

## MEASURING LIVES UNDER THE PENNSYLVANIA STATUTORY RULE AGAINST PERPETUITIES

FRANK L. JONES †

Many words have been written about the "wait-and-see" statutes which, where enacted, alter the common-law Rule Against Perpetuities. Too many, says Professor Leach, who thinks there should be more such laws and no more articles.<sup>1</sup> If his suggestion is to be heeded, it may be hoped that other legislatures tackling the problem anew will come up with acts of more clarity and less doubtful validity than section 4 of the Pennsylvania Estates Act of 1947.<sup>2</sup>

This Comment will not prolong the debate concerning the desirability of wait-and-see legislation. As a matter of policy, wait-and-see may be wise or unwise. But regardless of one's views on the policy question, it is not the policy itself but rather the specific embodiment of it in section 4 of the Estates Act with which Pennsylvania lawyers and courts have to contend.

Consideration of the Pennsylvania legislation suggests that it may not withstand an attack challenging it as unconstitutionally vague. The act's potentially fatal flaw concerns the measuring life problem. That there will be difficulty in determining which lives are measuring lives is not a novel suggestion<sup>3</sup>—even Professor Leach impliedly concedes that there is less than desirable clarity.<sup>4</sup> He avoids a square

† A.B. 1952, Westminster College; LL.B. 1955, Harvard University. Member, Pennsylvania and Florida Bars.

<sup>1</sup> Leach, *Perpetuities Legislation: Hail, Pennsylvania!*, 108 U. PA. L. REV. 1124, 1154 (1960).

<sup>2</sup> PA. STAT. ANN. tit. 20, § 301.4 (1950). The act reads as follows: "No interest shall be void as a perpetuity except as herein provided. . . . 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 . . . ."

<sup>3</sup> See Mechem, *A Brief Reply to Professor Leach*, 108 U. PA. L. REV. 1155, 1156-57 (1960); Mechem, *Further Thoughts on the Pennsylvania Perpetuities Legislation*, 107 U. PA. L. REV. 965, 976, 981-82 (1959); Phipps, *The Pennsylvania Experiment in Perpetuities*, 23 TEMP. L.Q. 20 (1949); Simes, *The Policy Against Perpetuities*, 103 U. PA. L. REV. 707, 732 (1955); Simes, *Is the Rule Against Perpetuities Doomed?*, 52 MICH. L. REV. 179, 190 (1953).

<sup>4</sup> Professor Leach, that most vigorous champion of the wait-and-see principle, states that it "may take a few cases to work out" the rules for determining appropriate measuring lives under the statutory modifications of the rule. Leach, *Perpetuities Reform by Legislation: England*, 70 HARV. L. REV. 1411, 1415 (1957). See also Leach, *supra* note 1, at 1142-47. The problem seems particularly acute under the Pennsylvania statute.

confrontation of the matter by asking rhetorically whether "[the anti-reformist writers] are . . . trying to make the statute look bad?"<sup>5</sup> Well, it is bad—the statute, that is, not necessarily the policy behind it. But it is not a bad statute *because* the "anti-reformists" have taken the trouble to demonstrate its deficiencies.

Section 4 assumes a nonexistent correlation between two concepts: first, "the expiration of the period allowed by the common law rule against perpetuities"; and second, the measurement thereof by "actual events." The statute assumes that "the period allowed by the common law rule" is an ascertainable span of time at the end of which vesting either will or will not have occurred. In fact, the period allowed by the common-law rule is not a period of time at all. It is a projection of possibilities made as of the effective date of the instrument in question. In short, the basic difficulty with section 4 is that it provides no ground rules for determining when the period allowed by the common-law rule does expire but nevertheless requires that the new provisions shall operate as of that will-o'-the-wisp expiration date.

#### MEASURING LIVES UNDER THE COMMON-LAW RULE

At common law an interest not necessarily vesting within twenty-one years after the termination of some life in being at the effective date of the instrument is void from the beginning. Concerned as it is with possibilities only, the common-law rule is not difficult to apply. For this purpose the law indulges in the presumptions, among others, that everyone living on a given day might die the next and that every living person is capable of having children—and goes on from there. Thus, the validity of the remainders in the following familiar examples is easily predictable under the common-law rule:

*Example 1:* *T* devises Blackacre "to *A* for life, then to *A*'s children for their lives with rights of survivorship, remainder in fee to *A*'s grandchildren living at the death of the survivor of *A*'s children."

