared with, for example, investments of life insurance companies, is a matter of conjecture. Besides, assuming the rather unsettled case against institutional investment, as such, if freeing funds for consumption and long-shot investments is the objective, we have a much sharper tool in the federal income and transfer tax structure. To free funds for consumption, we can reduce income and transfer tax rates in the lower brackets at the expense of higher bracket taxpayers. And to encourage long-shot investments, we can encourage speculative industrial development with specific tax subsidies, if the present capital gains possibilities are insufficient.

On balance, the rule emerges as class law for those in our society who possess substantial means, and their families or other chosen beneficiaries. Thus far, it has only incidental relevance to the general public. Such a conclusion does not, of course, establish the irrelevance of the rule. There is still the matter of adjusting the prerogatives of the testator, and his successors. But the conclusion does invite attention to the relatively generous restraints which Anglo-American law has placed upon freedom of testation.

However, before conceding so much, let us turn again to the tax question. Is Professor Simes right in saying "undue concentration of average income being $15,418, and 7,172 trusts producing annual incomes in excess of $25,000, the average in this instance not being included. Upon inquiry to the Trust Division, the writer was advised that this average figure was not available for publication. Since the burden of the statistics published was to establish that corporate fiduciaries serve people of ordinary means, rather than those of wealth, there was clear incentive to minimize the role of the larger trusts. Hence, it may well be that this average figure was not published because it was a good deal larger than $25,000.

34. See Broehl, Are Institutions "Controlling" Business?, 95 Trusts & Estates 64 (Jan. 1956), arguing that the business acumen of institutional investors can be of value in determining questions of business policy. There is also the familiar point that future technological advance is more likely to be the result of the massive research program of established industry than has been true in the past; to the extent that this is so, continued investment emphasis on this class of enterprise is justifiable. On the other hand, there is a good deal of sentiment favoring the conclusion that there is a shortage of true risk capital, an item which the corporate fiduciary is, prima facie, ill qualified to supply. See Hoover, Capital Accumulation and Progress, 40 Am. Econ. Rev. 124, 134 (vol. 2 1950).
35. After all, the investor who participates in organizing and financing a successful corporate enterprise can sell out later at capital gain rates, though there are obvious problems in the minority interest position and in marketing closely held corporate shares.
tion of wealth is an evil which can best be combatted by tax legislation, rather than by perpetuity rules. 37

Certainly it is true that the rule against perpetuities cannot insure a reduction in the size of family fortunes. The rule can serve no further function in this regard than to insure that, if an estate plan guards a lineal line of fools, some fool will ultimately be empowered to squander the family fortune. Indeed if, instead, the lineal line is laden with financial genius, the plan might be the retarding instrument and the rule the accessory to further accumulations of wealth.

But it by no means follows that the length of the perpetuities period has no bearing upon tax avoidance, in the United States, at the present time. Under our federal estate tax statutes, no tax is levied upon the termination of a life estate, unless it has been retained by the decedent. 38 And the taxation of property passing under a special power of appointment, other than one retained by the donor, is narrowly confined. 39 So our transfer taxes are not ordinarily levied upon the termination of a beneficiary's interest


38. The propriety of closing this "loophole" has been discussed of late, following a Treasury Study, calling attention to the tax avoidance possibilities of successive tax-free estates. See Surrey, An Introduction to Revision of the Federal Estate and Gift Taxes, 38 Calif. L. Rev. 1, 18-27 (1950); Rudick, What Alternative to the Estate and Gift Taxes?, 38 Calif. L. Rev. 150, 155, 167-82 (1950). The Montana inheritance tax statutes contained a rather puzzling provision subjecting the interest of the successor to a life tenant to taxation upon the termination of such life estate. Mont. Rev. Codes Ann. § 91-4434 (1947). This provision was repealed by the legislature in 1955. Mont. Rev. Codes Ann. § 91-4434 (Supp. 1957).

unless he possessed not only the right to enjoy the property during his lifetime, but also relatively unrestricted control over its disposition, and, in long-term settlement, such control need only be given to the ultimate remainderman. This being so, it is clear that the permissible duration of a series of life estates, accompanied by non-taxable powers, is most relevant to the bite of our transfer taxes — and thus to the redistribution of wealth which they are able to achieve.

The real strength of Professor Simes' position lies in the fact that a perpetuities period which is short enough for tax purposes is clearly too short for other purposes. Whether the proper function of the transfer tax system be redistribution of wealth, or the exaction of needed revenue, simple fairness points to equal tax burdens for estates of equal size, irrespective of the chosen form of disposition. On this tack, it is unfair that an estate which is passed from generation to generation by outright testamentary disposition should bear a heavier tax burden than a second, managed and conserved with equal skill, which passes in trust, each successive generation being limited to income interests. But a tax-conscious rule

40. Except, of course, to the extent that it is important to qualify a transfer to a surviving spouse for the marital deduction, Int. Rev. Code of 1954, § 2056, or to so qualify an inter vivos gift to a spouse, Int. Rev. Code of 1954, § 2523.

41. Why, for example, should a testator, whose very nice wife is both devoid of skill in business matters and fondly indulgent of sons too young to be judged as businessmen, be denied the privilege of preserving his estate in trust so that the wife, and the sons if necessary, may be provided for while saving something for succeeding generations? Prima facie, this is a reasonable arrangement on the facts and ought to be permissible. Where is the public interest in mismanagement of this testator's estate? Conversely, why should such a testator's family be accorded transfer tax advantages because the wife is, and the sons may be, less able to manage financial affairs than the family of another testator whose family situation makes outright bequests advisable? Prima facie, they ought not to be.


43. Their primary historic function, in the view of Mr. Eisenstein. Eisenstein, The Rise and Decline of the Estate Tax, id. at 819, 820-31.

44. It is quite possible, of course, to argue that there are differences. Focusing on the life tenant, his interest is much less than full ownership (e.g., unless he has some power of appointment over corpus, he has no power of disposition) and the balance of ownership is elsewhere (e.g., in a vested remainderman who does have the power to dispose of corpus). Arguendo, therefore, it is unfair to treat the life tenant as full owner for transfer tax purposes. Moreover, suppose the remainderman predeceases the life tenant. Do we include the value of his interest in his taxable estate? (Apparently the English Estate Duty would apply on these facts. Finance Act, 1894, 57 & 58 Vict., c. 30, § 2(1)(a). The tax would be measured by the market value of the interest. Finance Act, 1894, 57 & 58 Vict., c. 30, §§ 7(5),
against perpetuities, designed to avoid this problem, would preclude the creation of successive estates (either vested or contingent) beyond the point of provision for a surviving spouse. And such a rule would be cruelly harsh in its application to the testator who, because of the youth, business inexperience or financial ineptness of some members of his family, has need of the law of successive estates in preparing a sensible estate plan.

All this points persuasively to a transfer tax structure which remains apart from the private law of perpetuities, and vice versa. (If it also implies my personal preference—an end to the transfer tax free status of successive estates—I hastily acknowledge that this latter question, besides being technically most complex, is wholly severable.) I also acknowledge that, without a doubt, the

\[7(6)\]. If so, then upon the subsequent death of the life tenant, will the full value of the property be includible in the life tenant's estate? (This seems to be the English solution, under their Estate Duty. Finance Act, 1894, 57 & 58 Vict., c. 30, §§ 2(1)(b), 7(7)). But the effect of this solution is to cause the life tenant and remainderman to bear heavier transfer tax burdens than would have resulted had an outright gift been made to the life tenant, and had the life tenant survived the remainderman. Of course, the same can be said of our own federal estate tax, as respects a retained life estate with remainder. Int. Rev. Code of 1954 §§ 2031, 2036. ... ... ...

And then there are always the problems of avoidance by sheer technical skill. For example, it seems that the English, although they levy estate duty on termination of a life estate by death, do not do so upon such termination of a contingent income interest in a discretionary trust. Lord Advocate v. Muir's Trustees 21 Ann. Tax Cas. 204 (1942), 15 Halsbury, Laws of England, Estate Duty 11 n.(e) (3d ed. 1956). See Morris and Leach, The Rule Against Perpetuities 17 (1956).

In other words, the problem of establishing precise transfer tax equality between outright ownership, passed from generation to generation, and a series of successive estates may well be insuperable. For further discussion, see Surrey, An Introduction to Revision of the Federal Estate and Gift Taxes, 38 Calif. L. Rev. 1 (1950); Rudick, What Alternative to the Estate and Gift Taxes?, id. at 150. So our question may well be whether it is fairer to impose some transfer tax penalty (to be minimized as much as possible) upon the multi-generation estate plan, as compared with a series of outright transfers, or to accord such an estate plan substantial transfer tax preferences, as at present, I would vote for the change.

45. As to technical complexity, see notes 44, 38 supra. As to severability, the point is obvious. One need not agree that the transfer tax free status of successive estates should be brought to an end; it is sufficient to agree that if this change is to be made, it is unwise to achieve it by a drastic shortening of the perpetuities period which would virtually prohibit the creation of future estates.

To nail down the undesirability of such a course, beyond its effect of denying the use of future interests to those who need them, we might look at practicalities. Limiting transfer tax avoidance by restrictive changes in the law of perpetuities presents the problem of ramming perpetuities legislation of unprecedented rigor through the legislatures of every state, with the possible exception of Louisiana. Moreover, every victory would render enactment in the remaining states more difficult because of the incentive of the latter to attract migrant wealth by relatively liberal perpetuity rules.
best way to relieve transfer tax questions from involvement with the law of future interests is to abolish transfer taxes.\textsuperscript{46}

Thus, at the policy level, the case for Professor Simes' conclusion is a strong one indeed. True, the case falls short of establishing the literal irrelevance of perpetuities to taxes. Since, at present, the period of perpetuities is tied to the period of permissible transfer tax avoidance, it will be prudent to consider the tax consequences of a change to wait-and-see. But since the period of contingency at common law, in the hands of a careful draftsman, is something like a century, we should be surprised to find in the wait-and-see doctrine a broad avenue to tax avoidance. The barn is well emptied, under the common law rule.\textsuperscript{47}

In summation, it proves impossible to tie the law of perpetuities to transfer tax policy either. It must, therefore, be conceded that the rule is class law, the central function of which is to aid the testator's family in prying the ancestral fortune from custodianship, after an appropriate interval. On a broader plane, it may reflect some community feeling that gloomy appraisals of one's progeny can be carried too far. However, no vital public interest appears to be at stake. Now what has been established? This much at least: In passing on issues of perpetuities policy, we are substantially concerned with the interest of the testator and his family (or other chosen beneficiaries). Accordingly, in passing on such issues, we should focus attention on these parties. We need not be greatly concerned about the commonweal. Thus, the wait-and-see doctrine is

\textsuperscript{46} This point is stated with impressive force by Professor Oliver. "The interstitial nature of federal law, generally recognized by the Supreme Court as being based on the technical inability in specific statutory treatment of a federal question to define the content of all the legal terms and concepts involved, has been recognized with respect to even so comprehensive a body of legislative and administrative codification as that represented by the I.R.C. and the Regulations. While Justice Brandeis' statement in \textit{Erie v. Tompkins} that there was no federal common law has not stood uncontradicted by later opinions coming from the Supreme Court, there is still, even in the tax field (as distinguished from some others, such as the 'federal law merchant') very little that could be called a federal common-law-of-property-for-tax-purposes-only. Yet it is precisely in the field of property law, broadly defined to include the basic temporal-quantitative concept of estates, the various 'Rules of Property,' and the essentials of trusts and future interests, that dis-uniform or deviant state jurisprudence is at a minimum." Oliver, \textit{The Nature of the Compulsive Effect of State Law in Federal Tax Proceedings}, 41 Calif. L. Rev. 638, 655-56 (1954).

\textsuperscript{47} Thus, insofar as taxes are concerned, the warning of Professor Leach, that the failure of some states to liberalize the common law rule is likely to result in a shifting of wealth to jurisdictions which have seen the light, seems ill-founded. See Leach, \textit{Perpetuities in Perspective: Ending the Rule's Reign of Terror}, 65 Harv. L. Rev. 721, 730 (1952).
entitled to whatever presumption there may be in favor of freedom of testation.\footnote{Professor Simes concludes that, in England, no substantial restraints on freedom of testation in favor of the family were imposed for over a century prior to the 1938 enactment of the relatively mild Family Provisions Act, 1 & 2 Geo. VI, c. 45 (1938). Simes, Public Policy and the Dead Hand 7, 10-12. He also concludes that, in the United States, more extensive restrictions (dower, statutory dower, rights of election, community rights, family allowance and homestead) have been imposed. \textit{Id.} at 12-20.}

2. Failure to Wait-and-See

As we have observed, the case against the common law requirement of mathematical certainty of vesting is really the case for the wait-and-see doctrine, and vice versa.\footnote{See p. 45 \textit{supra}. This follows, of course, from the antithetical premises of the two. See p. 43 \textit{supra}.} Happily, therefore, the entire controversy may be neatly subsumed within two affirmative cases, the case for wait-and-see and the case for the common law test of possibilities. The pros include the cons.

\begin{itemize}
\item a. The case for wait-and-see
\end{itemize}

Obviously, the net effect of determining validity on the basis of actual events is to validate some interests which violate the common law rule. This follows from the fact that a determination of validity on the basis of possibilities necessarily ignores probabilities, though the latter are, obviously, more likely to occur in fact. By the same token, the contingent interests which are saved by looking to actual events are likely to be those which \textit{probably} would vest within lives in being and twenty-one years, but \textit{might} not.\footnote{This is not necessarily true, of course, in any particular case. Sometimes, the improbable possibility turns out to be the event.} The first argument for the wait-and-see doctrine is derived from these truisms.

\textit{Wait-and-see penalizes the intentional violator}

Under an actual events test, violations are more likely to occur in the case of remote interests which are created deliberately. Anyone who is interested in passing his accumulation of the world's goods through a number of succeeding generations must, to effectuate his purpose, respect the laws of probabilities and create contingent interests which will in fact vest. Since he must plan prospectively, he will doubtless include contingencies which are both likely and unlikely to occur, but the core of his plan must be the likely ones. Furthermore, this sort of person is likely to consult an experienced estate planner, who can, barring a succession of untimely
deaths, preserve contingencies about a century by the judicious use of a savings clause with well-chosen measuring lives.51

On the other hand, a truly unlikely possibility of remoteness can creep into a much less elongated plan of disposition, and is really more likely to creep in undetected simply because the draftsman does not have a long-term plan in mind.

It can be said in reply that matters of motive are peripheral at best. The ultimate question is whether actual events or possibilities is the better criterion of validity, all things considered. But one cannot consider all things simultaneously, and it is surely of some importance that the actual events criterion aims much more specifically at the deliberate violator than does the common law rule.

Of course, this argument assumes that the actual duration of contingent interests is of ultimate relevance, and that possibilities of remoteness are only relevant insofar as they point to actual remoteness. It is in this sense only that the longer-term settlement, which does not violate the letter of the rule, violates its spirit, while the shorter term settlement can be defended as a mere technical transgressor. But the relevance point is the next and central argument for wait-and-see.

Wait-and-see is more relevant

Prima facie, the point of superior relevance is easily made. No rule of law should turn on flights of fancy, and the common law rule does—at least sometimes. The strongest imaginable case for determining validity ab initio is still no case at all for considering possibilities which are non-existent or fantastically remote. And, on this, there is no denying the guilt of the common law rule. The Leach collection of unborn widows, fertile octogenarians and kindred curios would drown dissent in laughter.52

51. The draftsman is advised, in the American Law of Property, to select "a dozen or so healthy babies from families noted for longevity." American Law of Property § 24.7 (Leach and Tudor eds. 1952). For specimen perpetuities savings clauses, into which such a selection might conveniently be inserted, see Stephenson, Drafting Wills and Trust Agreements Dispositive Provisions 387-88 (1953). It is true that such clauses, if used as boilerplate, may do more harm than good. Shattuck and Farr, An Estate Planner's Handbook 290-91 (2d ed. 1953). But this is true of any standard clause. Tailored to the case at hand, such a clause offers the substantial advantage of continuing the duration of contingent interests in a long-term trust well beyond the lives of the testator's beneficiaries who were in being at his death. In substance, this device permits the draftsman to approach the creation of contingent interests for a period in gross measured by the lifespan of the survivor of a group, some member of which is likely to live well past three-score-and-ten.

