

#74

8/21/69

Memorandum 69-92

Subject: Study 74 - Civil Code Section 715.8 (Rule Against Perpetuities)

BACKGROUND

At the June meeting, the Commission briefly discussed the suggestion that Civil Code Section 715.8 be repealed. The staff was directed to solicit the views of the cognoscenti as to two questions: (1) Should Section 715.8 be repealed? and (2) Is simple repeal advisable without (a) related changes or (b) a more comprehensive revision of the perpetuities statutes to be based, presumably, upon a thorough study? The staff was directed to get the views of practicing estate planners as well as law professors. The staff broadly disseminated the letter shown in Exhibit I and we have received 36 replies (to date). The letter was sent to each person who participated in the Continuing Education of the Bar program on will drafting and to other experts in the field.

From these letters and from its own research, the staff concludes that the Commission should recommend repeal of Section 715.8 and that it should calculatedly decline to recommend either substitutional legislation or revision in addition to repeal of that section. Included with this memorandum is a draft of a tentative recommendation that might be appropriate for this purpose. This is a rather difficult recommendation to write because it must persuade without dealing too harshly or fancifully with the State Bar Committee's product, and at the same time it probably should not rely entirely on the views expressed by the "experts" and others. In other words, this matter of Section 715.8 is not so complicated that the Commission would be justified in acting, as does the Queen of England,

solely on advice. Perhaps, with our combined editorial talents, we can give the recommendation the proper tone and content.

As the bulk of these letters and the four law review articles devoted to Section 715.8 convincingly show, Section 715.8 is an almost "impossible" statute. It is possible, of course, to provide an exemption or exclusion as to any given application of the rule against perpetuities, but it is not logically possible to retain the rule (as is done by Civil Code Section 715.2) and, at the same time, to obliterate the concept of "vested" upon which it operates. In short, the rule is simply a rule against the remoteness of "vesting," (here using "vesting" in the traditional sense), and nothing more can be made of it. As no one advocates outright repeal of the rule, "revision" must take the form of changes in the way it is applied (cy pres, wait-and-see, etc.) or comparatively specific exemptions or exclusions. Changing a logically necessary component of the rule (as was done by enacting Section 715.8) is akin to making an error in arithmetic.

The staff is convinced that, with the repeal of Section 715.8, California statutes on perpetuities and closely related matters (restraints on alienation, trust duration, income accumulation, etc.) will be reduced to their simplest, clearest, and most plausible form in a century. Indeed, there would appear to be a positive need to leave this legislation alone for the foreseeable future. In 1959, the Commission concluded that it had set the perpetuities house in order by removing all vestiges of the old suspension rule, by retaining the common law rule (Civil Code Section 715.2), and by providing a special rule for the duration of private trusts (Civil Code Section 771). Then, in 1963, the State Bar Committee (Messrs.

Homer D. Crotty, Edward D. Landels, John R. McDonough, John M. Naff, and Lawrence L. Otis) proposed a cogent perpetuities reform "package." As we see, Section 715.8 was a sour note in the package, but the other reforms, especially the cy pres doctrine (Civil Code Section 715.5) and the unqualified 60-year period in gross (Civil Code Section 715.6), presumably are still "good" and ought to be sufficient. Surely it would seem wise before introducing other innovations, much less a comprehensive revision, to await at least one appellate decision that deals in a significant way with the changes of 1959 or the reforms of 1963. It seems to the staff that, notwithstanding the infinite productivity of legal scholars in this field, if Section 715.8 can be gracefully removed, the California legislation will have been placed in as good order as can be expected.

ANALYSIS OF COMMENTS

Writers (24) advocating repeal of Section 715.8

Turning to the thirty-six letters attached as exhibits (these are arranged merely in the order received), it appears that 24 of the writers advocate repeal of Section 715.8 and expressly disfavor additional changes. The law professors are unanimous in this view. See Simes (Exhibit VI); Halbach (Exhibit VII); Dukeminier (Exhibits XI and XXV); and Powell (Exhibit XVI). Some of the practitioners display a surprising grasp of this esoteric subject in supporting repeal of Section 715.8. See, e.g., Schifferman (Exhibit III); Cohan & Fink (Exhibit XII); Pigott (Exhibit XIII); and Humphrey (Exhibit XXIV). Of course, some of the writers supporting repeal are merely acting upon advice or state no reasons for their view.