*Example 2:* *T* devises Blackacre "to *A* for life, then to *A*'s children for their lives with rights of survivorship, remainder in fee to *A*'s grandchildren living at the death of the survivor of *A*'s children; provided, that if the remainder in *A*'s grandchildren does not vest within twenty-one years following the death of the survivor of *W*, *X*, *Y*, and *Z*, then the property revert to my heirs."

Assume in both examples that at *T*'s death *A* is living, is sixty years old, and has one adult married child, *B*. Assume further that *W*, *X*, *Y*, and *Z* are four healthy infants, all of whom survive *T*. The re-

<sup>5</sup> Leach, *supra* note 1, at 1143.

remainder in example 1 is void at common law. In example 2, however, the probabilities are that it will vest in time, and it is certainly not void from the beginning since it must vest, if at all, not later than twenty-one years after the death of the survivor of *W*, *X*, *Y*, and *Z*.<sup>6</sup>

Is it accurate to conclude that the lives of *W*, *X*, *Y*, and *Z* are irrelevant, even under the common-law rule, in determining the validity of the future interest in example 1? They are irrelevant if by that is meant the probable longevity of the survivor is no help to the lawyer seeking to uphold the future interest. On the other hand, it is clear that there is nothing *inherently* irrelevant about them. Witness example 2.

Taking the analysis one step further, what about *A*'s life itself in example 1? Is it a "measuring life"? If the term "measuring lives" is meant to encompass only those lives whose termination will establish a *valid* outer limit within which vesting must occur, then by definition *A*'s life does not qualify. Or perhaps it is more accurate, theoretically, to say that *A*'s is a measuring life but that the remainder is nevertheless void because it will not necessarily vest within twenty-one years after *A*'s death.

Now consider two equally clear cases:

*Example 3:* *T* devises Blackacre "to *A* for life, remainder to *A*'s eldest grandchild living at *A*'s death."

*Example 4:* *T* devises Blackacre "to *A* if and when (or twenty-one years after) *A* marries."

In each of these examples the future interest is good. In each, *A*'s is a built-in measuring life. In each, *A* is both beneficially interested in the property and mentioned by name in the will. But is it the presence of either or both of these facts that makes his a measuring life? No, of course not. At common law the measuring life need have no relationship either to the property or to the dispositive instrument.<sup>7</sup> *A*'s is a measuring life because, in each example, the future interest will neces-

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<sup>6</sup> In a practical sense there was room for more than a little waiting and seeing even under the common-law rule. For instance, in example 2, the grandchildren would have had to wait until twenty-one years after the death of the survivor of *W*, *X*, *Y*, and *Z* to see, first, if *B*'s death had conveniently occurred, and second, if so, how large their own group was at that time, the latter fact determining the size of their shares. The following advice, therefore, may (or may not) placate a client impatient to know his rights under an instrument governed by the Estates Act:

Remaindermen you may yet be,  
The statute says to wait and see,  
But don't despair: at common law  
They also served who waited and saw.

<sup>7</sup> *Thellusson v. Woodford*, 11 Ves. 112, 137, 32 Eng. Rep. 1030, 1040 (1805); 4 RESTATEMENT, PROPERTY § 374, comment *j* (1944). See also Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638, 641 (1938).

sarily vest, if at all, no later than twenty-one years after his death. Trying to be more specific is both futile and unnecessary.

The converse is also true at common law—that is, the fact that a named person has a life estate is not enough, of itself, to qualify him for measuring-life status. Examples 1 and 3 may be contrasted to illustrate the point. In both instances *A* has a valid life estate. Only in example 3, however, does *A*'s life qualify as a measuring life, at least in any meaningful way.