A minor weakness of this case is that its best illustrations prove too much. The most outrageous cases (those of truly impossible possibilities) cannot establish the superior relevance of actualities to possibilities because they are irrelevant to both. The apparent remedy for these is merely to look at the facts ab initio; it is unnecessary to wait-and-see.54

Seemingly, the case suffers little from this loss. It is certainly possible that son John, aged 55, happily married and possessed of several adult children, will ultimately be survived by a spouse as yet unborn. Still, the proposition that a remainder to John's children who survive his "wife" should be invalid under the common law rule because of the possibility of the event is adequately asinine to make the relevance point with emphasis. But here, the trouble is that, as a matter of common law, a present-day court might well avoid invalidity by construction.55 Indeed, this is a present-day possibility in the case of any contingency so remote as to have been, presumptively at least, beyond the contemplation of the testator.56

53. E.g., the possibility that a woman past the menopause will bear a child. A recent sample is Honeywell Estate, 70 Pa. D. & C. 472 (Orphans Ct. 1950) involving a 62 year old woman who had undergone surgery which insured that she would not bear children.

54. This is the statutory remedy recommended by the Law Reform Committee for impossible possibilities of parenthood. Law Reform Committee, Fourth Report, Cmd. No. 18, at 9 (1956).

55. See Batchelor Estate, 67 Pa. D. & C. 310 (Orphans Ct. 1949) in which the court reasoned that the reference in the will to spouses of then-married children should be construed to mean those persons who were spouses at the execution of the will, thus avoiding the unborn widow problem.

56. See Bryson v. Connecticut General Life Ins. Co., 196 S.W.2d 532, 542-43 (Tex. Civ. App. 1946), where the court avoided the problem of after-borns by holding that the grantor and his wife (aged 57 and 46 respectively at the date of the transfers in question and the parents of nine children at that time) did not intend to include their own after-born children because they did not expect to have more children. For later chapters in this involved litigation, see Bryson v. Connecticut General Life Ins. Co., 211 S.W.2d 304 (Tex. Civ. App. 1949), rev'd, 148 Tex. 86, 148 Tex. 86, 219 S.W.2d 799 (1949). In Stanton v. Stanton, 140 Conn. 504, 101 A.2d 789 (1953), the court held "descendants" to mean descendants who were living when the will in question became operative, thus avoiding the conclusion that a private trust had been intended to endure throughout the duration of the lineal line of testator's parents. In Bankers Trust Co. v. Pearson, 140 Conn. 332, 99 A.2d 224 (1953), the court concluded that testator had intended to limit bequests to the heirs or appointees of the children of his brother and sisters to heirs or appointees of children who were living at testator's death, though the parties apparently had stipulated the belief of the testator that his brother and sisters could not have more children.

Arguendo, the constructional escape is approaching a routine matter in cases of administrative contingencies. See Cambron v. Pottinger, 301 Ky. 768, 193 S.W.2d 412 (1946); Stanton v. Stanton, 140 Conn. 504, 101 A.2d 789 (1953); Emerson v. Campbell, 84 A.2d 148 (Del. Ch. 1915); In re Swingle's Estate, 178 Kan. 529, 289 P.2d 778 (1955); Braun v. Central Trust Co., 104 N.E.2d 480 (Ohio C.P. 1951), aff'd, 92 Ohio App. 110, 109 N.E.2d 476 (1952) (an interesting case because it was argued that a power to select
Moreover, both the impossible cases and the very unlikely ones are specific enough to invite remedial legislation that is equally specific as Professor Simes has suggested. Some of the current recommendations of the Law Reform Committee are of this character. Indeed, as existing remedial legislation suggests, it is even possible to go further and revise some specific types without regard to likelihood of contingencies on the premise that the testator would prefer the revision to invalidity.

Of course, these judicial and statutory departures from the rigor of the common law rule have been used to argue that the common law's reliance on possibilities is demonstrably breaking down. But the counter to this is clear enough: the assertion that this same evidence shows instead and in like degree the adequacy of limited judicial and legislative remedies. Moreover, the assertion gains strength from the fact that the Leach collection, though of extraordinary quality, is a relatively homogeneous one and from the further fact that any specific silly case can be dealt with by these limited means. So, abruptly, the relevance issue becomes more

assets which would qualify for the marital deduction trust under a formula clause was so worded as to make the creation of the trust contingent upon the executor's exercise of the power). Cf. Brownell v. Edmunds, 209 F.2d 349 (4th Cir. 1953).

See generally 6 American Law of Property § 24.7 (Leach and Tudor eds. 1952).


58. See the Committee's recommendation regarding possibilities of after-borns, Law Reform Committee, Fourth Report, Cmd. No. 18, at 15 (1956). The Committee also recommends specific statutory remedies for unborn spouses, id. at 15, and class gifts which are valid only as to some members of the class, id. at 14.


61. As to the extent of constructional escape, see note 56 supra. Professor Leach has avoided this trap, carefully arguing for judicial change where possible, but conceding that, in many states, stare decisis makes legislative change necessary. See, e.g., Morris and Leach, The Rule Against Perpetuities 29-35 (1956) ; Leach, Perpetuities in Perspective: Ending the Rule's Reign of Terror, 65 Harv.-L. Rev. 721, 745-49 (1952).

62. In his renowned article, Perpetuities in a Nutshell, Professor Leach helps to make this point, stating: "Mistakes of this sort are readily classifiable into frequently recurring types." 51 Harv. L. Rev. 638, 643 (1938). He then lists the "fertile octogenarian" cases, the "unborn widow" case, and the "administration contingency" cases. Id. at 643-45. Fourteen years later, when
pointed. It is not possibilities versus actual events, but real possibilities versus actual events.

Again, prima facie, this point is easily made. The common law rule turns on possibilities of contingency, continued beyond lives in being and twenty-one years, which lead to overly attenuated estate plans. This, then, is the apparent evil at which the rule strikes. But this is an actual evil, which is dealt with specifically, and completely, by a test of actual remoteness. Thus viewed, a possibilities test is not silly because it turns on silly possibilities. It is silly because it turns on possibilities in the first place — when the evil aimed at is the actual event.

We are down, then, to the rule's objective. If it is to limit the duration of future estates and nothing more, a possibilities test is demonstrably absurd, and preoccupation with the cases of silly possibilities is mere treatment of symptoms while ignoring the disease as Messrs. Leach and Morris suggest. However, if the rule is properly concerned with possibilities of remoteness as such, and not merely as indicia of actual remoteness, we have a more difficult question. At this point, the essentials of the case for possibilities presenting his case against the common rule, Professor Leach can go no further than to re-name his "administration contingency" category "The Case of the Magic Gravel Pit," and to add the "Precocious Toddler" to the "Fertile Octogenarians." Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 Harv. L. Rev. 721, 731 (1952). In addition, the problem of dealing with age contingencies in excess of twenty-one has been solved by legislation in several jurisdictions. See note 59 supra. In fact, the problem of unlikely procreation has been dealt with in a specific recommendation for statutory change by the Law Reform Committee. Law Reform Committee, *Fourth Report*, Cmd. No. 18, at 9, 15 (1956). However, Illinois and Kentucky have enacted statutory provisions designed to deal with this problem. Ill. Rev. Stat. c. 30, § 153(a) (1955); Ky. Rev. Stat. Ann. § 381220 (Baldwin Supp. 1957). For a brief discussion of these provisions, see 55 Mich. L. Rev. 1040 (1957).

It may be noted that the Massachusetts statute, which was sponsored by Professor Leach and subsequently enacted in Maine and Connecticut (note 59 supra), does nothing to draw the teeth of the common law rule in administrative contingency cases unless the happening of the contingency is "limited to take effect at or after the termination of one or more life estates in, or lives of, persons in being." Mass. Ann. Laws c. 184A, § 1 (1955). Indeed, Professor Leach borrowed a specific statutory solution for the problem of age contingencies in excess of twenty-one for his Massachusetts legislation. See note 59 supra. And the Law Reform Committee's report adds another specific recommendation for legislation to uphold class gifts valid only as to some members of the class. Law Reform Committee, *Fourth Report*, Cmd. No. 18, at 14 (1956). This recommendation accepts an earlier Leach objection to the common law doctrine. See Leach, *The Rule Against Perpetuities and Gifts to Classes*, 51 Harv. L. Rev. 1329 (1938). 63. Leach and Morris, Book Review, 54 Mich. L. Rev. 580, 581-2 (1956).
have become clear—the case must be a relevance case; here lies the pivotal issue.

Miscellany

There are other arguments for wait-and-see. Some of these turn out, upon inspection, to be points already made. Some are spurious. Some have merit:

a. Intricacy — A much-damned feature of the common law rule, resulting from the possibilities test, is the sheer intricacy of its doctrine. But it is difficult to make much of this alone. Our twentieth century legal system is rife with broader areas which are at least equally intricate, and consequently harass the general practitioner and his client far more than the rule against perpetuities, e.g., income and transfer taxation. Moreover, the rule exists to curb the wishes of the testators to whom it applies. This means that intricacy can be justified if necessary to the objectives of the rule, which returns us to the central question: the relevance of possibilities versus actual events to those objectives.

b. Partiality — A conspicuous feature of the common law rule, already noted, is the ease with which it can be violated unwittingly. Conversely, as we have seen, a draftsman who is wise in the ways of the rule can not only stay within permitted bounds, but manipulate those bounds to a considerable degree. It can be argued, therefore, that the rule puts a premium upon specialization and discriminates unfairly against the general practitioner and his client. But this is the other side of the point, already made, that the actual events test aims more specifically at the deliberate violator. Therefore, it adds nothing to the case and is, like the earlier point, subordinate to the central question of relevance. If possibilities are sufficiently relevant, it is proper to turn validity on possibilities, even to the detriment of the good faith transgressor. Moreover, both points are weakened by the availability of both flexible construction and specific remedial legislation to deal with specific traps for the unwary.

64. In this connection, the comment of John Chipman Gray is worth recalling: "That I have done all my own sums correctly, I do not venture to hope. There is something in the subject which seems to facilitate error.... A long list might be formed of the demonstrable blunders with regard to its questions made by eminent men...." Gray, the Rule Against Perpetuities xi (4th ed. 1942). For some damning, see Leach, Perpetuities in Perspective: Ending the Rule’s Reign of Terror, 65 Harv. L. Rev. 721, 722-23 (1952).
65. See p. 53 supra.
66. Ibid.
67. See p. 54 supra.
68. See pp. 55-57 supra.
c. Superior consistency—This is a tempting argument for a wait-and-see advocate. It combats the pervasive notion that the common law rule, though intricate, is a symmetrical structure of shining logical which should not be marred by tinkering. And, arguendo, it is a necessary argument in view of Professor Leach's prior, and highly quotable, portrayal of the rule as a Gibraltar of certainty in a changing world. 69

Like most arguments, this one rests on an assertion. The assertion is that, by construction and by doctrine as well, the common law rule has been moving away from an absolute possibilities test and toward a criterion of actual events. The argument is, of course, that in the interest of consistency, we should stop flip-flopping between possibilities and actualities and settle on the latter. But, in the eyes of those to whom consistency is King, this is an argument which backfires with a vengeance.

First, conceding the assertion, the case is self-defeating. To make the argument, it is necessary to damn the common law rule for avoiding the sillier results of the possibilities test. 70 This places an advocate of wait-and-see on both sides of the matter. (Furthermore, if he presses the consistency point it leaves him on the wrong side, and will cost votes elsewhere.)

Second, the assertion is foredoomed to linger as an argument, for inconsistency cannot be demonstrated at the doctrinal level. 71

69. Quoted in note 25 supra.


71. Mr. Tudor made an effort in this direction. Tudor, Absolute Certainty of Vesting Under the Rule Against Perpetuities—A Self-Discredited Relic, 34 B.U.L. Rev. 129 (1954). But this effort serves far better to illustrate the weakness of his point than to establish it. To review briefly:

(a) Mr. Tudor asserts (at pp. 136-37) that the sub-class or Caitlin v. Brown, 11 Hare 372, 68 Eng. Rep. 1319 (Ch. 1853), exception to the doctrine of Jee v. Audley, (1 Cox 324, 29 Eng. Rep. 1186 (Ch. 1787), and Leake v. Robinson, 2 Mer. 363, 35 Eng. Rep. 979 (Ch. 1817), is inconsistent with the major premise of the latter cases that a class gift is invalid unless it is valid as to all members of the class. But of course the sub-class rule is not inconsistent with that premise. As a matter of doctrine, each sub-class is a separate class for purposes of the class gift rule. Moreover, there is a substantial economic difference between a group of sub-classes and a single larger class, namely that (perpetuities aside) the shares of the individual members of each sub-class are de-
Inconsistency exists, if at all, at the level of construction, which means, inevitably, that the whole issue is entwined with the various presumptions favoring validity,\(^7^2\) mired in the details of the instru-

\(^{6}\) American Law of Property § 24.29 (Leach and Tudor eds. 1952); Restatement, Property § 389, comment a (1944). Of course, it may be most difficult, on the specific language of a particular instrument, to draw the distinction; maybe a judge in a perpetuities case will tend to draw the distinction so as to favor validity; maybe he won't. Whether he will or not is irrelevant to doctrinal inconsistency.

(b) The argument is made (34 B.U.L. Rev. at 137-35) that the application of the rule to powers (wherein standard doctrine permits the court to consider events occurring between the creation and exercise of a power in determining whether the appointment is valid) is inconsistent with the possibilities test. But Professor Simes has given the obvious and conclusive answer to this contention. Interests created by the exercise of a power are created when the power is exercised. Simes, The Policy Against Perpetuities, 103 U. Pa. L. Rev. 707, 728 (1955). In order to combat this point, an inconsistency advocate must reply that, in theory the donor of the power is the conveyor. But this merely proves that the perpetuities doctrine was developed by people who were sensible enough not to swallow the general powers theory whole when to do so would lead to silly consequences; it has nothing to do with internal inconsistency of the perpetuities doctrine itself. What have the rules which measure the period of the rule from the creation of a special or (commonly) general testamentary power, while measuring from the exercise of a general power presently exercisable, to do with the rules regarding facts to be taken into account in passing on the validity of appointments.

(d) Finally, the point is made (34 B.U.L. Rev. at 138-40) that the common law rule regarding the splitting of contingencies is inconsistent with Mr. Tudor's "second rationale" for the possibilities test, i.e., "that the heir should not be kept out of his inheritance on mere possibilities." (Id. at 139.) But of course, this rationale, if taken literally, is inconsistent with the existence of contingent future interests at all, since any contingency makes the right of the testator's heirs dependent upon future events. Thus, Mr. Tudor says in substance that the rule permitting a testator to split a contingency is inconsistent with the view that contingent future interests should not be permitted. This is true, but such a view of contingent interests is foreign to the common law rule. In fact, Mr. Tudor does not put the matter quite so baldly. He points out instead that at common law a most unlikely contingency, which the testator has split and which is certain to vest if at all within the period of the rule, can defer determination of ultimate ownership in contravention of the interests of heirs. (Id. at 139.) At this point, he has established that a testator who was fond of creating awkward situations but wholly disinterested in an effective disposition of his property, could, within the rule, bequeath his estate to his youngest cross-eyed lineal descendant in being when Hell freezes over, if Hell freezes over within twenty-one years after the death of the survivor of two-dozen named healthy babies. Perhaps this is true, or perhaps such a testator would be held to have died intestate for want of testamentary capacity. It is not, however, too difficult to explain this omission in the common law rule.

\(^7^2\) Mr. Tudor recognizes this, of course. See Tudor, Absolute Certainty of Vesting Under the Rule Against Perpetuities—A Self-Discredited Relic, 34 B.U.L. Rev. 129, 140-43 (1954). But he attempts to equate the existence
ment before the court and lost in the fog surrounding judicial stimulus and response.