Writers (9) not objecting to repeal but raising questions

Nine of the remaining letters do not oppose repeal, but do raise questions or make suggestions. In most of these letters, the writer simply claims a skeptic's privilege to check this matter out for himself. This is an entirely understandable reaction because, excepting persons who follow "perpetuities" as an avocation, it does take a day or two of hard study to reorient oneself with it. The views expressed in the 9 letters can be summarized as follows:

(1) Mr. Chadenayne (Exhibit V) opposes "piece-meal tinkering," but apparently would favor repeal if the repeal were based on a "thorough consideration."

(2) Mr. Ferguson (Exhibit X) observes that Section 715.8 is "wretchedly written," but would be reluctant to see restoration of "a strict historical application of the rule against perpetuities."

(3) Professor Dukeminier has additional ideas in the field of perpetuities (Exhibit XI), but "would make a small start by repealing Civil Code Section 715.8." (Exhibit XXXV)

(4) Mr. Farrell (Exhibit XXVI) favors repeal and states his reasons, but would go further and reduce the perpetuities sections to a single definition of, and limitation upon, "vesting." His draft statute captures the essence of the "wait and see" doctrine which was passed over by California in 1963 in favor of the cy pres principle (Civil Code Section 715.5).

(5) Mr. Abel (Exhibit XXVIII) notes that Section 715.8 cannot be "rationally reconciled with Section 715.2," but he would favor "careful study" of the effect of the repeal, especially upon related code sections.

(6) In a thoughtful letter, Mr. Samuels (Exhibit XXIX) concludes that, "I have no hesitancy in recommending that the section be repealed, unless the rule against perpetuities as stated in the Constitution and Civil Code 715.2 is clarified so as to be compatible." He observes, however, that it is at least possible that the Legislature in 1963 actually meant to exempt all trusts the assets of which can be sold by the trustee. He concludes that, "If so, the clarification should go a step beyond the existing code section and clarify whether it is intended to apply only to legal and equitable interests in specific assets, or whether it is also intended to limit the terms of private trusts."

(7) Mr. Kimbrough (Exhibit XXXI) was unable to conclude whether Section 715.8 "could be repealed without harm to other sections and concepts," but he doubted "the correctness of the sweeping conclusions expressed by Professor Dukeminier."

(8) Mr. Glass (Exhibit XXXII), believes Section 715.8 should be repealed, but he wants it made clear "that there is no intent thereby to limit Civil Code Section 715.5 [cy pres]." He also observes that "there may be lurking behind the confusing language of Section 715.8 the germ of a meritorious idea." His suggestion (validity during the lifetime of the transferor's grandchildren), however, seems less forceful than the cy pres rule or other changes that have been or might be made.

(9) Lastly, Mr. McInnis (Exhibit XXXIII) is "convinced that Civil Code Section 715.8 should be repealed," but he apparently would also repeal the entire "package" of 1963.

Writers (3) objecting to repeal

The dissents are limited to Mr. Boucher (Exhibit XX), Mr. Crotty (Exhibits XXI and XXVII), and Mr. Schwarz (Exhibit XXIII). Mr. Boucher has "no doubt that Section 715.8 has raised serious theoretical problems in the perpetuities field," but he doubts "that from a practical standpoint repeal of the section is so urgent that it should be promoted by the Law Revision Commission." He would give priority to another matter in the probate field. His view, understandable as it is, seems sufficiently answered by the letters of Mr. Warmke (Exhibit XXV) and Professor Dukeminier (Exhibit XXXV).

Mr. Schwarz (Exhibit XXIII) of Gibson, Dunn & Crutcher, unlike Mr. Pigott (Exhibit XIII) of that firm, agrees with Mr. Crotty that Section 715.8 should be retained.

Mr. Crotty (Chairman of the 1963 State Bar Committee) is the lone defender of Section 715.8, and he makes several points. He reiterates that "it is the purpose of Section 715.8 to eliminate from the rule against perpetuities commercial and contract transactions." But, of course, the section also seemingly eliminates beneficial interests under trusts, executory interests under wills, and the like. He does not believe that Wong v. DiGrazia ("on-completion" lease is good) "cleared up the cloud surrounding Haggerty v. Oakland" ("on-completion" lease is bad). The matters alluded to here apparently are limited to the dissent of Justice Peters (a perpetuities "purist") in Wong v. DiGrazia; dicta in First & C Corp. v. Wencke, 253 Cal. App.2d 719 (1967) in which the court, rather oddly, quotes the Haggerty decision; and the decision in Prime v. Hyne, 260 Cal. App.2d (1968) in which the court (Cobey, Shinn, and Ford) held

that a purported sale of real property by the "heirs" of a living person to take effect upon the distribution of the real property from the living person's estate violates "the rules against restraints of alienation and perpetuities." The latter decision dealt with a transaction made before the 1963 legislation, but in any event the genuine basis of the decision appears to have been "the courts' general tendency to frown upon such transactions, which tend to defeat the intentions of the testator and leave the heir with only a fraction of his rightful inheritance."