Though it is possible, then, to make certain positive statements about measuring lives under the common-law rule, these propositions, even collectively, do not jell into anything like a definition of the term. The simple reason for the common law's failure to supply a readymade definition for "measuring life" is that none is required in applying the common-law rule. The usual formulation of the rule itself includes everything that needs to be said about measuring lives. For example, a lawyer asked for advice on any of the four hypotheticals postulated thus far would appear something of a dolt, and rightly so, if he began the analysis by asking: "Now, let's see, whose lives can we use as measuring lives here?" The appropriate question, of course, would be: "Is this interest necessarily going to vest, if ever it's going to, within the lifetime of some person alive at the testator's death, or at least no later than twenty-one years after such person's death?"

Having posed the proper question for himself, the lawyer will have no trouble answering "no" to example 1 and "yes" to examples 2, 3, and 4. He will not speculate as to whether *A*'s is properly regarded as a measuring life in example 1 because it doesn't make a nickel's worth of difference. The remainder is void for remoteness regardless of the answer to the theoretical question.

Section 4 of the Estates Act, however, destroys the possibilities test of the common law and plunks the law of the commonwealth down, more or less blindfolded, smack in the middle of the conceptual jungle inherently growing out of any attempt to *define* "measuring life"—a term which, standing alone, was devoid of meaning at common law. The act requires that the period allowed by the common-law rule be determined prior to and independently of application of the rule. A two-stage process is thus substituted for the single inquiry posed by the common law. Whether the period has expired must always be determined in isolation. And this necessarily entails clothing the term "measuring life" with independent meaning, a process about as straightforward as the definition of "good" for one not acquainted with the concept of "evil." The draftsmen seem to have missed the *yang* and *yin* of the common-law Rule Against Perpetuities.

## DEFINING MEASURING LIVES UNDER SECTION 4 OF THE ESTATES ACT

In hacking out a solution to the measuring lives problem under section 4—if they are able to do so at all—the courts will have three approaches from which to choose: first, the “strict approach,” that is, the measuring lives can be limited to those so regarded at common law; second, the “universal approach,” that is, the lives of all human beings living at the effective date of the instrument may be consulted; or third, the “selective approach,” that is, an arbitrary set of rules can be fashioned on a case-by-case basis for this or that type of situation. While none of these approaches seems satisfactory, speculation luckily need not be entirely in the dark.

For more than a decade Pennsylvania’s statutory substitute for the common-law Rule Against Perpetuities did not affect the outcome of a single reported case.<sup>8</sup> Then the Court of Common Pleas for Dauphin County decided *Mumma v. Hinkle*.<sup>9</sup> Whatever else may be said of the decision, it does afford Pennsylvania lawyers an opportunity to examine section 4 in the aftermath of its first encounter with a set of facts.

Although this Comment is not an indictment of the wait-and-see principle, to the extent that such an indictment has been brought, Pennsylvania’s legislation may be considered the prosecution’s bill of particulars and *Mumma v. Hinkle* its first witness. What happened to bring about the litigation was substantially this: in 1950 the defendant, by written instrument, gave the plaintiff an option to purchase a certain tract of land for thirty thousand dollars. The contract bound the defendant’s “heirs, executors, administrators, and assigns” and ran in favor of the plaintiff, her “heirs, executors, administrators, and assigns.” There was no stated time limit within which the option had to be exercised. In 1956 the plaintiff purported to exercise the option, tendering thirty thousand dollars. Defendant refused to convey and plaintiff sued to compel specific performance. Defendant demurred.

At common law the option was plainly worthless—void as a perpetuity at least since *Barton v. Thaw*.<sup>10</sup> The court, however, decided in favor of the plaintiff, overruling the demurrer. The decision was based

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<sup>8</sup> The statutory provisions exempting certain types of interests from any rule against perpetuities, statutory or otherwise, have affected the outcome of several cases. In particular, the cemetery lot exemption has been called upon fairly often. See Dreisbach’s Estate, 26 Lehigh L.J. 459 (Pa. Orphans’ Ct. 1955); Duffy’s Estate, 2 Pa. D. & C.2d 250 (Orphans’ Ct. 1954); Reedy’s Estate, 40 Berks Co. L.J. 81 (Pa. Orphans’ Ct. 1947). These cases are, however, outside the mainstream of the law and can have no effect on the development of the act’s basic provision.