Third, there is the matter of comparisons. While wait-and-see as originally enacted in Pennsylvania,73 borrowed in the 1957 Vermont legislation,74 and recommended by the Law Reform Committee,75 is true to actualities themselves, the doctrine in this form has been widely criticized as rendering the eligible measuring lives, and consequently the period of the rule, uncertain.76 Perhaps this matter can be dealt with through technical amendment,77 but no such amendment has been enacted in those states or recommended by the Committee. Instead, the remedy which has been devised is that employed in the Massachusetts,78 Maine79 and Connecticut80 statutes. As modified in the statutes of these states, the wait-and-see doctrine does not wait and see at all unless the duration of contingent interests is measured by life estates in or lives of persons in being at their creation. (Which restrictions effectively limit actu-

of the presumption with judicial dissatisfaction with the possibilities test, stating that the usual justification in terms of a presumption that the testator intended to make a valid gift is pretty thin. Id. at 141. Specifically, he objects that, after all, the testator knows little about the intricacies of the law of perpetuities. Ibid. Well, so what? How many clients wish to make invalid testamentary dispositions? Is there any reason for ignoring this generalized testatorial desire to achieve a valid disposition? As Professor Simes puts it:

If the testator knew of the rule against perpetuities, it is only fair to assume that he intended the meaning which would avoid its application. And, even if he may not have known about it, the presumption that he intended a valid and not a void disposition, and that he did not intend to die intestate as to any of his property, should lead us to take the construction which is valid under the rule. Simes and Smith, The Law of Future Interests 228 (2d ed. 1956).

It will be noted that Professor Simes' statement combines the presumption favoring validity under the rule with the presumption against intestacy, which, of course, will also find application in supporting validity in the typical perpetuities case. Moreover, there is also the well-known presumption favoring early vesting, which reinforces the other two in many perpetuities cases. 6 American Law of Property § 24.19 (Leach and Tudor eds. 1952). An examination of the current cases in which construction is more or less strained to achieve validity under the rule will reveal indiscriminate appeal to any or all of these presumptions. See cases cited note 56 supra. It is true that the results of these cases strongly suggest judicial refusal to adhere to the test of possibilities, as to administrative contingency cases in particular. Ibid. But there is very little in the language used by the courts to demonstrate deliberate avoidance of the possibilities test via construction.

76. See pp. 42-43 supra.
77. See note 96 infra for a discussion of possible statutory approaches.
alities to certain possibilities, besides leaving some of Professor Leach's horror cases untouched.) Moreover, this modified doctrine waits only until those lives terminate to become an old fashioned possibilities test. Surely any inconsistency within the common law rule is well out of focus at this point.

Finally, we have already examined, and found wanting, an alternative argument based on this same assertion—the argument that common law departures from the possibilities test show generalized dissatisfaction with the test itself. In this latter context the assertion may be conceded and effectively countered with the argument that the same evidence proves, instead and in like degree, the capacity of the common law rule, as is, to effect any needed reforms. And, a wait-and-see advocate's best refuge from this last point is a return to the issue of relevance.

All this at least implies the futility of the assertion itself, and the wisdom (from the viewpoint of the wait-and-see advocate) of sticking with the issue of relevance.

d. Pre-emption—The wait-and-see doctrine has been in the arena for only a decade. It is supported by legislation in five states which offer three different versions. Beyond this, it is supported by a recent English Committee Report, in a fourth version. This means that in current popularity it stands a poor third behind the common law rule and the various versions of the New York statutory rule. On these facts, to proclaim victory for wait-and-see is to invite unwelcome comparisons, e.g., May 1 baseball standings.

81. See pp. 56-58 supra.
82. Ibid.
83. See p. 54 supra.
84. All of these statutes embrace the principle of considering actual events subsequent to the creation of the interest in deciding the issue of validity. However, the Massachussets, Maine and Connecticut statutes restrict this principle to interests limited to take effect at or after the termination of life estates in or lives of persons in being. See discussion at p. 61 supra. For statutory references, see notes 78-80 supra. The Pennsylvania statute does not so limit the principle and hence permits actual events occurring throughout the perpetuities period to be considered. See discussion at p. 61 supra. For the language of the Pennsylvania statute, see p. 42 supra. Arguendo, the Vermont statute, while it embraces the Pennsylvania form of wait-and-see, is a third version because the wait-and-see language is coupled with enactment of a cy pres rule to deal with invalid interests. It can be argued, however, that the cy pres portion of the Vermont statute relates to the separable problem of the disposition of property in the event of invalidity. For the Vermont provision, and some discussion, see note 23 supra.
85. The Law Reform Committee's recommendations contemplate a considerably more detailed statutory structure than has been enacted in any of the United States. Law Reform Committee, Fourth Report, Cmd. No. 18 (1956). For a brief discussion of the Committee's recommendations, see Leach, Perpetuities Reform by Legislation: England, 70 Harv. L. Rev. 1411 (1957).
86. The Restatement of Property lists 32 states which followed the common law rule without substantial modification as of January 1, 1944. Resta-
Nevertheless, there is a point of substance here. It is pretty clear that some revisions of the common law rule are in order, and surely the fewer rules against perpetuities we have among the several states, the better. One rule is enough of a task to master, and estate plans of these days often cross state lines. Accordingly, notwithstanding its limited acceptance and unwelcome differences of detail, the wait-and-see doctrine rates a clear preference over alternative remedies which are only equally promising.

In summary

At bottom, the case for wait-and-see is largely a relevance case, resting on a single assumption. The assumption is that the evil at which the common law rule strikes flows from actual remoteness, that the purposes of the rule can be achieved by preventing contingent interests from remaining contingent too long.

If the assumption is correct, or substantially correct, a possibilities test cannot be justified, for it is merely a clumsy method of preventing the actual event. Moreover, it is a method which (a) tends to punish small transgressions in the innocent with lesser deterrent effect on the well-advised testator who aims deliberately at a family settlement of maximum duration, and (b) is unneces-

ment, Property, Introductory Note at 2133-35 (1944). Since that date, Indiana, Michigan and Wyoming have restored the common law rule by statute. See Comment, 48 Mich. L. Rev. 1158 (1950). As of January 1, 1944, 13 states followed various versions of the New York statutory rule against suspension of the absolute power of alienation. Restatement, Property, Introductory Note at 2135-36 (1944). Two of these were Indiana and Michigan, previously referred to as having restored the common law rule. In addition, California and North Dakota have revised their statutes in the direction of the common law rule. Cal. Civ. Code § 715.1 (Deering Supp. 1955) (discussed in Fraser and Sammis, The California Rules Against Restraints on Alienation, Suspension of the Absolute Power of Alienation, and Perpetuities, 4 Hastings L.J. 101 (1953)); N.D. Rev. Code §47-0227 (Supp. 1953). As previously noted, five former common law jurisdictions have now shifted to the wait-and-see doctrine. See pp. 41-42 supra. The net result of all this is that 30 states adhere substantially to the common law rule, 11 states (including California and North Dakota) have varying forms of the New York rule and 5 states have wait-and-see.

87. Professor Simes, the most consistent critic of wait-and-see, is flatly committed to legislative revision of the common law rule. In his words: "It is, I think, obvious that nothing short of legislative action can adapt the Rule to the requirements of modern society." Simes, Public Policy and the Dead Hand 71 (1955).

88. Having struggled with the Montana mutation of the New York statutory rule, I feel somewhat qualified to insist that this area of the law of property, being simultaneously intricate and litigated with relative infrequency in the reported cases of many states, is one in which uniformity is highly desirable. For the tragi-comedy of this struggle, see Waterbury, Montana Perpetuities Legislation—A Plea for Reform, 16 Montana L. Rev. 17 (1955).

89. See notes 84, 85 supra.
sarily intricate. Finally, the wait-and-see doctrine has received sufficient legislative acceptance to merit top billing as a prospective remedy, if the relevance point be conceded. We turn now to the case for possibilities.

b. The case for possibilities

As we have observed, the case for possibilities must be a relevance case. The required assertion is, "While it is true that possibilities are relevant to the actual event, and that, in this respect, actualities are obviously more relevant, the test of possibilities has relevance for other reasons, viz: . . ."

What are the reasons? Professor Leach says that he does not recall seeing any. Professor Simes says, "It is of the essence of the Rule against Perpetuities that we must be certain whether an interest is valid or void. . . . There is a social policy involved in determining the validity of an interest at an early date; and the Rule against Perpetuities is grounded on that policy." But why is it of the essence of the rule that validity be determined at the outset? What is the social policy served thereby? It has been argued that the possibilities test restricts the perpetuities period.

Possibilities limit the perpetuities period

Professor Simes made this point some time ago, observing that the possibilities test forced selection of measuring lives at the creation of the interest, thus preventing the use of hindsight to select long-lived individuals.

The Massachusetts legislation has solved the technical problem of selecting measuring lives under wait-and-see by resorting to delayed selection on a possibilities basis, the selection being made as of the termination of lives which, under the terms of the instrument, must terminate before vesting can occur. But it is not clear that this solution avoids the selection of measuring lives with the substantial benefit of hindsight. The Pennsylvania statute does not attempt a solution to this problem.

93. See pp. 61-62 supra.
94. Under the Massachusetts statute, in cases in which no savings clause has been employed, a measuring life which could not satisfy the common law possibilities test at the creation of the challenged interest may satisfy it on the basis of facts occurring during the continuance of life estates. Professor Leach makes this clear with his illustration of the operation of Section 1 of the statute as applied to an unborn widow case. Leach, An Act Modify-
However, conceding the existence of this weakness in the Pennsylvania legislation, and the possibility of its existence in Massachusetts, Maine and Connecticut, there is a broader answer.

It is true that, at common law, the possibilities test serves two functions. As a criterion for the selection of measuring lives, it serves to establish the period of the rule. And as a criterion of compliance, it serves to determine validity under the period thus established. But it does not follow that an actual events test must be similarly relied upon to do double duty.

If the actual events test is relied upon to select measuring lives, the logical result is the nonsense of which Professor Simes complains—any life which was in fact in being at the creation of the interest may be used to establish the period of the rule. But given an actual events test of compliance, the period of the rule may be established by any means thought appropriate. Thus, for example, it may be coupled with a narrowed selection of measuring lives so as to yield a rule which limits the duration of estate plans much more

ing and Clarifying the Rule Against Perpetuities, 39 Mass. L.Q. 15, 17-18 (1954). This being so, what would be the result in Massachusetts if a trustee were given power to select new measuring lives at any time prior to the termination of such life estates? Obviously, there is a strong case for the conclusion that such action by the trustee is merely another "fact" to be given due recognition in passing on the validity of the interest when the life estates have terminated. Cf. the common law savings clause employed in Zweig v. Zweig, 275 S.W.2d 201, 202 (Tex. Civ. App. 1955): "Said trustees and their successors in trust shall hold and administer such fund from the time when same comes into their hands and until twenty-one (21) years after the death of the last of the trustees named, at which time the trustees then acting, may, if they elect to do so, and can legally do so, extend the time of such trust for a period of time within their discretion."

The savings clause involved in the Zweig case is "different," but does the difference merit a distinction? The trustee's power is aimed specifically at elongating the estate plan, while, presumably the husband in Professor Leach's illustration did not avoid taking an unborn second wife in order to comply with the rule. But can such a distinction be drawn in the face of long-continued judicial approval of savings clauses prepared ab initio, the function of which is also to elongate the permitted period?

Of course, the common law's restrictions on measuring lives do not add up to a requirement of actual relevance to the testator's family situation. The requirement of the possibilities test is merely that of a causal connection between termination of the lives and vesting, or failure, of contingent interests (the required causal connection being that an interest must be certain to vest, if at all, not later than twenty-one years after the lives terminate). This causal connection may be supplied naturally, as in a gift to A for life, remainder to A's surviving children. Or it may be supplied artificially, as with a savings clause which provides for vesting, at the latest, twenty-one years after the termination of specified lives in being. In this latter case, the only limitation on the use of unrelated lives is the generous restraint imposed by the requirement of a workable maximum number. Restatement, Property § 374 (1944). Cf. the English Royal Lives clauses, discussed in Law Reform Committee, Fourth Report, Cmd. No. 18, at 6-7 (1956).

severely than the common law rule, e.g., a wait-and-see rule under which the permitted period is limited to the life of the transferor's spouse (if any) and twenty-one years. Or, in contrast, it may be coupled with a more liberal selection of measuring lives than at common law so as to sanction estate plans even more elongated than the century-long arrangements which are possible at common law. 96

96. The difficult problem is to achieve a method of selecting measuring lives which will yield approximately the same maximum period as the common law rule (conceding that the common law rule is not notably restrictive in this respect, see note 94 supra, second paragraph). Arguendo, the Massachusetts method devised by Professor Leach will still permit selection with the benefit of hindsight, if the draftsman has the forethought to include a power of selection in his instrument in the first instance. See note 94 supra, first paragraph. (Though it would seem quite feasible to plug this possible loophole in Massachusetts with a specific statutory prohibition.) Moreover, the Massachusetts statute is a long way from an unrestricted wait-and-see doctrine a la Pennsylvania. See p. 61 supra. However, Professor Leach's effort places him well in the van of those who have considered the problem. Cf. Comment, 48 Mich. L. Rev. 1158, 1167-69 (1950). Though his only advice to Pennsylvania is the helpful suggestion that the matter be left to the courts. See note 16 supra.

As a plausible approach to the Pennsylvania problem, I proffer the following:

(1) In applying the rule against perpetuities to any contingent interest subject to said rule, the period of said rule may be measured by any measuring lives whose continuance have a cause in fact relationship to the vesting or failure of said contingent interest.

(2) In the preceding sentence, the term "measuring lives" means one or more human lives in being when the period of said rule commences to run and whose continuance had said cause in fact relationship to the vesting or failure of said contingent interest at that time, provided, however, that if said human lives are so numerous or so situated that evidence of their continuance or termination is likely to be unreasonably difficult to obtain, none of said human lives may be measuring lives.

The thought behind this provision is obvious enough: The common law method of selecting measuring lives requires a particular cause in fact relationship of the lives to vesting, i.e., a relationship which insures vesting or failure of the interest within twenty-one years after termination of the lives. In the above statute, an effort is made to broaden this requirement to one of a cause in fact relationship, and at the same time to avoid the problem of selection with the benefit of hindsight by the requirement that only lives having some cause in fact relationship to the continuance or termination of the challenged interest when the period of the rule commences can qualify.

To elaborate with a couple of examples. Suppose a testamentary gift to the children of A (a living person) who graduate from Reed College. We select measuring lives at the outset. They are: (1) A (assuming that he may have more children) because the maximum membership of the class cannot be determined as long as A can add more members. (2) Any living children of A. (If A's living children have graduated from Reed, their lives increase the likelihood of vesting, or decrease the likelihood of failure, and hence qualify on either count. What about children of A who are in being but have not yet graduated from Reed? Their lives increase the likelihood of vesting or decrease the likelihood of failure, also. Hence they qualify.) (3) A's present spouse, if any (as a co-source, with A, of additional members of the class). But not an after-acquired spouse because the required relationship would not have existed at the commencement of the perpetuities period.

Suppose the same case, but an instrument containing a savings clause which provides that, if the gift has not sooner vested, it shall vest in those
In other words, the adoption of wait-and-see in no way pre-
judges the conflict between those who favor a more restrictive 
rule than the common law rule and those who favor a more liberal 
one. On the contrary, this step merely serves to remove the aura of 
inherent severity supplied by the possibilities test, and to separate 
the question of duration from the question of compliance. Prima 
facie, this is a turn of events which both simplifies and clarifies the 
former issue, and, accordingly, merits the support of those on both 
sides of the duration question.

Possibilities are necessary to predictability

It is worth recalling at this point that our case for an actualities 
test rested at the point of demonstrating the superior relevance of 
actual events to the actual duration of contingent interests. We 
raised, and reserved, the ultimate question: to what extent are the 
objectives of the rule served by limiting actual duration? The reason 
for recalling this is that in the predictability argument we have a 
similarly self-evident case for the possibilities test.

