

2/21/69

First Supplement to Memorandum 69-44

Subject: SCR 17 - New Topics

Senate Concurrent Resolution 17 was introduced to effectuate the Commission's recommendation that it be authorized to study three new topics:

- (1) Counterclaims and cross-complaints
- (2) Joinder of causes of actions
- (3) Civil Code Section 715.8 (rule against perpetuities)

With respect to the first topic, the Judicial Council has sent us a rough draft of an old study on the topic that may be of some assistance. The Judicial Council had determined that the topic was one that was in need of study since a number of trial and appellate judges had indicated that the existing law was resulting in a waste of the court's time and injustice. However, the topic could not be given a high priority by the staff of the Judicial Council and the Chief Justice suggested that the Commission take over the project.

With respect to the third topic, you will be interested in Exhibit I, which is an extract from the special report prepared for the Assembly Committee on Judiciary suggesting that Civil Code Section 715.8 be repealed.

Senate Concurrent Resolution 17 was amended in the Senate Judiciary Committee hearing at the suggestion of the California Real Estate Association to authorize the study of the following new topic: "Whether the law relating to liquidated damages in contracts and, particularly, in leases, should be revised." The Counsel for the State Bar Committee on the Administration of Justice later expressed his personal view that this topic

is greatly in need of study. He indicated that from time to time efforts had been made to revise the existing law, but no satisfactory standard could be developed because of the inability of the bar to devote sufficient resources to the problem and because of the various interest groups involved.

The Resolution was approved, as amended, by the Senate Committee on Judiciary. We will give you an up-to-date report at the March meeting.

Respectfully submitted,

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Executive Secretary

Perpetuities. Related to the problems of probate are the laws which regulate trusts. In this area, one California statute has been criticized by law professors. According to UCLA law Professor Jesse Dukeminier, "All the perpetuities experts in the state would vote to get rid of one confusing statute, California Civil Code, Section 715.8. We need nothing in its place."

In Professor Dukeminier's article written in the August, 1967 California Law Review, he pointed out that this particular section, enacted in 1963 to overrule a district court of appeals decision (later reversed by the California Supreme Court), makes it possible to create private trusts of unlimited duration. This is a clear violation of the classic rule against perpetuities.

Professor Lewis Simes joins Professor Dukeminier in urging repeal of S. 715.8. Edward Halbach, Dean of the Law School at Berkeley, also has questioned the constitutionality of the section.

The present California statute, according to these experts, violates the policy of the rule against perpetuities because it allows wealth to be tied up in trusts indefinitely. The purpose of the prohibition is to achieve the benefits of a turn-over of wealth and eliminate deadhand control. As Harvard Law Professor Simes has written, "The rule against perpetuities strikes 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."