<sup>9</sup> 71 Dauphin Co. Rep. 241 (Pa. C.P. 1958). For a comment on the effect of the decision on option agreements, see 4 VILL. L. REV. 144 (1958).

<sup>10</sup> 246 Pa. 348, 92 Atl. 312 (1914).

on the Estates Act and the following is the crux of the opinion: "We think that under the plain provisions of § 4 where a future interest created by a contract vests within the lives of the contracting parties, the future interest cannot be declared void as a perpetuity."<sup>11</sup>

The future interest in *Mumma v. Hinkle* was created less than six years before it "vested." That is not very long. But the court did not advert to this relatively brief period in reaching its conclusion. Instead, it noted that both parties to the contract were still alive when the option was exercised. It is the ease with which the court treated the lives of the contracting parties as proper measuring lives that compels one's attention.

If the opinion is good law, two corollaries follow. First, the outcome would be the same if only one contracting party were alive at the time of vesting. Under the common-law rule any life in being will do. Second, the option would remain exercisable until at least twenty-one years after the death of the survivor of both contracting parties. If theirs are proper measuring lives, the courts, required as they are to wait until the expiration of the period allowed by the common-law rule, cannot become impatient and quit their vigil at the conclusion of the measuring lives. That would be a different, and briefer, period than that allowed at common law—which, after all, is the waiting period specified in section 4.

It is clear that the court regarded the lives of Miss Mumma and Mr. Hinkle, at least, as proper measuring lives. The crucial question is *why* they were so regarded. Was it because they happened to be parties to the agreement? (The selective approach.) Or was it because their own continued existences, quite apart from their participation in the contract, offered convenient and conclusive proof that *some* "life in being" at the effective date of the agreement remained in existence when the interest vested? (The universal approach.) Or was the interest really upheld, despite the court's language to the contrary, because it vested within twenty-one years? (The strict approach.) The result in *Mumma v. Hinkle* is consistent with any of the three approaches and the language of the opinion with two of them.

#### *The Universal Approach*

The universal approach has the advantage of being closer than either of the others to an "actual events" measurement of "the period allowed by the common law rule." Waiting until twenty-one years after the death of the survivor of all persons living at the effective date of

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<sup>11</sup> 71 Dauph. Co. Rep. at 245.

the instrument is, after all, waiting no longer than the period allowable at common law. If that survivor turns out to be a shepherd living in the hills of Afghanistan, no matter. The testator *could* have specified that shepherd's life as the measuring life even at common law. Now the testator merely has the statutory test to do the specifying for him in the light of hindsight or, as the draftsmen preferred, in the light of "actual events." Unhappily, the universal approach is completely unworkable, the Afghan Bureau of Vital Statistics being what it probably is.

### *The Selective Approach*

While the selective approach will not entail extended treks to the Middle East, it will involve a long process of picking and choosing appropriate measuring lives for the infinite variety of fact situations which can and will arise. Returning to *Mumma v. Hinkle*, recall the court's assumption that *some* measuring life was available.<sup>12</sup> The court did consider the lives of the parties to the agreement as measuring lives, but they would have had no such special significance at common law. The agreement also bound their "heirs, executors, administrators, and assigns." Suppose, therefore, instead of the actual facts in *Mumma v. Hinkle*, that the original parties died immediately after executing the agreement. Suppose further that the optionee's executor, the next day, purported to exercise the option by a letter to the optionor's executor. Suppose still further that both executors were individuals who had been living at the effective date. Would the option not be upheld under these facts also? Probably it would. It is true that using the executors'