Who will deny the superior relevance of the possibilities test to 
a prediction of actual duration? Indeed, the prima facie case here 
is even stronger. Possibilities are at least relevant to actual dura-
tion, but the events which determine actual duration come too late 
to aid in a prediction of duration. Therefore, if an accurate predic-
tion of validity is vital to the objectives of the rule, an actual events 
test is palpably defective, for it will be necessary, in this event, to 
determine validity before contingencies have happened anyway—
and, if so, there is little merit in delaying adjudication.97

children of A who have so graduated at the death of the survivor of 
TUVWXY and Z (seven unrelated persons in being)? Here, notwithstanding 
their lack of family relationship, TUVWXY and Z are permissible 
measuring lives because the draftsman has established a cause in fact rela-
tionship between the continuance of their lives and vesting or failure of the 
gift to A's children.

It may be objected that the proposed statute, as drawn, ignores the fact 
that the common law rule applies to class gifts which are vested subject to 
open (over the heart-felt disapproval of Professor Leach). Leach, The Rule 
Against Perpetuities and Gifts to Classes, 51 Harv. L. Rev. 1329 (1938). 
Touche! But I would avoid this objection by advocating the proposal of the 
Law Reform Committee, validating such gifts in favor of those members of 
the class whose interests have vested. See p. 100 infra.

97. At this point, however, it is relevant to notice the common law 
doctrine of Pennsylvania and Massachusetts, declining to pass upon the ques-
tion of validity during the existence of concededly valid prior estates. E.g., 
In re Quigley's Estate, 329 Pa. 281, 193 Atl. 85 (1938); B.M.C. Durfee 
Trust Co. v. Taylor, 325 Mass. 201, 89 N.E.2d 777 (1950). For the evolu-
tion of this doctrine in Pennsylvania, see Phipps, The Pennsylvania Experi-

In fact, this wait-but-do-not-see doctrine is neither unqualified nor 
widely adhered to. See p. 73 infra. Nor is it an easy one to justify, notwith-
standing Professor Leach's supporting argument that it is important to the
So, without more, let us turn to the ultimate question. Does an actual events test, solely relevant to actual duration, or a possibilities test, essential to a determination of validity before the event, best serve the objectives of the rule? We cannot have the full advantage of both. A choice is necessary.

The central function of the rule is, as we have seen, to arbitrate fairly between the testator and his successors. Our question then becomes: which is the more important to a fair arbitration; a later decision based upon the actual duration of a contingent interest, or an earlier one based upon prediction of its duration?

c. The ultimate question: fairness to interested parties

Of course, for purposes of the question, it is necessary to assume a permitted period of equal duration under either test, and this equality is difficult to achieve as we have seen. But we have also seen that the variance may favor either side. So it may be ignored for present purposes.

Fairness to the testator

It would require some boldness to assert that the testator is disinterested in knowing whether his estate plan will hold water. Of course, the testator, through his draftsman, has control over the terms of the will, and hence he is in a position to achieve compliance with the rule without the necessity of litigation. But in order to be sure of doing so, the draftsman must avoid the possibility of invalidity whether the legal test is possibilities or actualities.

Rights of remaindermen to postpone adjudication of the validity of their interests until they can be represented personally rather than theoretically by guardians ad litem. See p. 70 infra. But it is unnecessary, at this stage of the inquiry, to pass upon the merits of the doctrine. It is sufficient, for present purposes, to note that such a doctrine did develop and that it has respectable judicial support. The mere fact that this is so strongly suggests the absence, in the minds of the appellate judiciary of Pennsylvania and Massachusetts, of vital reasons for determining validity immediately upon the creation of an interest. And this should make us suspect that these reasons are something less than obvious.

98. See p. 52 supra.
99. See note 96 supra.
100. See p. 65 supra.
101. This is not to say that the draftsman must comply with a legal test of possibilities under an actual events rule. But even this latter statement is a good deal closer to the truth than its antithesis—the proposition that adoption of wait-and-see spells an end to preoccupation with what may happen. After all, preoccupation with the latter is the raison d'être of the whole law of future interests. Moreover, on the near side of the shadowy line which separates the unlikely from the absurd, are possibilities which the draftsman under an actual events test must consider in order to serve his client well. Finally, while it is true that a draftsman under an actual events test will be relieved of concern with impossible and absurd possibilities, we have already observed that these can be dealt with sans wait-and-see. See pp. 55-56 supra.
difference is that if the draftsman slips under the latter test, the testator still has the law of probabilities working in his favor, while under the former he does not. Admittedly, under an actualities test there is a correlative advantage to the draftsman; he is likely to be dead before his error can be demonstrated. But query whether this is a meritorious basis for choice?

Further, sometimes in the case of an inter vivos plan, the transferor finds himself on the side of invalidity, and in such a case he does need access to the courts, though, perhaps, it is no major function of the rule to relieve inter vivos transferors of ill-considered transfers. Moreover, an actual events test might interfere with reformation sought by the transferor to avoid violations of the rule.

What stands out thus far, however, is the limited advantage to the transferor of an actual events test. This criterion will not relieve him or his draftsman of concern for possibilities, for to be certain of validity under a test of actual events, it is necessary to exhaust possibilities. And if his estate plan is an inter vivos one, he may regret the switch to wait-and-see. The substantial advantage is derived from the enlistment of the law of probabilities in favor of validity, and some of this advantage can be attained by eliminating impossible and improbable contingencies through specific legislation. Let us turn, then, to the effect of an actual events tests on those who claim an interest in the testator’s property.

Fairness to those beneficially interested

When we come to those beneficially interested in the testator’s property, the question of advantage becomes more refined. In every case, there will be two such groups. One group will favor validity because the testator has dealt with its members more favorably than does the law of descent and distribution or the testator’s residuary

102. See Olmsted Estate, 65 Pa. D. & C. 451 (Orphans Ct. 1947), where the settlor of an inter vivos trust sought to regain corpus, relying in part upon violations of the rule.

103. See McPherson v. First & Citizens Nat. Bank, 240 N.C. 1, 81 S.E.2d 386 (1954). Actually, at the creation of this trust in 1944, the settlor appears to have been 44 years of age and his wife 39. At that time, their youngest child was but two years old. Prima facie, therefore, there was a real possibility of after-born children at the inception of the instrument (which, in fact, provided for that possibility). Moreover, there was a virtual certainty (confirmed prior to the 1953 litigation date) of after-born grandchildren. On these facts, the North Carolina courts permitted reformation, relying on invalidity under the rule to justify the alteration of the rights of grandchildren and great-grandchildren under the reformed instrument. Query whether this solution would have been available under an actual events tests?

104. See p. 56 supra.
clause. The other group will stand to gain by invalidity through an intestate or residuary distribution. More specifically, the effect of the possibilities test is to benefit the testator's immediate heirs or residuary beneficiaries or their successors at the expense of the later generations whom the testator has selected. Is this a rational discrimination?

Certainly it is not in the opinion of Professor Leach. But his argument is that later generations are inadequately represented under the possibilities test. And this argument is not only an inconclusive one on the merits, but it invites most unfavorable comparisons. Under an actual events test coupled with a perpetuities period extending beyond lives in being, who will represent the interest of the testator's immediate heirs or residuary beneficiaries? Or do we say that, having found Peace with their Maker, they have no need of representation? This last is a Christian thought—is it

105. Of course, these two groups may be identical in fact.
107. First, the Leach argument is that it is important to the rights of remaindermen to postpone adjudication of their interests until they are known persons who can be represented personally rather than by a guardian ad litem. But the horror cases in this area to which he refers the reader do not involve this problem. In both the case of Baylies v. Hamilton, 36 App. Div. 133, 55 N.Y. Supp. 390 (1st Dept. 1899) to which he refers, and the case from his practice (as he describes it) the difficulty was a plain error by counsel for the guardian ad litem of a flesh and blood minor. It is at least relevant, at this point, to reply that there is nothing in the Massachusetts wait-and-see doctrine which will insure that the remainderman, when life estates or lives in being have terminated, will be an independent adult of sufficient wisdom to select counsel wise in the ways of perpetuities.

Second, query whether the problem of adequate representation for these unborn and unascertained persons is a crucial one where the issue is validity under the rule against perpetuities? In a perpetuities case, where the issue of validity is litigated prior to distribution, there will normally be a trustee involved. And the trustee is almost sure to be with the testator, and the remaindermen, on the side of validity. For one thing, the typical trustee of a long-term trust is a professional fiduciary who cannot attract new business by exhibiting indifference to the wishes of the testators currently being served. For another, the trustee is likely to be somewhat committed to the validity of the instrument by virtue of a judicious (and entirely proper) examination of its provisions by the trustee's counsel or legal department prior to acceptance of the trust. Indeed, since this examination is not infrequently contemporaneous with the preparation of the instrument, it may well be difficult, as a practical matter, for the trustee to acquiesce in a subsequent charge of invalidity without accepting some responsibility for the result.

Finally, if the attack on the trust raises the possibility of hastening its termination, the trustee has an obvious financial incentive to resist. For a recent sample of prolonged fiduciary devotion under such circumstances, see Altemeier v. Harris, 335 Ill. App. 130, 81 N.E.2d 22 (1948), aff'd, 403 Ill. 345, 86 N.E.2d 229 (1949).

Of course, it is common enough to see a perpetuities issue raised in a trustee's petition for instructions. But query as to the number of cases in which the impetus for the petition (if it was filed prior to the trustee's final accounting) was the unprompted curiosity of the trustee?
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an adequate answer? We have arrived, at last, at the heart of the controversy.

If these immediate successors of the testator have a substantial interest, it is certainly fair that they should be permitted to litigate the perpetuities question. And this permission is necessarily denied by an actual events test which postpones the question throughout lives in being. The Massachusetts concession to possibilities is of no advantage here.

The obvious argument for the testator's immediate successors is that they are entitled to litigate the perpetuities question because they are the closest relatives of the testator and therefore have a substantial interest in the disposition of his property. A possibilities test confers any invalid interests upon these closest relatives. By contrast, under an actual events test, the ultimate recipients are sure to be the uncertain successors of these relatives, probably unknown to the testator and certainly having a lesser claim upon his bounty. In fact, a survey of current cases strengthens this argument.108

Thus, the argument just made would be effectively answered if it were the fact that most perpetuities cases do not arise until the termination of prior life estates, for, if such were the case, it would follow that the typical perpetuities plaintiff would not be an immediate successor of the testator. But a survey of current decisions indicates that a substantial majority of such perpetuities cases are brought before the courts during the existence of the life estates.109

108. See notes 109, 110 infra.

109. This survey covered about 100 cases, decided under the common law rule since 1945. These cases all involved a perpetuities problem in the context of a family estate plan, and cases involving immediate gifts for debatably charitable purposes were excluded. Of these cases, 77 were clearly cases involving life estates or the equivalent, and it was possible to determine from the facts given when the case had risen in relation to termination of those life estates. Most of the balance of the 100 cases were discarded because they involved trusts for a period in gross.

My survey showed 47 cases as being litigated prior to the termination of these life estates. They were:


Kentucky—Maher v. Maher, 139 F. Supp. 294 (E.D.Ky. 1956); Thomas
v. Utterback, 269 S.W.2d 251 (Ky. 1954); First Nat. Bank & Trust Co. of Lexington v. Purcell, 244 S.W.2d 458 (Ky. 1951); Taylor v. Dooley, 297 S.W.2d 905 (Ky. 1957).


Missouri—Thomson v. Union Nat Bank in Kansas City, 291 S.W.2d 178 (Mo. 1955); Potter v. Winter, 280 S.W.2d 27 (Mo. 1955).


Ohio—Cleveland Trust Company v. McQuade, 72 Ohio L. Abs. 120, 133 N.E.2d 664 (1955).


The 30 cases in which perpetuities litigation arose after the termination of prior life estates or lives were the following:


Florida—Cartinhour v. Houser, 66 So.2d 686 (Fla. 1953); Adams v. Vidal, 60 So.2d 545 (Fla. 1952).


Kentucky—Letcher's Trustee v. Letcher, 302 Ky. 448, 194 S.W.2d 984 (1946).


Pennsylvania—In re Throm's Estate, 378 Pa. 163, 106 A.2d 815 (1954);
a substantial number of them shortly following the testator's death.\textsuperscript{110}

Again, commencing with more guarded language,\textsuperscript{111} wait-and-see advocates have moved to the assertion that "it is standard judicial practice for a court to refuse to pass upon a perpetuities issue as to a remainder until the life estates have terminated and the trustee is called upon to make distribution."\textsuperscript{112} Obviously, if it were well settled that a perpetuities plaintiff could not present a justiciable perpetuities issue during the continuance of life estates, it would be the height of folly to fret about the litigation rights of immediate heirs of the testator. As a practical matter, they would have such rights only if by accident they were to survive the life tenants. And of course, if they \textit{were} the life tenants, they would have no such rights at all. It seems, however, that the practicalities are quite otherwise. A survey of current common law decisions indicates that, commonly, our courts do accept and decide such perpetuities cases during the continuance of such life estates.\textsuperscript{113}


\textit{Tennessee—Crockett v. Scott}, 284 S.W.2d 289 (Tenn. 1955); \textit{McCord v. Ransom}, 185 Tenn. 677, 207 S.W.2d 581 (1948).


Also, there are cases in which an inter vivos settlor seeks to raise the issue before his death. \textit{McPherson v. First & Citizens Nat. Bank}, 240 N.C. 1, 81 S.E.2d 386 (1954); \textit{Olmsted Estate}, 65 Pa. D. & C. 451 (Orphans Ct. 1947).

\textit{111. It is standard practice in some states to refuse to pass upon the validity of a remainder until prior estates have terminated.} Leach, \textit{Perpetuities in Perspective: Ending the Rule's Reign of Terror}, 65 Harv. L. Rev. 721, 729 n.11 (1952).


\textit{113. Thus all of the cases cited in the second paragraph of note 109, supra, were cases in which plaintiff sought an adjudication despite the existence of prior estates. In one, \textit{Stuart v. Stuart}, 33 Del. Ch. 501, 106 A.2d 771 (1953), plaintiff successfully extinguished the life estates on a theory of merger. In the remainder, the life estates were not invalidated. And only in the \textit{Durfee} case in Massachusetts and the \textit{Laucks} case in Pennsylvania did}
find current cases to the contrary only in Pennsylvania and Massachusetts, and a number of lower court decisions in Pennsylvania which calmly ignore the problem and adjudicate the issue. Moreover, an examination of the Pennsylvania and Massachusetts cases leaves one with the strong suspicion that they do not stand for any flat rule of prohibition, but rather represent applications of a discretionary rule which permits these courts to refuse adjudication, absent a showing of current need for adjudication.

The court decline to pass upon the perpetuities issue. Indeed, in the latter case, the court did consider the perpetuities question to the extent of determining that the plaintiff was not entitled to present distribution on a theory of infectious invalidity. True, in only one of the remainder, American Trust Co. v. Williamson, 228 N.C. 458, 46 S.E.2d 104 (1948), did the court consider the question of timeliness, but we are speaking of judicial practice. In this latter case, the court blandly disregarded the trial court's reservations on timeliness and then rendered a highly debatable decision on the merits. For a substantial collection of earlier cases see Annot., 174 A.L.R. 880 (1948). This note deals with the general question of whether declaratory or advisory relief regarding future interests will be granted, but a number of the cases discussed are perpetuities cases. The latter reveal substantial variations in result from case to case, depending on the facts.

114. In re Laucks' Estate, 358 Pa. 369, 57 A.2d 855 (1948). And in this case the court carefully considered the issue of whether prior life estates were terminable under the doctrine of infectious invalidity, an inquiry not open under the Pennsylvania wait-and-see doctrine.

115. B.M.C. Durfee Trust Co. v. Taylor, 325 Mass. 201, 89 N.E.2d 777 (1950). The opinion cited two earlier Massachusetts cases, neither of which had anything to do with perpetuities questions, but which involved the discretionary question of whether the plaintiff had made a showing entitling him to present equitable relief. Thus viewed, the Durfee case falls far short of laying down a flat rule to the effect that perpetuities plaintiffs have no such interest during the continuance of prior estates. Moreover, the court acted by way of affirmance of the Probate Judge's decree, and the Judge's findings of fact were not contested on appeal.