The dread which Mr. Crotty and other lawyers may have as to these admittedly infrequent judicial dicta and decisions seems to have given rise to the desire for a modified "rule against perpetuities" that is literally self-applying. In other words, the search is for a rule and for exemptions and exclusions that are so clear that the courts cannot possibly misstate, misconstrue, or misapply them. As worthy as this objective may be, the goal seems utterly unobtainable in this area, and one can wonder whether Section 715.8 is even a step in this direction. Perhaps it would be better to attempt to educate the courts in cy pres and the 60-year period in gross or, as an alternative, specifically to exempt leases to commence in futuro, long term options, oil and gas rights that purport to arise in the future, and the like. A general and confusing section such as 715.8 may ultimately serve the contrary purpose by causing the courts to lapse back into . . . "fundamental" perpetuities policy, rules, and tradition.

Mr. Crotty wonders, as does Mr. Boucher, about the practical significance of Professor Dukeminier's views as to the perpetual estate tax avoidance possibilities inherent in Section 715.8. In Exhibit XXXV, Professor

Dukeminier again explains his fears as to the tax avoidance possibilities, but in the staff's view, the tax problem is not the core of the effort to repeal Section 715.8. In our view, the tax problem involves a contingency upon a contingency upon a contingency, because it seems impossible to predict (1) whether Section 715.8 is constitutional, (2) how it might be interpreted to apply to trusts, or (3) what the tax consequences of a given construction might be.

Mr. Crotty also mentions the proposed deletion from the California Constitution of Section 9 of Article XX ("No perpetuities shall be allowed except for eleemosynary purposes"). The Constitution Revision Commission intends to delete that section, of course, simply as a matter of eliminating legislative matter from the Constitution. In view of Civil Code Section 715.2 (the common law rule against perpetuities) this deletion will have no effect, except possibly to "validate" certain questionable features (novel concept of vesting and 60-year period in gross) of the legislation of 1963. Removal of the constitutional exemption for "eleemosynary purposes" will have no significance because, if there is one thing clear about the rule against perpetuities, Civil Code Section 771 (trust duration), Civil Code Section 724 (accumulation of income), and the California decisions on perpetuities, it is that none of these matters have any bearing upon the duration of a charitable trust. As the decisions put it, the beneficial interest under a charitable trust is always and forever "vested in charity." The only problem in this area is determining whether a trust is charitable (as opposed to "honorary" or "private"), and this is a matter not aided or affected by constitutional or statutory provisions.

Professor Dukeminier (Exhibit XXXV, third paragraph) observes that, "an examination of the social philosophy underlying perpetuities policy will bog the commission down in a swamp from which it will not likely emerge with any agreement or legislation." The staff agrees and would add only that the Commission in 1959, and the State Bar Committee in 1963, did craftsmanlike work, and that with repeal of a single section (715.8), the code provisions will be left in fair shape whether one is thinking in terms of "social philosophy" or of understandable codification.

Respectfully submitted,

Clarence B. Taylor,
Assistant Executive Secretary

CALIFORNIA LAW REVISION COMMISSION

July 18, 1969

SCHOOL OF LAW
STANFORD UNIVERSITY
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THE SAID
 WILLIAM E. STANTON, JR.
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 WILLIAM A. YALT
 GEORGE H. MURPHY
 Et Cetera

Mr. DeMouilly: 2/21/69
 I enclose in the
 Goldfarb - Singer article
 J. H. DeMouilly

J. N. DeMco, Esq.
 DeMco Building
 1022 Mendocino Avenue
 Santa Rosa, California 95401

Dear Mr. DeMco:

The 1969 Legislature authorized the Law Revision Commission to make a study to determine "whether Civil Code Section 715.8 (rule against perpetuities) should be revised or repealed." In a special report prepared for the Assembly Committee on Judiciary, it is stated: "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." Goldfarb & Singer, *Problems in the Administration of Justice in California* 62 (1969). An extract of the pertinent portion of this report is enclosed.