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<sup>12</sup> It is curious that Professor Leach suggests that in cases like *Mumma v. Hinkle* the gross period of twenty-one years should be the waiting period because there are no "relevant lives." Leach, *supra* note 1, at 1145. One can only wonder why the optionor's and optionee's lives are less relevant than those lives designated as being relevant by Professor Leach in his hypothetical judicial opinion appearing a page earlier. The distinction would make sense under the Massachusetts act where holders of valid life estates are used as the measuring lives and there is no attempt to utilize the common-law time period. MASS. ANN. LAWS ch. 184A, §§ 1-6 (1955). It seems pretty clear that under the Pennsylvania act the line between what are relevant lives and what are "patently frivolous" or irrelevant lives is an arbitrary one. Furthermore, it is a line that can never rise above the arbitrary so long as the courts are bound, as they are in Pennsylvania, to draw it with an eye on an apparently mandatory but nondirective statutory test. The problem of drawing the line under the selective approach is illustrated by two different assumptions made in regard to the application of the act to the following facts: *T* devises Blackacre to his son, *A*, for life, remainder in equal shares to *A*'s children, if any, for their lives with curtesy, and, on the death of the survivor, to *T*'s eldest male lineal descendant then living, in fee simple. *T* is survived by his wife, *W*, his three-year-old son, *A*, and a daughter, *Mary*. One commentator has assumed that *A*'s is the only measuring life, Brégy, *A Defense of Pennsylvania's Statute on Perpetuities*, 23 TEMP. L.Q. 313, 316 (1950), while another has assumed that *Mary*'s life would also be available on the theory that she was also named in the will, Phipps, *supra* note 3, at 23. Who is right is not the point. The point is that the statute as enacted leaves the matter completely up in the air.

lives as measuring lives is one step removed from using those of the original parties. The latter were named in the agreement and the former, necessarily, only described. But that can scarcely matter unless an arbitrary judge-made rule makes it matter under the process of "selectivity."

Option agreements are admittedly odd cases. A more orthodox perpetuities question provides a fairer test. Assume the following fact situation:

*Example 5:* *T*, a bachelor, in a valid will, devises Blackacre (part of the residue) "to *S*, the son of my best friend, for life, remainder to *S*'s children living at *S*'s death for their lives with rights of survivorship, then to the grandchildren of *S* living at the death of the survivor of *S*'s children in fee simple." At *T*'s death, *S* is living, married, and without children. One year later, however, a son, *G*, is born to *S*. *S* dies on the day his son is born. Twenty-one years later, *G* marries and has a son, *H*. *G* dies on the day his son is born. It is now twenty-two years after *T*'s death and twenty-one-plus years after *S*'s death. A lawsuit follows between *H*'s guardian and *B*, an errant brother of *T* and *T*'s only heir at law. *B* is sixty years old.

The weakness of *B*'s case under the "actual events" test is obvious. He must argue that *H*'s interest did not vest within twenty-one years of some life in being at *T*'s death, when his own ability to appear in court and make the argument gives it the lie. That the court would be motivated by *T*'s obvious intent to exclude his brother and by the relatively short period of twenty-two years which had elapsed since *T*'s death is to be expected. Furthermore, the act allows—perhaps even requires—an award of Blackacre to *H*. If "actual events" is the test, *H*'s interest did vest within twenty-one years of *some* life in being at *T*'s death—namely, *B*'s life. Would it be unworkable to extend the measuring life concept under the act to allow consideration of the lives of the disputing claimants? No, it would not.

Nor is there any reason to stop the search for a life in being with those of the disputing claimants. Suppose, in example 5, that *B* was not *T*'s sixty year old brother but rather *T*'s twenty year old nephew who had already squandered three fortunes. Now *B*'s is not a life in being at *T*'s death. But what is to prevent the judge, *J*, from reasoning: "I, *J*, am sixty years old. Mine was a life in being at *T*'s death. In fact, *T* was a friend of mine. Judgment for *H*." Professor Leach regards the possibility of such a holding as "patently frivolous" and points to two sources "neglected" by Professor Mechem and others "which indicate that no such nonsense as they propose was intended by the official committee . . . which prepared this statute—and there-

fore, on recognized principles of statutory construction, that no such intention can be attributed to the legislature . . . .”<sup>13</sup> One of the sources is the commissioners’ comment that the act “is intended to disturb the common law rule as little as possible, but to make actualities at the end of the period, rather than possibilities as of the creation of the interest, govern . . . .”<sup>14</sup> But, as Professor Mechem points out, the act, whatever its wisdom, bears only an “external resemblance” to the common-law rule;<sup>15</sup> Professor Simes has branded it “revolutionary.”<sup>16</sup> There may be those who take comfort in the comment of the commissioners. Were it not for its source I would be inclined to think it naïve, let alone the sort of stuff from which legislative intent should be derived.