117. For a discussion of the Durfee case in Massachusetts, see note supra. For Massachusetts applications of the discretionary rule, see National Shawmut Bank of Boston v. Morey, 320 Mass. 492, 70 N.E.2d 316 (1946). In this connection, although the Massachusetts court does not cite the Morey case in Durfee, it is of interest that the Morey case does cite Hill v. Moors, 224 Mass. 163, 112 N.E. 641 (1916), one of the two Massachusetts cases cited by the same court in Durfee as authority for its position.

As to the Pennsylvania doctrine, in addition to the lower court decisions discussed in note supra, it may be noted that the Pennsylvania Supreme Court quite evidently will permit inquiry during the continuance of prior estates in infectious invalidity cases. See In re Laucks' Estate, 358 Pa. 369, 57 A.2d 855 (1948), which carefully considers the infectious invalidity issue before holding the perpetuities question otherwise premature. It will also be observed that, in Laucks', the Pennsylvania court was moved to answer plaintiff's claim of present interest in determining title to realty on the merits, pointing out that he in fact had no such interest, and by no means indicating
In this event, even the Massachusetts and Pennsylvania cases represent only applications (and, arguendo, hyper-applications in some cases\(^\text{118}\)) of a well-recognized doctrine of equitable origin under which some perpetuities plaintiffs have sometimes been tossed out of court in other states, and sometimes have not.\(^\text{119}\) And if such is the case, it is not difficult to produce some plausible cases in which there is a need for such adjudication, if our starting point is the assumption that validity is to be judged by a possibilities test so that the testator's immediate heirs do have "rights" immediately upon his death.\(^\text{120}\)

Thus, the claim of immediate successors to litigation rights will not down on facts or procedure. It must be met on the merits. And on the merits there is an impressive answer, resting on the rationale of the perpetuities period. A rule which measures the permissible duration of future estates in lives, necessarily concedes the testator's right to deny full ownership to his immediate successors, without ignoring them altogether.\(^\text{121}\) Moreover, there is appealing common sense in such a rule. These are people whom the testator knows personally.

He is in a good position to judge them, both as potential beneficiaries and as potential property managers. If he concludes that they are unworthy of his property, or incompetent to manage it, that the claim, if substantiated on the facts, would have been disregarded. Moreover, in the recent case of \textit{In re Taylor's Estate}, 384 Pa. 550, 121 A.2d 119 (1956), the Pennsylvania Supreme Court decided an issue of construction regarding a remainder interest of a minor income beneficiary before it was necessary to decide the question since he was clearly entitled only to income during minority. And the court relied on perpetuities consequences in justifying the construction which it adopted.

\(^\text{118}\) See \textit{McCreary's Estate v. Pitts}, 354 Pa. 347, 47 A.2d 235 (1946), in which the Pennsylvania Supreme Court, in passing upon the validity of a trust as to \(\frac{1}{2}\) of a testatrix's residuary estate, declined to pass upon the validity of corresponding provisions of a trust as to the other \(\frac{1}{2}\), notwithstanding the fact that, in prior litigation involving these trusts, the court regarded them as sufficiently identical to combine the two in describing their provisions. See \textit{In re McCready's Estate}, 328 Pa. 513, 196 Atl. 25 (1938). If, in fact, the provisions of these two trusts were identical, it is difficult to see the justification for postponing a determination as to the latter.

\(^\text{119}\) For a substantial collection of earlier cases from various states, including Pennsylvania, see Annot., 174 A.L.R. 880 (1948).

\(^\text{120}\) For example, where an inter vivos settlor seeks to terminate a trust, or where the rights of creditors are involved. See the recent lower court decisions in Pennsylvania in which the perpetuities question has been adjudicated notwithstanding the existence of life estates, note 116 \textit{supra}. Note also the care with which the Pennsylvania Supreme Court handled the plaintiff's assertion of a real property title issue in \textit{In re Laucks' Estate}, 358 Pa. 369, 57 A.2d 855 (1948) (last paragraph of the court's opinion). And, in the case of the inter-vivos settlor whose draftsman has erred, there is also the reformation problem. See note 103 \textit{supra}.

\(^\text{121}\) For that matter, is not the entire structure of future estates so premised, as to both inter vivos and testamentary transfers?
there is more reason for respecting his opinion as to them than as to future generations. And if he goes beyond the rule in creating contingent future estates, it is difficult to see how this fact increases the likelihood that he was wrong about his heirs.122 Thus, a persuasive answer to the point that an actual events test distributes the testator’s bounty among remote generations is that the testator did not want his immediate heirs to have control of his property, and that, as to them, there is good reason for respecting his judgment.

True, an actual events test leaves us with the related problem of disposing of invalid interests at the end of a generation or two with minimum violence to the testator’s over-all plan. If the testator’s plan of disposition has excluded some of his heirs or treated some of them less generously than others, the effect of invalidity may well be to benefit successors of those whom the testator has chosen to slight. There is something to be said for the Pennsylvania statute which attempts to avoid this result, as many draftsmen of savings clauses have avoided it, by providing for ultimate distribution to those entitled to income at the end of the perpetuities period.123 Another way to avoid it is to employ the more discriminating device of cy pres.124 But the possibility that an actual

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122. To argue that the foundation of the possibilities test is the thought that an excessively attenuated estate plan proves the unreasonableness of the testator’s judgment regarding his immediate kindred, in the face of the fact that that test demonstrably discriminates against the unwitting violator (see p. 53 supra), is surely to press notions of presumptive cause and effect well past the point of reason.

   (a) Valid interests following void interests. A valid interest following a void interest in income shall be accelerated to the termination date of the last preceding valid interest.
   (b) Void interests on condition subsequent or special limitation. A void interest following a valid interest on condition subsequent or special limitation shall vest in the owner of such valid interest.

124. A statute which seems to embody this thought has recently been enacted by the Vermont legislature. See note 23 supra.
events test might distort the testator's plan cannot make a case for the common law test of possibilities for the apparent reason that results under the common law rule are not notably respectful of the desires of the testator.

Nevertheless, the actual events test is a strong remedy. It effectively disfranchises those kindred of the testator who have the strongest natural claims to his bounty from any litigation of perpetuities questions. In fairness, all arguments in their favor should be considered.

Broadly, the case for the testator's heirs rests on the proposition that there ought not to be rights without remedies. But some prima facie arguments for the possibilities test do not even reach this point. These find inherent merit in an adjudication of invalidity.

Thus it can be argued that under an actual events test, actual invalidity can go unpunished. Under such a test, when the measuring lives have terminated, it is quite possible that distribution day will have arrived and the then-representatives of the testator's heirs or residuary beneficiaries will be the testator's chosen remaindermen. If so, they will not care to litigate any perpetuities issue with themselves, and presumably it will never be litigated. But on such facts there is no reason why the issue should be litigated. The real question is whether immediate successors should have been permitted to litigate it earlier.

Another similar argument is the proposition that an actual events test hampers enforcement of the rule against perpetuities. This argument can be supported by impressive statistical evidence, previously referred to, in that a majority of perpetuities cases arise before distribution day at the present time. But the whole argument is premised upon the merit of an adjudication of invalidity and fails to reach the question of whether the rule should be enforced for the benefit of the testator's immediate successors.

Other prima facie arguments for the possibilities test reach the issue of rights without remedies but assume the sufficiency of the former to justify the latter. Professor Simes seems guilty of this when he objects that it is impossible to retain the doctrine of infectious invalidity under an actual events test. His case is stated in terms of the incongruity of declaring life estates void after they

125. For example, suppose that the testator's sole heir is son S, that distribution is to occur 25 years after S's death and is to be made, share and share alike, among the then-surviving children of S who are S's only heirs.
126. See note 109 supra.
have terminated and the problem of whether to postpone any distribution until then. But the broader objective of the infectious invalidity doctrine is to preserve equality of treatment between several lines of descent, equality which the testator has provided for but which is rendered impossible by invalidity of contingent interests under the possibilities test in one or more lines. In other words the objective of the doctrine is to carry out the testator's wishes, not to preserve the rights of his heirs. Viewing the doctrine in this light, it is at least arguable that the adoption of an actual events test will serve the testator's wishes far more effectively by respecting his judgment that his heirs ought not to be given unrestricted ownership of his property. True, this leaves us with the problem of ultimate disposition under an actual events tests, but this problem is also present under the possibilities test; moreover, there are several available solutions.

A similar argument can be made, addressed to alienability. It is not a broad argument, asserting a public interest, but a narrow one, asserting an interest of the testator's heirs in free alienability of the property which they take by inheritance. The argument is, of course, that the existence of non-justiciable perpetuities questions hampers alienability by heirs. And the prima facie appeal of the point can be improved somewhat by substituting the heir's creditors for the heir. The argument is more appealing in the context of legal future interests in land, some of which are still being created as the current decisions demonstrate, but it still has some force in the context of a trust. Again, the argument assumes that these heirs and their creditors are entitled to assert such rights.

128. Id. at 189.
129. Restatement, Property § 402 (1944).
130. See pp. 75-76 supra.
131. Here, reference is to alienability of the interest of the heir, not to alienability of the property itself. In this way, the present argument neatly sidesteps our prior conclusions that present-day future interests do not withdraw property from commerce. Here, the argument is that marketability of the interest would be increased if doubts caused by perpetuities problems could be resolved conclusively.
133. Because, arguendo, the holder of the legal future interest in land is somewhat less likely to hold it subject to valid restraints on his alienation of his interest than is the case with respect to equitable interests in a trust. See 6 American Law of Property §§ 26.88-26.100 (Schnebly ed. 1952). For recent samples, see Maher v. Maher, 139 F.Supp. 294 (E.D.Ky. 1956); Sands v. Fly, 292 S.W.2d 705 (Tenn. 1956).
134. The holder of a legal future interest in land is somewhat less likely to hold it subject to valid restraints on the alienation of his interest than is the case with respect to equitable interests in a trust. See 6 American Law of Property § 26.99 (Schnebly ed. 1952). There is substantial authority sustaining the validity of spendthrift provisions as to an equitable future interest in corpus. Ibid.
In fact, on the merits, there is no plausible case for enforcement of the rule by the testator's immediate successors. This is so for several reasons.

First, these perpetuities plaintiffs gain little for themselves, at a substantially larger cost to testators' estates. All but a handful of perpetuities cases arise in a trust context and involve an executor or trustee. This means expense to the estate, whoever wins. And if the cases of the past decade are any indication, the vast majority of perpetuities plaintiffs lose—on the merits. In fact, on a reading of the reports, it is difficult to escape the conclusion that a good deal of this litigation was virtually foredoomed at the outset. Perhaps some of it is carried on out of sheer pique at the testator's arrangement. If so, it is difficult to see the point in encouraging such efforts. Moreover, when a perpetuities plaintiff wins, he ordinarily winds up with some share in a more or less remote remainder interest, marketable, if at all, at a substantial discount from actuarial value. In fact, if he does market it, this is probably adequate evidence that the testator was right about him all along. True, if he does not market it, he has gained something: the right to dispose of a share of the corpus of the testator's estate even if he does not live long enough to receive distribution. But unless he is the life tenant, it is likely that distribution day will occur on or after the termination of lives which are irrelevant to the successful plaintiff's personal estate plan, which will make it difficult for him to make a useful disposition.

135. In surveying the common law perpetuities cases since 1945, I sought cases involving a substantial perpetuities issue in the context of a private estate plan. I settled on about 100 cases, about three-fourths (77) of which are listed in note 109 supra. Of the latter, 28 involve violations of the rule. Over-all, my impression after culling through several hundred more-or-less perpetuities cases decided since 1945 is that there must be easier ways for an heir to make money. I submit that Professor Leach's lurid titles (Leach, Perpetuities in Perspective: Ending the Rule's Reign of Terror, 65 Harv. L. Rev. 721 (1952); Leach, Perpetuities: Staying the Slaughter of the Innocents, 68 L.Q. Rev. 35 (1952), reflect some poetic license. Insofar as they imply that the cases of invalidity which arise are typically cases in which a slight drafting correction could have avoided the difficulty, I wholeheartedly agree. In only a few cases, e.g., Taylor v. Dooley, 297 S.W.2d 905 (Ark. 1957); Wright v. Renehan, 10 N.J. Super. 363, 76 A.2d 705 (1950), did I find plans which would be likely to violate an actual events test. But the common law rule of which I have been reading is not wrecking wholesale havoc with American estate plans.


137. There are exceptions of course, cases of merger, Stuart v. Stuart, 33 Del. Ch. 501, 106 A.2d 771 (1953), and infectious invalidity, Taylor v. Dooley, 297 S.W.2d 905 (Ark. 1957), but these are conspicuous exceptions. Indeed, in the Taylor case, the successful plaintiff did not receive her share free of trust.
Second, if the testator's immediate successors are to be protected against capricious testamentary acts, it is sheer lunacy to make the common law rule the instrument of protection, for the permitted period at common law exceeds the remaining life span of every heir of the testator! The proponents of this policy should do it the honor of urging means adequate to the end, such as an extension of rights of election against the will. Moreover, the substance of this point will remain so long as we retain a law of future estates. If the permitted period of contingency were reduced to twenty-one years in gross, life estates vesting within that period could easily deny the fruits of possession to the testator's heirs throughout their lives.

Third, there is no discernible reason why a testator's act of violating the rule against remoteness points to increased equity in favor of that unwary testator's heirs. Indeed, since a skilled draftsman can elongate the perpetuities period with considerable success, it is even arguable that a violation is a badge of innocence. But this last is unnecessary to the case. Suffice it to say that there is no apparent reason for discriminating in favor of the heirs of the testator who violates the rule.\textsuperscript{138}

Finally, if a case is to be made for limiting freedom of testation in the interest of heirs, it would be better to have illusory remedies removed so that their plight may be clear. Viewed in this light, the nominally rigorous but practically ineffectual possibilities test is an affirmative obstacle in the path of reform.

To sum up, it is true that the possibilities test is of some benefit to the testator's immediate successors. But the benefit is most insubstantial. Typically, it is not available at all. If it is available, rare cases aside, the benefit is of small cash value and small utility. Further, the benefit is awarded by the possibilities test on a basis which defies equation with the strength of plaintiff's claim upon the testator's bounty. Moreover, the price of the benefit is far too high. In dollar terms, the aggregate benefit to heirs is accompanied by a much larger aggregate loss to testators' estates. And the source of the benefit, the possibilities test, is no more rational in punishing testators than in benefiting heirs. Indeed, as we have seen, that test is more a trap for the innocent than an obstacle to the dynastic testator.

The remaining issue of fairness concerns future generations, and their right, at some point, to be free from the restraint of their ancestors in their enjoyment and disposition of ancestral property. But clearly, an actual events test is better suited to arbitration be-

\textsuperscript{138} See note 122 supra.
tween future generations and the testator than is a test of possibilities, for an actual events test turns on whether the testator did in fact so prolong his estate plan as to unduly restrict future generations in the utilization of his property. By contrast, a test of possibilities prejudges that issue.

At this point we are ready to answer the question of fairness, at least insofar as the testator and his heirs and chosen beneficiaries are concerned. While the possibilities test does not interfere seriously with testatorial prerogative, its abolition in favor of wait-and-see will eliminate a purposeless and technical hazard to the testator's plan. Moreover, the advantage is greatest to the testator who lacks the services of a highly-skilled estate planning specialist. Still further, the advantage is in the area in which the testator's claim to preference makes sense; the wait-and-see doctrine respects his judgment regarding his immediate relatives whom he knows and can evaluate. As to the testator's chosen beneficiaries, of course their interest is identical with his, unless they are also his heirs, so we need not evaluate them separately. As to immediate successors, the possibilities test is a small, expensive, and capricious exception to an overall perpetuities policy which plainly subordinates their claims to freedom of testation. If we are to ignore trivia, and a few uncommon cases, it merely serves as a vehicle for registering ineffectual protest against that overall policy. The possibilities test is, therefore, not even fair to immediate successors, because it gives them no real relief against a capricious testator, and yet maintains some posture of rigor so as to conceal their helplessness. Finally, as to later generations, a test of actual events is superior in fairness, for it postpones adjudication of issues affecting their interest, permitting them to decide whether, and when, to litigate those issues.