### *The Strict Approach*

The adoption of the strict approach, which would restrict measuring lives under the act to those which would be so regarded at common law, is not likely for several reasons. In the first place, although such a rule sounds easy enough, no one knows what it means. The discussion of example 1 indicates that it is not even clear that the holder of a valid life estate preceding a void future interest is a measuring life at common law. In the second place, the court in *Mumma v. Hinkle* plainly rejected any such limitation when it assumed there was necessarily some measuring life available in a case where at common law there would have been none. Finally, and most important, there will be cases in which the “fair” result requires resort to measuring lives which clearly would not be so regarded at common law. A further example may clarify the point:

*Example 6:* *T* devises Blackacre “to *A* for life, then to *A*’s widow for life, remainder in fee to *B*’s issue living at the death of *A*’s widow.” At *T*’s death *A* is married to *W*. *A* dies and leaves *W* as his widow. Twenty-two years later *W* dies. *W* was, in fact, alive at *T*’s death.

Assuming that the term “widow” in the will cannot be construed to mean *W*, the remainder to *B*’s issue would be void at common law under the familiar “unborn widow” application of the rule:<sup>17</sup> the courts would assume that *W* might die or divorce *A*, who might then marry

<sup>13</sup> Leach, *supra* note 1, at 1144.

<sup>14</sup> Commissioner’s Comment on Section 301.4(b), in PA. STAT. ANN. tit. 20, at 475 (1950).

<sup>15</sup> Mechem, *A Brief Reply to Professor Leach*, 108 U. PA. L. REV. 1155, 1157 (1960).

<sup>16</sup> Simes, *Is the Rule Against Perpetuities Doomed?*, 52 MICH. L. REV. 179, 183 (1953).

<sup>17</sup> Leach, *supra* note 7, at 644.

$W_2$  who just *might* turn out to be someone who was not alive at  $T$ 's death. The situation represents one of the more embarrassing applications of the common-law rule, and section 4 of the Estates Act was surely intended to correct it.

It is a safe prediction that a Pennsylvania court, with the help of the statute, would uphold the gift to  $B$ 's issue in the example. The opinion could be expected to read something like this: " $W$  was alive at  $T$ 's death. Furthermore,  $W$  in fact remained married to  $A$  until  $A$  died, and in fact became his widow. Under the 'actual events' test, the remainder vested in  $B$ 's issue at  $W$ 's death and since  $W$  was a life in being the vesting occurred in time."

Convincing? Well, yes. But it cannot be overlooked that reaching the desired result requires the court to look to a measuring life which would not have been considered at common law—namely,  $W$ 's life. If the act requires an extension of the common law's measuring life concept to rectify one of the plainest anomalies of the common law, it seems reasonably clear that the act must have intended such an extension. Otherwise there was not much point in enacting the statute at all.

Or suppose that, in *Mumma v. Hinkle*, Miss Mumma had exercised her option not six but twenty-two years after the agreement was signed but while Mr. Hinkle was still alive. No court would be inclined to strike down the option even though the gross period had fully elapsed. Furthermore, the General Assembly probably intended that it should be upheld and the Dauphin County Court, for one, indicated that it would uphold the option.<sup>18</sup> But, if no measuring lives except those so regarded at common law can be utilized, the option would necessarily be void in such a case.

Obviously some extension of the common-law concept is needed if section 4 is to operate as intended. The strict approach, assuming that it could be made understandable, just will not do.

### CONCLUSION

A well-developed rule of law requires that a statute which is either too vague or internally inconsistent in some substantial respect be declared inoperative.<sup>19</sup> And the statutory admonition to ascertain "the

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<sup>18</sup> See 71 Dauph. Co. Rep. at 245.