Having answered the question of fairness, as between the testator and his successors, we have an answer to the question of relevance, which turns on that of fairness. Since the only substantial function of a possibilities test, which an actual events test cannot serve, is that of permitting immediate successors of the testator to litigate perpetuities questions, and since we have decided that these immediate successors ought not to be permitted to litigate those questions, the issue of relevance resolves itself. As we observed earlier an actual events test is inherently more relevant to what actually happens than is a test of possibilities. And we have just decided that, consistently with fairness to all concerned, it is best to postpone per-

139. See p. 53 supra.
140. See p. 57 supra.
petuities questions until the actual event has occurred. So an actual events test is superior in relevance to a possibilities test because actual events are more relevant than possibilities to achieving a fair balance between the desires of the testator and those of his immediate and remote successors.

We have, then, but one further question. Is retention of the possibilities test of importance because wait-and-see is a tax dodge? Or, in other words, is the possibilities test conspicuously superior in fairness to the Revenue?

Fairness to the revenue

As previously suggested, this question need not detain us long. The answer is no.

Marital deduction qualification aside, the federal estate tax on a testator's estate is not affected by the form of a testamentary transfer. This means that, in the context of testamentary transfers, the actual events test will only reduce taxes to the extent that it affects the tax liability of the testator's successors, and its effect in this area is necessarily quite limited.

In the first place, as we have seen, the rule is not frequently violated even under the possibilities test. Second, as we have observed, the possibilities test is more of a trap for the inadvertent planner of a relatively small estate than for the perpetuities-wise draftsman of the wealthy testator's truly long-term settlement. Both of these facts point to a small revenue loss from the change, and also suggest that the loss to the redistribution policy itself is likely to be minimal. Third, there is no assurance that the estates of the testator's successors, even when augmented by their intestate or residuary shares in invalid interests, will be large enough to yield much transfer tax revenue or require much redistribution.

It is true that the effect of an actual events test may well be to defer determination of validity beyond the date of death of some heir of the testator, so that the value of his share in invalid interests will have to be determined for estate tax purposes before it is known whether there are invalid interests. And it is also true that the uncertainty over invalidity is likely to depress the value of such potential interests in that heir's estate—possibly to zero. But this

141. See p. 53 supra.
142. See p. 79 supra.
143. See pp. 53-54 supra.
144. Commissioner of Internal Revenue v. Cardeza's Estate, 5 T.C. 202 (1945), aff'd, 173 F.2d 19 (3d Cir. 1949). Though this is by no means a certain result, see Lowndes and Kramer, Federal Estate and Gift Taxes, 525 nn. 303, 304 (1956).
advantage is an uncertain one because of the burden of proof on valuation, which rests with the taxpayer.\textsuperscript{145} True, the estate tax attributable to a reversionary interest may be deferred at the executor's election until the termination of prior estates.\textsuperscript{146} And a case might arise in which wait-and-see would delay such termination, by validating some prior estates which would be invalid under a possibilities test. But the election carries with it the multiple obligations of paying interest on the deferred tax, posting bond and notifying the Commissioner when such prior interests in fact do terminate,\textsuperscript{147} so it is difficult to make much of a loophole out of this.

When we turn to inter vivos transfers by the original testator as an alternative to testamentary disposition, the tax advantage of the actual events test is scarcely more apparent. In this context, when Spiegel\textsuperscript{148} was in flower, and property transferred inter vivos was being included in testators' taxable estates on the ground that some reversionary interest was retained, it might have been possible for the estate to eliminate one source of such a reversionary interest—invalidity under the rule—by arguing that the perpetuities question was premature.\textsuperscript{149} However, a much more promising remedy is to be found in the Pennsylvania provision dealing with the effect of invalidity which seeks to avoid reversions in favor of distribution to income beneficiaries at the end of the permitted period.\textsuperscript{150} At present, however, the reversionary interest criterion is pretty well hemmed in by Congressional restrictions, \textit{i.e.}, the five per cent valuation requirement and the conjunctive requirement of a condition of survivorship.\textsuperscript{151} It would seem, therefore, that the utility of the actual events test in minimizing estate taxes on inter vivos transfers is reduced to the uncertain valuation advantage previously discussed. The advantage is a little greater in this context because of the practical certainty of an estate large enough to create the tax problem, but it is still decidedly peripheral.

\textsuperscript{145} Robinette v. Helvering, 318 U.S. 184 (1943). (On the facts, this is a gift tax case, holding that the taxpayer may not deduct from the value of transferred property a reversionary interest not susceptible of actuarial valuation.) Lowndes and Kramer, \textit{op. cit. supra} note 144, at 524.
\textsuperscript{146} Int. Rev. Code of 1954, § 6163(a).
\textsuperscript{147} Int. Rev. Code of 1954, § 6601(b).
\textsuperscript{148} Estate of Spiegel v. Comm'r, 335 U.S. 701 (1949), in which an extremely remote reversionary interest was seized upon to justify inclusion of the corpus of a trust in the donor's estate under Int. Rev. Code of 1939, § 811(c).
\textsuperscript{149} Though query whether the Court which decided the Spiegel case would have been deterred by the prematurity of the perpetuities question?
\textsuperscript{150} For the text of the Pennsylvania provisions, see note 123 \textit{supra}.
\textsuperscript{151} Int. Rev. Code of 1954, § 2037(a).
And if a tax-conscious critic of wait-and-see would take a firm position against whatever minor tax advantages may flow from an actual events test, there are still two forceful avenues of reply. The first stems from our previous conclusion that perpetuities policy and transfer tax policy are properly severable.152 This being so, the critic is exposed to the admonition that he go to Congress with the problem. Moreover, it may be added that if he wishes to spend his time more profitably, from the standpoint of the Revenue, he should lobby instead for an end to the preferred tax status of successive estates.153 The second stems from the obvious fact that the Commissioner's rights are derivative. In fact, a possibilities test does take something from the testator's heirs. Save in rare cases, it is nothing of material importance or value. It is also capriciously awarded. But it is something. So there is sound basis on the merits for the small tax advantage which might flow, for example, from the elimination of an intestate share in invalid interests from some immediate heir's estate.

3. In Summary

The possibilities test stands convicted, then, of failure to wait-and-see. For the predictability which is served by the possibilities test turns out upon inspection to be an ineffectual and irrational instrument for the assertion of rights by heirs and those who stand in their shoes. And while it may be argued that freedom of testation should be less than it is, and the prerogatives of heirs greater than they are, it would be necessary to virtually abolish the law of future estates to protect the latter via the rule against perpetuities. Plainly, this alternative is indefensible, for the law of future estates has a function to perform in protecting the families of some testators against their own limited talents or inexperience. Therefore, we may properly ask that heirs look elsewhere for relief.

We may justifiably conclude at this point that the wait-and-see doctrine is deserving of the acceptance which it has received and that the law of perpetuities will make more sense when that acceptance is universal. But this conclusion, without more, is a minimum reward, which suggests some attention to corollaries, e.g., what light has been shed on the propriety of the common law perpetuities period?

152. See p. 52 supra.
153. Ibid.
II. COROLLARIES

A. THE PERIOD OF THE RULE

Thus far, as we have seen, preoccupation with the central thesis of wait-and-see has tended to relegate the period of the rule to the status of a technical problem, that of securing the advantages of wait-and-see without permitting the selection of measuring lives with the substantial benefit of hindsight.154 Yet the wait-and-see discussion has provoked thoughtful attention to the present-day function of the rule, leading Professor Simes to the conclusion, endorsed by Messrs. Leach and Morris, that the central function of the rule today is to strike "a fair balance between the desires of members of the present generation, and similar desires of succeeding generations, to do what they wish with the property which they enjoy."155

We have just demonstrated that the common law possibilities test is not well suited to this function. What of the common law perpetuities period? To ask is to answer.

Professor Simes entitled his lecture on the rationale of the modern rule: The Policy Against Perpetuities: Dead Hand v. Living Hand.156 But if the proper function of the modern rule is to arbitrate fairly between the dead and the living, the common law perpetuities period with its quasi-actuarial savings clauses may fairly be parodied as a conspiracy of the dead and the unborn against the living. In fact, such a parody is an understatement.

With the aid of such a clause, a capable draftsman can, barring capricious bad luck, secure a period of contingency of a century. He can absolutely guarantee contingency beyond the lives of the testator's lineals in being (including those unborn) at the testator's death. And the common law rule remains grandly aloof from the duration of trusts,157 so he can provide for a full galaxy of vested interests for life and in remainder commencing at the end of this century. Manifestly, the mere existence of such divided ownership is a substantial obstacle to termination of these trusts.158 But beyond

154. See p. 64 supra.
157. Restatement, Property § 378 (1944); 1 Scott, Trust § 62.10 (2d ed. 1956).
158. Even if it becomes settled that spendthrift provisions may not be annexed to such an attenuated plan, the fact that a group of life tenants and remaindermen must agree to assign their interests (and hence agree on a division of proceeds) or agree to petition for termination, 3 Scott, Trusts § 3337.1 (2d ed. 1956), has an undeniably restraining influence on their access to the corpus. On the question of spendthrift restrictions, see note 159 infra.
this it is still unsettled whether spendthrift provisions may be annexed to these vested interests.\textsuperscript{159} Plainly, in the language of our national pastime, the umpire is a "homer," allied with the dead against the living and the unborn.

It is partly for this reason that past objections to wait-and-see as a liberalization of the common law rule have carried so little force, though, as we have seen,\textsuperscript{160} a better answer to that complaint is the severability of wait-and-see from the duration of the perpetuities period. But these two points together afford a powerful reply to the view that adoption of wait-and-see should be deferred pending a solution to the problem of limiting measuring lives under an actual events test more narrowly than at common law. As we observed earlier in another connection,\textsuperscript{161} the barn is well emptied under the common law rule, and the adoption of wait-and-see is no obstacle to correction. But conceding this, our present problem is, what should be done about the period of the rule?

It is easy enough to reconcile the past with a more restrictive period of contingency. Wait-and-see advocates have repeatedly called attention to the perpetuities criterion of Lord Nottingham in the \textit{Duke of Norfolk's} case, that of "visible Inconvenience."\textsuperscript{162} And clearly, the perpetuities period which found sanction in that case—a single, incompetent life in being—involved no prospect of a uniformly available century-long period of contingency. Twenty years earlier, John Graunt's initial actuarial study of the life expectancy of Londoners had indicated that not one in one hundred would live beyond his middle seventies, that thirty-six of one hundred would die in the first six years of life and that only one in ten would attain the middle forties.\textsuperscript{163} Though he concluded that country folk fared somewhat better,\textsuperscript{164} and subsequent tables were considerably

\begin{itemize}
\item \textsuperscript{159}There seems to be no American case deciding this question. 1 Scott, Trusts § 62.10 (2d ed. 1956). Professor Simes insists that, if the common law rule does not apply to indestructible trusts, a closely analogous rule does limit their duration to the common law perpetuities period. Simes and Smith, The Law of Future Interests, § 1202 (2d ed. 1956). And the editors of the American Law of Property regard the period of perpetuities as a probable maximum. 6 American Law of Property § 24.66 (Leach and Tudor eds. 1952). But Professor Gray took the opposite view, continued in the fourth edition of his treatise. Gray, The Rule Against Perpetuities §§ 432-38 (4th ed. 1942). And Gray is followed by Dean Griswold. Griswold, Spendthrift Trusts §§ 290-93 (2d ed. 1947).
\item \textsuperscript{160}See pp. 65-66 supra.
\item \textsuperscript{161}In assessing the common law perpetuities period as a guardian of the revenue, see p. 52 supra.
\item \textsuperscript{162}3 Ch. Cas. 1, 26, 49, 22 Eng. Rep. 931, 946, 960 (1682).
\item \textsuperscript{163}Graunt, Natural and Political Observations Made Upon the Bills of Mortality 69-70 (1662).
\item \textsuperscript{164}Id. at 76.
\end{itemize}
THOUGHTS ON PERPETUITIES REFORM

more sanguine, it is clear that a perpetuities period limited to a seventeenth century life span would be far more restrictive than that of the present-day common law rule.

True, people live longer today and there is manifest common sense in gearing the permissible duration of estate plans to life spans, since most testators are interested in people, not calendars. But in proceeding from an original conception of one life span, of expectancy brief duration, is there no distinguishable stopping point short of that presently prevailing at common law—the maximum number we can keep track of?

The plain truth is that we have had difficulty in finding one. Of course, the problem as to contingency is the inclusion of patently irrelevant lives through savings clauses. But how to limit the number to relevant lives? The New York solution of a two lives rule is one possibility, though the obvious difficulty here is that relevant lives may well exceed that number, a fact which has resulted in some extremely complex New York case law on the subject of separable trusts. The Law Reform Committee has surrendered to the actuaries, advocating an optional period of eighty years in gross.

The Committee failed to find a satisfactory method of eliminating their royal lives clauses, declaring, “In this connection we have considered proposals, based in the main on the undesirability of ‘royal lives’ clauses, for restricting the permissible lives in being to those who take some real interest in the property concerned, or have some real and necessary connection with the limitations. However desirable such proposals may be in theory, in the end they founder on the difficulty of evolving a definition which, without being too complex to be practicable, succeeds in drawing the line in approximately the right place.” True, it may be relevant that the English tradition favoring freedom of testation is conspicuously stronger than our own. But the fact that this talented Committee, drawn from the Bar which produced the Law of Property Act of 1925,

165. Thus the Northampton Experience table of 1780 indicated a life expectancy at birth of twenty-five years and an expectancy of nearly thirty-three at twenty-one. American Conservation Company, History of Life Insurance in Its Formative Years 377 (1936).
170. Id. at 6-7 (1956).
confess their inability to solve this technical problem satisfactorily is most persuasive evidence of its difficulty.

Moreover, there is this disturbing thought. Does it really matter much that the umpire is a "homer"? Professor Leach is not distressed. Witness his now classic metaphor, depicting the rule as a nosy oldster whose activities need to be curbed.\textsuperscript{172} In the context of a rule whose function is to arbitrate, the metaphor is tantamount to the proposition that testators can be trusted to be reasonable, so that succeeding generations require no militant protection. The Law Reform Committee takes the same position, deprecating the importance of royal lives clauses on the basis that few testators are silly enough to go as far as the common law permits.\textsuperscript{173} Of course, all of this invites the reply that, on such a hypothesis, we do not need the rule at all. But we need not go so far. We can say, merely, that the case for restricting freedom of testation in the interest of succeeding generations is a weak one since few testators, given free rein, will abuse their license, and add that the rickety old common rule will do for the small task remaining. After all, eventually, the rule will relax the grip of the departed. And if it seems quite possible that we will all be Megatoned into oblivion before a few current estate plans run their course, there is an obvious answer: let us, in the service of our lineals, concentrate upon these more pressing problems, and leave the lesser for more tranquil times.

For if we are not to follow the course just suggested, a hard task lies ahead. It is not an impossible task, but a major reworking of the law is necessary. As we have seen, the present common law rule, relatively unconcerned as it is with the permissible duration of trusts, is a vastly malleable instrument in the hands of a skilled draftsman serving a determined testator.

Suggestions such as the tentative proposal of Professor Simes for extension of the rule to require vesting in possession or enjoyment of net income\textsuperscript{174} within the present common law period, promise limited service to future generations, judging, as we must, without benefit of a detailed exposition.

On first reading, the proposal would seem to require that any disposition in trust at the end of the perpetuities period be for the


\textsuperscript{173} "... in any event the mischief of the 'royal lives' clauses, confined as it is to comparatively few cases, is not in our opinion so great as to call for a general legislative restriction on lives in being merely in order to rescue such limitations from what is after all but one aspect of ill-advised drafting." Law Reform Committee, \textit{Fourth Report}, Cmd. No. 18, at 7 (1956).

\textsuperscript{174} Simes, \textit{Public Policy and the Dead Hand} 80-82 (1955).
benefit of a single beneficiary, or in co-tenancy. This seems desirable because the creation of successive vested estates, with their attendant obstacles to termination of the trust, would be prevented. But we have assumed that the testator complies with the new rule. Were he to violate it, and attempt to create vested life estates and remainders, it would seem that the result would be invalidity of the remainder interests, which would then vest in the testator’s heirs. And in this latter event, the result would seem to be divided ownership again—the life tenants holding estates vested in possession and the heirs holding reversions with the result that there are at least the same obstacles to trust termination during the lives of the life tenants as with vested interests in remainder, and the added disadvantage that the testator’s plan has been distorted. It is rather difficult to defend a rule which invalidates the testator’s plan without corresponding benefits in immediate ownership more prominent than these. Here, there is merely a robbing of remaindermen to pay heirs, and the testator chose the former. Of course, this problem is not necessarily insuperable. For example, it might be dealt with by vesting invalid interests in income beneficiaries. But, beyond the foregoing, it is not apparent that the Simes proposal does anything to insure the invalidity of spendthrift limitations annexed to such terminal vested life estates.

True, Professor Simes’ suggestion has other real advantages. It would reduce the prominence in perpetuities matters of the esoteric distinction between contingent and vested remainders. Prima facie, assuming that it can be worked out without introducing new technical problems of a serious nature, such a change would be a

175. Because life estates and vested remainders cannot be created without producing remainder interests which are vested in interest only.

176. Of course, a possible way around this difficulty would be a statutory rule enlarging the vested life estate into full ownership. But if this is to be the remedy, why not require vesting in full ownership in the first place?

177. Of course, the heirs may be identical with the life tenants, but if this is the hoped-for result, why not enlarge the life tenants’ estates to begin with? There is also the possibility that the vested remaindermen will be the heirs, in which case there will be much ado about nothing if anyone chooses to raise the perpetuities issue.

178. A possible answer to this whole line of objection would be a cy pres power in the judiciary to remould an invalid interest. But Professor Simes has decided against such a solution. Simes, Public Policy and the Dead Hand 78 (1955). And the objection goes further than squeamishness at departures from the intent of the testator. There is still much force in the words of Maitland, “Of the law of descent we are therefore obliged to speak, though it is certainly difficult to criticize it without insulting the intelligence of our readers. What need be said may be said in few words. The law makes a will for intestates which no sane testator would make for himself.” 1 Maitland, Collected Papers 172 (Fisher ed. 1911).

179. This is the Pennsylvania solution. See note 126 supra.

helpful simplification of perpetuities doctrine. But the blessings of this change will be impartial.

Query the oft-repeated admonition that we should go slowly in perpetuities reform and depart but little from the basic structure of the common law rule. Is this not rather near the admonition that law reform in this area should be confined to steps which will make it easier for the testator and his counselor to realize the maximum benefits of the liberal common law perpetuities period? Such is the effect of wait-and-see and of Professor Simes' proposals for specific statutes to deal with silly possibilities.

To illustrate more concretely, let us set about the task of outlining a law of perpetuities which seriously considers that succeeding generations have "rights" which the testator is bound to respect, seeking the sanctions of history insofar as is possible.

One major problem, as we have seen, is the license granted by the common law rule to create an estate plan which may endure (through indestructibility or failure of beneficiaries to agree on termination) for the full life spans of after-born beneficiaries who take at the close of the permitted period of contingency. And we find, in Professor Simes' proposal, no clear solution to this problem. But he would only require vesting in possession or enjoyment of net income at the end of lives in being and twenty-one years. Suppose we were to go further and require vesting in possession, free of trust, at the end of the permitted period? Let us see whether such a rule can be justified.

Why measure the perpetuities period in lives? The measuring life sanctioned in the Duke of Norfolk's case was a single life in being which the grantor knew to be incompetent. Let us proceed from this point. Let us concede that, subject to rights of election, a testator ought to be permitted to pass conclusive judgment on the right of his heirs to succeed to his property and, moreover, to choose the form and extent of their rights if he does elect to benefit them. Let us concede that this rationale justifies full testatorial prerogative as to the manner and extent of enjoyment and control to be permitted any person living at his death whom he chooses to benefit, even his infant grandchildren born subsequent to the execution of his will, because he might have some basis for concluding that such an infant would not be competent to manage property, or dispose of

183. 3 Ch. Cas. 1, 22 Eng. Rep. 931 (1682).
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it, wisely. Let us go still further and concede that the testator should be permitted to deny full ownership to persons unborn at his death, those too young to be expected to have the requisite skill and judgment to manage property themselves or entrust its management to competent hands. Let us say that the period of twenty-one years now permitted is too short for this purpose and that the period should not be less than thirty years. Does it follow from any of this that a testator should be permitted to inflict upon the unborn a presumption (and arguendo, a conclusive one) of incompetence after maturity? Prima facie, no. Prima facie, at this point, we have gone pretty far in the direction of preserving the prerogatives of donors and testators.

If the foregoing be accepted, we have a case for stiffening the common law rule (with a slightly extended period in gross) to the point of requiring vesting in possession, free of trust and in absolute ownership, at the expiration of the period of perpetuities. This means, inevitably, a substantial departure from existing law because we will need several rules applicable to interests which are vested in possession, those vested only in interest and those which are contingent. Furthermore, we must endeavor to make these several rules the same, insofar as possible, in the plain interest of simplicity. Now let us see whether such a course is feasible.

Let us commence, with the formulation of a general statutory rule. Such a rule might say in substance something like this: Whatever the donor or testator says goes until his chosen beneficiary becomes a person who was not in being at the creation of the interest and who has attained the age of thirty years. But when the beneficiary becomes such a person he is entitled to be free of the testator’s restraint and influence. He is entitled to whatever property is held for his benefit, and that of his spouse and lineals, outright. At this point, he should make decisions affecting his family. He shall take to the extinction of any interests conferred by the testator on his spouse or lineals. He shall take absolutely, free of trust, free of the rights of any subsequent takers who are not in his lineal line, and free of the rights of any reversioners who might, under the terms of the instrument, be in a position to claim an interest. He shall only take subject to the interests of persons in being at the testator’s death who hold prior estates. Now let us take a few examples to see how such a rule would work.

1. Interests Vested in Possession

Testator devises his residue in trust to pay income to son S
for life, then to pay income to S's wife W for her life, then in trust
to divide corpus into shares, one for each of the children of S, and,
to pay the income from the several shares to the several children,
respectively, for their lives, corpus to be distributed at the death of
each such child to his then surviving issue per stirpes. At testator's
death, S and W have no children; their single child, A, is born one
year later. S and W both die in a common disaster on A's twenty-

Under our proposed rule, the life estates given S and W cannot
be interfered with. And the trust continues for the benefit of A for
one year. On A's thirtieth birthday, under our rule, the trust would
terminate by operation of law and the corpus would vest in A, free
of trust. But query, do we need to go so far in such a case? Do we
need to go further than to give A an absolute right to compel termi-
nation, at his election, at or after his thirtieth birthday? Arguendo,
no. Therefore, it might be wise to make this the first modification
of our general rule. In the case of interests which are vested in pos-
session, the right of the beneficiary to take absolutely to the ex-
clusion of subsequent takers shall be elective. Prima facie, if the
beneficiary is satisfied with the testator's arrangement, there is no
reason to disturb it, for our rule exists for his benefit and in such
a case as this there is no reason to force the benefit upon him. And
while the illustration chosen involves a beneficial interest in a trust,
there is no apparent reason why the same rule could not apply to
a succession of legal estates in Blackacre. In either case, it would
be necessary to work out details regarding the election, but the
problems to be solved in this area are familiar ones—those of
providing notice to interested parties in an orderly manner.

2. Interests Merely Vested in Interest

Here, we may take the same initial facts as in illustration 1.,
but assume that at the testator's death, S's and W's child A was al-
ready in being, and that a second child, B, is born one year after
the testator's death. And let us also assume that B attains the age
of thirty while both S and W are still alive. Here, there is even
more reason to have an elective rule. Even though B elects to take
an undivided one-half of corpus to the extinction of the rights of
his issue to participate further in the trust, he cannot secure dis-
tribution while S or W remains alive. Prima facie, he may well
decide to defer any such action until they die, and there is no par-

184. For recent specimens of successive legal estates, see the cases
cited in note 133 supra.
ticular reason to deny him the privilege. On the other hand, $B$ may wish to provide for a different disposition of his share of corpus than that which the testator has planned, and if so the right to make such a disposition is a valuable right which, prima facie, $B$ is entitled to exercise as an after-born adult. So it would seem appropriate to make our rule an elective one in this context also. Again, there is no apparent reason to discriminate between legal and equitable interests.

In the trust context, however, a further point is inherent in the facts. Suppose that $B$ elects to take his undivided one-half, subject to the rights of $S$ and $W$, and that $A$ and $B$ survive them. At this point, the trustee must distribute one-half of the trust corpus to $B$, while continuing to hold the balance for $A$'s benefit. It would seem desirable to give the trustee discretion to distribute in cash or in kind in order to protect beneficiaries in $A$'s position, subject of course to the judicial review of his decision which would inhere in his accounting for a distribution of corpus.

There is still another point of importance inherent in these facts. The effect of permitting $B$ his election while $S$ is still alive raises the question of the rights of a child of $S$ born after $B$ so elects. Of course, in the case of a class gift to children, the event is an unlikely one because most people do not beget or bear children thirty years apart. But such a case might arise. One solution would be to close the class in the event of an election. The alternative would be to leave the class open to future increase, which would give an after-born child something at the expense of $A$, who was in being during the testator's lifetime and is, perhaps, an even more likely object of the testator's bounty than $B$. Faced with this alternative, it seems easier to justify the former result. To the point that neither result is justifiable because $B$'s election should not be permitted prior to distribution day, we have an answer. $B$ is after-born. He is mature—an adult. His election does give him something of value—the right to dispose of one-half of the trust corpus (e.g., by his will) while his parents are still alive. The testator may not reasonably deny him this right.

3. Contingent Interests

At this point, we face difficulties with the major premise of our hypothetical rule. That premise is that it is unreasonable for a testator to deny full ownership to mature persons born subsequent to his death if he elects to benefit them. But suppose that when such
a beneficiary appears, it is not clear whether the testator intended to benefit him?

For example, suppose a bequest in trust to pay income to $A$ for life, remainder to the children of $A$ who survive $A$, but if no child of $A$ so survives, remainder to $X$. And suppose that all of $A$'s children, $B$, $C$ and $D$, are after-born, $B$ attaining thirty during $A$'s lifetime. Now what? Do we invalidate the remainder, pro rata? If so, in favor of whom? $C$ and $D$ or the testator's heirs? This is a choice between the unthinkable and the revolting. Cy pres? Possibly, but this smacks of evasion. How likely is it that available evidence will really shed light on the testator's intentions in such a case? Arguendo, we must disregard the condition of survivorship altogether in order to adhere to our purpose, that of freeing adult after-borns from testatorial restraint. And a case can be made for this solution. Within such a rule, conditions of survivorship could still operate as to after-borns who died under thirty, and this would prevent the passage of an interest through the estate of a minor child; indeed, very possibly from such a child to a life tenant parent by intestate succession. Moreover, a thirty year old is in a somewhat improved position to claim the right to dispose of a remainder interest prior to distribution. And the objection that a testator was permitted such a condition at common law cannot be decisive. If our arbiter is to lose the name of "homer", an occasional close call must favor the visitors.

On the other hand, if the contingency is an age contingency, we might well borrow the Massachusetts solution of a statutory rule reducing the age contingency, under our hypothetical rule, to thirty years.

Of course, there are other sorts of contingencies. For example, suppose an incentive contingency: a bequest in trust to pay income to $A$ for life, remainder to the children of $A$ who graduate from the Yale Medical School. At testator's death, $A$ has no children. Three children, $B$, $C$ and $D$ are born subsequently. $A$ then dies and the trust income reverts to the heirs of the testator. Then $B$ attains the age of thirty without having so graduated. Now what? To have either a mandatory or an elective rule requiring distribution to $B$ would utterly defeat the testator's purpose. Yet, though $B$ has not satisfied the contingency it is possible that he might yet do so. Perhaps it would be well to have a judicial cy pres doctrine to permit a distribution to $B$ on the basis that the testator would have preferred such a result. (E.g., suppose $B$'s education was delayed by military

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185. See note 59 supra.
service and he was a second year student in Yale's Medical School on his thirtieth birthday.)

If we may generalize from these examples, the application of our hypothetical rule to contingent interests would seem to require specific provisions disregarding some, altering others and providing a judicial *cy pres* doctrine for the remainder.

4. The Effect of Discretionary Dispositive Powers

Here we may encounter future interests in either income or corpus, or both, which are either vested subject to defeasance in the discretion of the trustee, or contingent upon an affirmative exercise of the trustee’s discretion. Under the common law rule, such powers are, of course, invalid if they may be exercised beyond the permitted period of contingency. But the trustee’s discretion is not dealt with too harshly if he is restricted to exercising these powers during the century which is available to him under a seriously drawn savings clause, and directed to dispose of corpus outright or in trust (the chosen beneficiaries to receive vested estates) immediately before the expiration of the permitted period. Let us take a case.

Testator bequeaths his residuary estate in trust to pay income to son $S$ for life, then to $S$’s wife $W$ for her life, and then to distribute income in such shares and proportions as the trustee in his sole and absolute discretion deems appropriate among the children of $S$ and $W$ who survive $S$ and $W$, and, upon the death of any such child, in the trustee’s sole and absolute discretion, to distribute such share of corpus (if any) as said trustee deems appropriate to such child’s then-surviving issue in such shares and proportions as the trustee, in his sole and absolute discretion shall deem appropriate, the trust to terminate nevertheless upon the death of $S$’s surviving child.

Now suppose that $S$ and $W$ have two children, $A$ and $B$, at the testator’s death and that two more, $C$ and later $D$, are subsequently born. Also suppose that $C$ attains age thirty during the lives of $S$ and $W$. And suppose that the trustee, being clearly authorized to do so by the terms of the testator’s will, makes a final determination on the evening before $C$’s thirtieth birthday that $C$ shall never re-

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186. If the effect of the exercise of the power would be to divest a vested interest in income or corpus, the result of its invalidity is, of course, to render that interest indefeasible. But if the interest be contingent upon the exercise of the power, the consequence of invalidity is to deprive the beneficiary of his interest altogether. Gray, *The Rule Against Perpetuities* § 246 (4th ed. 1942). On the application of the common law rule to discretionary powers, see Gray, *Ibid.*; 6 American Law of Property § 24.32 (Leach and Tudor ed. 1952).
ceive any allocation of income. What do we do on the following morning? One solution, of course, is to over-ride the discretion of the trustee with a rule to the effect that, whenever a member of a class in whose favor such a discretionary power over income or corpus could have been exercised is after-born and attains the age of thirty, such beneficiary shall be entitled to a pro rata remainder interest free of trust, to the extinction of any further rights of his lineal line to participate in the trust and subject only to prior estates in persons in being. If we are to adhere rigidly to our original premise, perhaps this should be the result. On the other hand, a compromise solution is available which will deprive the trustee of any incentive to exclude such a beneficiary so as to prolong the trust and at the same time preserve the discretion intended by the testator to a much greater degree. We could settle for a mandatory rule, requiring that the trustee exercise his discretion on C's thirtieth birthday to make an irrevocable designation of a pro rata share of corpus in remainder, i.e., subject to the life estates in S and W to some person or persons within the eligible class of income beneficiaries. On our facts, this would mean such an allocation of a one-fourth remainder interest in corpus among A, B, C and D to the pro rata extinction, of course, of the rights of any such distributee's lineal line.187

5. Executory Interests: Gift Over Prior to Age Thirty

Suppose a testator who wishes to provide for his immediate family, and then to provide perpetually for the advancement of the youth of his lineal line. For example, testator bequeaths his residuary estate in trust to pay income to son S for life, then to pay income to S's only child A for life. Upon the death of A, the trustee is instructed to distribute income among the issue of A per stirpes so long as A's lineal line continues, with the proviso that the income rights of any such issue shall terminate the evening before their

187. One obvious problem which might arise in applying our hypothetical rule to a discretionary trust is not revealed by the illustrative case. The problem appears in the case of a discretionary power to allocate income (or corpus, or both) among a class consisting of several generations, e.g., the issue of the testator. Suppose such a power in the context of these facts: At testator's death, his sole heir in his son S who has one child, A. After the testator's death, children B and C are born to S. When B attains thirty, the members of the class entitled, in the discretion of the trustee, to receive income and/or corpus consist of A, A's child X, B, B's two children Y and Z, and C. Now what is B's pro rata share? One-sixth—because the class now consists of six eligibles? Or one-half—because B takes to the extinction of future rights of his lineal line and hence is entitled to three shares of one-sixth each? Neither solution is appealing, to put it mildly. Pretty clearly, if distribution is to be forced by statute in such a case, B must be allotted one-third. Or in other words, our pro rata distribution must be per stirpes.
respective thirtieth birthdays. At this point, subject to the variables of lineal fecundity, we have the prospect of a perpetual private trust for the advancement of the testator's line. Clearly, we need some such mandatory rule as that last suggested under illustration 4, a rule which will in effect prohibit exclusion from the class prior to age thirty and require a pro rata distribution (subject to any valid prior estates) on the thirtieth birthday of any such beneficiary. Here, however, we assume that the trustee has no discretion with respect to distribution of corpus. This suggests the propriety of a judicial cy pres rule, authorizing an appropriate court to frame a decree of partial distribution, subject to valid prior estates and extinguishing, pro rata, the rights of the lineal lines of any such distributees.188

6. Interests Created by the Exercise of a Power

Suppose that the residuary bequest in illustration 5 was an appointment by that testator, pursuant to a general testamentary power given him under his father's will. Here, the only new issue is whether we define after-borns as persons in being at the creation or exercise of the power. No departure from the common law rules seems necessary.