<sup>19</sup> *Wilcox v. Penn Mut. Life Ins. Co.*, 357 Pa. 581, 55 A.2d 521 (1947); *Miller v. Belmont Packing & Rubber Co.*, 268 Pa. 51, 110 Atl. 802 (1920). To what particular constitutional provision this rule of law is traceable is unclear—neither *Wilcox* nor *Belmont Packing* discusses the question in constitutional terms. In *Pennsylvania State Athletic Comm'n v. Loughran*, 9 Pa. D. & C.2d 427 (C.P. 1956), however, the rule was characterized as within the concept of due process. For present purposes, its origin is unimportant.

expiration of the period allowed by the common law rule against perpetuities" by "actual rather than possible events" may be not only too vague for intelligent application but also self-contradictory. This statutory phrase—upon *some* construction of which any workable application of section 4 must depend—begins with the implicit but fallacious assumption that there is such a thing as an "expiration" date under the common-law rule. Contrary to this assumption, the common-law "period" is curiously projectible, in its relevant legal sense, only from its beginning. The statutory requirement of an "actual events" test to measure a period of time purportedly determinable by reference to a common-law formula that has never before been called upon to pinpoint an expiration date for anything is something like attempting to measure time or distance in pounds and ounces.

The problem seems more fundamental than a "technical weakness"<sup>20</sup> and far worse than the mere probability of an anomalous result.<sup>21</sup> A technical weakness, whatever that may mean, sounds like something curable by strong construction, and anomalous results abound under perfectly valid statutes. The task of the courts under the act, on the other hand, is that of converting a meaningless combination of concepts into a meaningful body of law.

If section 4 of the Estates Act is construed to incorporate some form of the selective approach to the measuring life problem—as is probably the case—it should say so. Its failure to say so not only provokes speculation about the statute's meaning but also raises the more serious question of whether the statute conveys any meaning at all other than a general disenchantment with the common-law rule.

Clearer language is possible, as is demonstrated by the Kentucky act<sup>22</sup> which does not pretend that common-law tests are appropriate and acknowledges that there are to be new rules—however difficult their formulation may be—to determine the validity of future interests. The Pennsylvania act, by assigning an impossible task to inappropriate tests, invites criticism not limited to considerations of policy.

The Massachusetts act<sup>23</sup> avoids the constitutional problem entirely by requiring that future interests vest no later than the conclusion of preceding life estates. Here, too, there is no pretense that vesting must occur within the time period allowed under the common-law rule. A new test is provided.

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<sup>20</sup> See Waterbury, *Some Further Thoughts on Perpetuities Reform*, 42 MINN. L. REV. 41, 42-43, 64 (1957).

<sup>21</sup> Mechem, *Further Thoughts on the Pennsylvania Perpetuities Legislation*, 107 U. PA. L. REV. 965, 976-77 (1959).

<sup>22</sup> KY. REV. STAT. §§ 381.215-223 (1960).

<sup>23</sup> MASS. ANN. LAWS ch. 184A, §§ 1-6 (1955).

If there is to be an extension of the common-law measuring life concept for purposes of applying the statute, the courts *must* adopt either the universal approach, which is “patently frivolous,” or the selective approach, which might become workable but only after subjecting practitioners and courts to years of sheer agony while they guess at the manner in which measuring lives will be determined for the myriad of limitations imaginable. This guesswork would be particularly distressing in a field of law whose value lies largely in its predictability. Furthermore, the selective process would be superimposed upon statutory language which expressly incorporates the common-law time “period” and therefore presumably prohibits either increasing or decreasing the common-law class of “measuring lives”—that is, the end result of such a series of judge-made rules would not be the measuring of the period allowed by the common-law Rule Against Perpetuities which, after all, is what section 4 purports to require.

It may not be inappropriate to observe that a judicial holding of invalidity here could prove as much a blessing as was the holding in *Wilcox v. Penn Mut. Life Ins. Co.*<sup>24</sup> with regard to the Community Property Act.<sup>25</sup> It would allow the General Assembly to try again on a clean slate—either by a new formulation of the wait-and-see principle or by the perhaps preferable approach of specific legislation designed to eliminate on a piecemeal basis the obvious anomalies of the common-law rule. But until the Supreme Court of Pennsylvania has an opportunity squarely to decide the question, Pennsylvania practitioners, and particularly those concerned with estate planning, would do well to adhere to the requirements of the common-law Rule Against Perpetuities. It may be back.

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<sup>24</sup> 357 Pa. 581, 55 A.2d 521 (1947).

<sup>25</sup> Pa. Laws 1947, No. 550.