7. Inter Vivos Transfers

Here, again, the new issue is our definition of after-borns. Do we mean persons in being at the date of the transfer, or persons in being at some subsequent point in time? Again, no departure from the common law rules seems necessary.

8. Trusts for a Period in Gross

At the least, the testator is assured of a period in gross of thirty years. Beyond this, a term trust will be subject to the same rules as any other trust.

But a broader point is discernible here. We have avoided the problem of limiting measuring lives to relevant lives by concentration on the rights of the testator's beneficiaries and permitting or requiring the assertion of those rights, or their termination, when those beneficiaries become after-borns aged thirty. We do not gear the testator's rights to any particular period. We tell him instead that he can do anything he likes for as long as he likes, except to

188. In the case put, the precise question for the court would seem to be whether the testator's plan would be most effectively carried out by giving effect to the divesting condition in favor of some other member of the class, or by refusing to give effect to it.
tie up property in the hands of after-borns who have reached maturity.

9. In Summary

Of course the foregoing by no means exhausts the problems which would arise in formulating such a statutory rule. So far, we have merely sketched outlines. Moreover, nothing has been said of accumulations or of the application of the rule to charitable trusts, options, possibilities of reverter, powers of termination or insurance contracts. But we have a fair outline of the rule's structure as it might apply to a private estate plan. So what?

I suggest these points. First, prima facie, the technical task of replacing the stacked deck of the common law perpetuities period with a rule which comes much closer to a fair arbitration between today's testators and tomorrow's adults is not impossible, though substantial departures from existing law would be required. Second, the task is, nevertheless, formidable enough to require the prolonged efforts of some able and dedicated technicians, such as those responsible for transforming Helvering v. Clifford,189 in sixteen years, from a muddy Supreme Court opinion into the bulk of Subpart E of Subchapter J of the 1954 Code, with Regulations, a body of highly complex doctrine set forth in reasonably workable form.190 It seems likely that a new rule against perpetuities, tailored with similar skill, would be workable too. Third, I proffer the foregoing hypothetical rule as a plausible, or at least provocative, point of departure for such an effort, assuming sufficient interest in the project. Fourth, I seriously doubt the sufficiency of that interest, the recent trends in perpetuities reform having been all the other way. Moreover, it seems doubtful that this is a transitory situation. As of any point in time, testators and those presently serving them can raise a louder clamor in legislative halls than unborns, and those who might serve them later. Finally, pending the appearance of such interest, there is no reason to defer the task of tidying up the present law. If the umpire is to be a "homer," at least for the time being, it is better that he be forthright and favor the bench as well as the first team.

This last returns us to the areas of perpetuities reform in which there is, demonstrably, current interest—the wait-and-see doctrine.

189. 309 U.S. 331 (1940).
B. We Need A Wait-and-See Doctrine

As we have observed, wait-and-see is not, at present, a well crystalized statutory formula. Rather, it is a central idea which has already been expressed in various ways by its various advocates.191 These variations detract from the usefulness of the doctrine, for obvious reasons already stated.192 At this point, there is clear need for a wait-and-see doctrine, available for submission to the legislatures of the several states. By natural sequence, this leads us to the Commissioners on Uniform State Laws, whose model statute re-enacting the common law rule has already proved useful,193 and to the further suggestion that a model wait-and-see statute be prepared.

Of course, if the Commissioners are to assume responsibility for promulgating such a statute, their prerogatives in its preparation must be respected. With all deference, however, it seems appropriate to tender an outline of the subject.

1. How Long Do We Wait?

Pennsylvania, Vermont and the Law Reform Committee are content to wait throughout the perpetuities period without having evolved a workable wait-and-see definition of measuring lives. This is a hard course to justify, even though the issue is effectively postponed. The case for wait-and-see is sufficiently one of technical convenience to disparage a price in the same coin. Arguendo, a workable statutory guide can be achieved at the price of an immaterial extension of the common law perpetuities period.194 But pending satisfaction on this point, the Massachusetts solution195 of a delayed possibilities test is probably the better choice, though even that test involves a measuring lives problem deserving of attention.196

2. Narrower Problems

There is much to be said for a statute which leaves few stones unturned. Accordingly, the following deserve serious consideration.

a.

A simple statement that an interest is presumptively valid under-wait-and-see until it fails the actual events test, with the exceptions indicated in b. below.197

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191. See p. 62 and notes 84, 85 supra.
192. See p. 63 supra.
194. For a possible statutory provision, see note 96 supra.
195. See p. 64 supra.
196. See p. 64 and note 94 supra.
197. This is the approach of the Law Reform Committee. Law Reform Committee, Fourth Report, Cmd. No. 18, at 10-11 (1956).
b.

Provisions permitting determination of validity at any time if compliance has become either a certainty or an impossibility.\textsuperscript{108}

c.

If Pennsylvania rather than Massachusetts style wait-and-see is to be adopted, a provision recommended by the Law Reform Committee\textsuperscript{109} and approved by Professor Leach\textsuperscript{200} which carries the statement in a. above to the logical conclusion that the prospect of future invalidity does not justify a denial of intermediate income rights to the holder of a contingent interest.

d.

Though it is better to wait-and-see than to decide on the basis of possibilities, it makes little sense to wait upon impossible afterbirths for lack of evidence. So there is much to recommend the Law Reform Committee's provisions permitting a determination of fertility in an appropriate case, and establishing sensible presumptions in the absence of evidence.\textsuperscript{201}

e.

Three other specific provisions seem desirable on the basis that they make changes in the testator's plans which he would almost inevitably prefer to invalidity.

(1) One is the familiar provision, reducing an age contingency to twenty-one if necessary in order to avoid invalidity.\textsuperscript{202}

(2) The second is a provision for severability of class gifts for perpetuities purposes, a change recommended by the Law Reform Committee\textsuperscript{203} and one foreshadowed some years ago by the writings of Professor Leach.\textsuperscript{204}

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198. The Law Reform Committee suggests the following: If, at the creation of the interest, it is impossible for it to vest within the permitted period, the interest is invalid ab initio. Conversely, if an interest is certain, at its creation, to vest if at all within the period of the rule, it is valid ab initio. Moreover, at any time during the perpetuities period, any interested person may apply for a determination of validity or invalidity on the basis of facts which have occurred since the creation of the interest. \textit{Ibid.}


201. Law Reform Committee, \textit{Fourth Report}, Cmd. No. 18, at 9. If the recommended presumptions (that no woman of 55 or older is capable of bearing a child and that no male or female under 14 is capable of procreation or child bearing) are not medically irrefutable as to children, 3 Gray, \textit{Attorneys' Textbook of Medicine} § 301.09 (3d ed. 1951), they are certainly sustainable on the basis that the testator would not contemplate parenthood in persons of such tender years and hence, prima facie, would not intend to provide for their children.

202. \textit{See note 59 supra.}


204. Leach, \textit{The Rule Against Perpetuities and Gifts to Classes}, 51 Harv. L. Rev. 1329 (1938).
(3) The third is a provision aimed at the unborn widow case, also recommended by the Law Reform Committee. Their remedy is a rule of construction interpreting a reference to a spouse which would produce invalidity as a reference to a spouse in being at the creation of the interest thus invalidated.\textsuperscript{205}

As to all three of these provisions, the question arises whether they should apply before or after application of the wait-and-see doctrine. The Law Reform Committee recommends the former as to (1),\textsuperscript{206} and (3),\textsuperscript{207} and the latter as to (2).\textsuperscript{208} The Committee's position on (1) provoked vigorous dissents, which seem to have the better of the argument,\textsuperscript{209} and I would quarrel with their conclusion on (3) as well.\textsuperscript{210}

Certainly if the Massachusetts version of wait-and-see is to be accepted, there is much to be said for a specific provision dealing with the administrative contingency cases, for the typical case of this sort will not secure the benefits of the Massachusetts wait-and-see doctrine at all.\textsuperscript{211} The recent Illinois and Kentucky statutes are available for guidance in this area, as are the suggestions of Professor Simes.\textsuperscript{212} Such a provision is probably unnecessary if the


\textsuperscript{206} Id. at 14-15.

\textsuperscript{207} Id. at 15-16.

\textsuperscript{208} Id. at 14-15.

\textsuperscript{209} Id. at 34-35. The position of the dissenters is that there are sensible reasons for a testator to wish to postpone vesting beyond the age of twenty-one and that application of that wait-and-see doctrine to age contingencies in excess of twenty-one before cutting them down would permit effectuation of the testator's intention in many of these cases.

\textsuperscript{210} The Committee, \textit{op. cit. supra} at 16, takes the position that it is undesirable to have to wait until near the end of the perpetuities period in order to determine whether the life estate given an unborn spouse will in fact bring about invalidity under the rule (\textit{i.e.}, it would not, says the Committee, if the spouse of the unborn spouse were a life in being and if the latter died within twenty-one years after the former). I would argue, on the other hand, that application of wait-and-see before the Committee's remedy would in many cases give effect to life estates which a testator had provided for the spouses of his infant grandchildren. And I would argue that it is sound policy to encourage testators to provide for such spouses, rather than to obstruct their efforts to do so.

\textsuperscript{211} See note 62 \textit{supra}.

\textsuperscript{212} For the Illinois and Kentucky statutes, see note 60 \textit{supra}. These statutes are something less than unassailable in some respects. See Recent Legislation, 55 Mich. L. Rev. 1040 (1957). Professor Simes' recommendation is as follows:

There would also be a section providing for the so-called administrative contingency case. In effect it would provide that, where property is given on the condition precedent 'when my will is probated,' or 'when my estate is settled,' or 'when my debts are paid,' or a like condition is stated, and no period of time within which the condition is to happen is stated, then the will or other instrument shall be deemed to be on the condition that the will be probated within twenty-one years, or the
Pennsylvania wait-and-see rule is followed, for these contingencies are such as will almost always occur in fact within twenty-one years. Moreover that would seem to be long enough to wait, in such a case.

The utter inability of the testator's heirs to challenge his arrangement under wait-and-see opens the door to their coercion in the interest of prolonging his plan. Arguendo, the draftsman who is skilled enough to coerce them is also capable of maximizing the common law perpetuities period, which should satisfy the most demanding testator. But just in case, it would do no harm to insert a provision aimed at this possibility.

A good deal has been said of the consequences of invalidity at common law—a disposition to heirs who may well be the last persons whom the testator intended to benefit. The Pennsylvania solution, a distribution to persons entitled to income at the end of the perpetuities statute seems worthy of serious consideration. A plausible alternative is cy pres, the solution of the new Vermont statute.

3. In Summary

While the foregoing outline leaves some areas untouched (e.g., the application of the rule to options, possibilities of reverter, powers of termination and insurance settlements), it seems adequate to estate be settled within twenty-one years, or debts paid within twenty-one years.


The horror case might be as follows: Testator bequeaths his estate in trust for son S, his sole heir, for life, with remainders for life to S's surviving children, followed by remainders for life to great-grandchildren of the testator, followed by a distribution of corpus to the next generation. Prima facie, in this situation, it is likely that an actual events test would be violated. Our testator, however, cunningly adds one further contingency to the life estates of his grandchildren and great-grandchildren. Each line of descent will be disinherited in favor of the American Red Cross unless son S, and each of his children, includes in his or her will a clause disposing of any interest in the trust corpus which he or she takes by reason of invalidity under the rule, to the same trustee upon the same trusts as stated in the testator will.

At this point, a good case can be made for the proposition that, even after the expiration of lives in being, no one will have anything to gain by litigating perpetuities questions if the testator's son and grandchildren remain in line. And it seems quite likely that they will under an actual events test which denies them access to the courts. The obvious remedy is an express statutory provision rendering any such contingency invalid as contrary to public policy.

215. The Pennsylvania statute is quoted in note 123 supra.
216. Quoted in note 23 supra.
raise those questions which are of pivotal importance in preparing a model wait-and-see statute for general adoption. Nor is it suggested that legislative provisions dealing with all of these matters are indispensable. The point is, rather, that the merits of each should be considered by the Commissioners.

C. THE RULE AGAINST REMOTENESS OF VESTING

Professor Simes has made the point that the distinction between contingent and vested interests lacks current relevance and unnecessarily complicates the law of perpetuities. His tentative suggestion is an extension of the rule to require vesting in possession within the permitted period. As we have observed this suggestion does not seem to involve a material stiffening of the common law rule, though a firm conclusion is impossible in the absence of a specific statutory proposal. It seems likely, however, that the advantages of this change would be analogous to those of wait-and-see—simplification of an obtuse area of the law for the benefit of those who must deal with the rule. As wait-and-see involves only nominal changes in the rigor of the rule, the same may well be true of this proposal.

If so, the technical task of reducing the thought to workable statutory form is one which merits the attention of would-be perpetuities reformers. For if the recent history of perpetuities reform means anything, the draftsman of such a remedial statute is much more likely to see his efforts crowned with legislative approval than the draftsman who dedicates his efforts to substantial abbreviation of the common law perpetuities period.

III. IN CONCLUSION

Presumably the thesis of this article is, by this time, redundantly clear. Whatever the innermost thoughts of Lord Nottingham, the common law rule against perpetuities has, in fact, evolved into a most generous restraint on testatorial freedom. And judging by the trend of perpetuities reform, both back to the common law rule and from it to wait-and-see, there is little current sentiment in the United States which favors a more rigorous course. This being so, certain things follow.

One is that such a liberal rule should be a simple rule, both because its restraint is insufficient to atone for intricacy and because

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217. See note 180 supra.
218. See pp. 88-89 supra.
all are equally entitled to its liberality. Thus, we properly conclude that the possibilities test, though easily evaded and of relatively infrequent offense, is productive of more trouble than it is worth. Hence we may subsequently conclude that the rule against remoteness of vesting should become a rule against something less esoteric, if, as seems likely, this can be managed without a seemingly unwanted stiffening of the rule.

Another is that if the rule is truly to become an arbiter, a real perpetuities revolution will be necessary.

And a third is that, for the time being at least, the unborn should speak well of their ancestors.