We note that you participated in the C.E.B. project which resulted in the publication of California Will Drafting (Cal. Cont. Ed. Bar 1965). The Commission would appreciate your assistance in this project. Specifically, we seek your opinion whether Civil Code Section 715.8 should be repealed and, if so, your reasons why.

If you believe that Section 715.8 should be repealed but only if additional legislation is enacted, we would appreciate your advising us of the nature of the legislation needed. The Commission is not now in a position to undertake any additional substantial projects. Accordingly, we would have to defer making any recommendation concerning Section 715.8 if it is concluded that such a recommendation could be made only after a comprehensive study of all aspects of the rule against perpetuities had been completed.

If possible, the Commission would like to submit a recommendation on this topic to the 1970 Legislature. If we are to meet this schedule, we need to receive your response not later than August 15, 1969. If you are unable to send us a full expression of your views by that date, we would nevertheless appreciate receiving a brief statement of your conclusion as to whether Section 715.8 could be simply repealed.

Sincerely,

John H. DeMouilly
 Executive Secretary

THOMAS, SNELL, JAMISON, RUSSELL, WILLIAMSON & ASPERGER

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July 21, 1969

Mr. John H. DeMouly
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California Law Revision Commission
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Dear John:

This is in reply to your form letter of July 18, 1969, soliciting my comments on the move to repeal Civil Code Section 715.8. I believe the appropriate comment would be, "It's about time"--I certainly favor repeal of the section as soon as possible. In my opinion, in view of the very substantial body of common law on the meaning or meanings of "vesting," no substitute for the section is needed or desirable.

Very truly yours,


Philip H. Wile

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July 22, 1969

Mr. John H. DeMouilly
Executive Secretary
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Dear Mr. DeMouilly:

I am in receipt of your letter of July 18, 1969 with respect to California Civil Code §715.8.

I am in agreement with those who propose repeal of this code section. I do not believe that additional legislation is needed.

In my view, this section is quite confusing and tends to detract from the legislative purpose reflected by the Rule against Perpetuities. Furthermore, it appears to inject considerations which were apposite as long as we had a rule against the suspension of the power of alienation, but which have not obtained since 1951 (see former Civil Code §715).

Accordingly, I concur in its proposed repeal.

Sincerely yours,

RPS/nd

ROBERT P. SCHIFFERMAN

Memo 69-92

EXHIBIT IV

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July 22, 1969

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California Law Revision Commission
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Re: Civil Code Section 715.8

Dear Mr. DeMouilly:

Replying to your letter dated July 18, 1969,
it is my opinion that California Civil Code Section 715.8
should be repealed, with no replacement therefor.

The reasons for my opinion are well set forth
in the extract from Goldfarb and Singer, Problems in the
Administration of Justice in California 62-63.

Sincerely yours,

LEON E. WARMKE

LEW:rh

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FRANK A. GRANDI

July 22, 1969

California Law Revision Commission
School of Law
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Stanford, California 94305

Gentlemen:

In response to your letter of July 18th concerning action, if any, which should be taken in reference to Section 715.8 of the Civil Code, I seriously doubt if I should be classed as anything approaching an expert on this business of perpetuities as it is something which very, very seldom arises in the general practice of law in a community the size of Tracy.

However, your letter implemented me to check the code section and the available authorities in reference to it. Review of one code section cannot, of course, be intelligently made without considering other code sections bearing on the same problem. Even a cursory examination of the code sections bearing on this problem of perpetuities indicates that there has been considerable piece-meal tinkering with the rule against perpetuities over the years, particularly during the last ten or twelve years. This, in and of itself, would indicate that rather than more tinkering, a thorough consideration should be given to the whole problem, and that pending such thorough revision, it would seem to me that unless Civil 715.8 is creating more problems than appears from the cited authorities, that there is no real need in wasting the Legislature's time in repealing it. If, on the other hand, it has created some particular problems, it is probably not much of a chore to repeal it, since repeal would probably not have any notable effect on the perpetuities problems. My conclusion is that 715.8 is rather unimportant except in a consideration of the whole problem of rules against perpetuities, and this whole problem should be reviewed in the not too distant future.

Very truly yours,

CHADEAYNE, WILKINSON, TALLEY & GRANDE

J. Kingsley Chadeayne

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July 22, 1969

John H. DeMouilly, Executive Secretary
California Law Revision Commission
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Stanford, California 94305

Dear Mr. DeMouilly:

Answering your letter of July 17th: I think Section 715.8 of the Civil Code should be repealed; and I do not believe that it is necessary to revise it or to substitute other legislation for it. My views on this section are contained in an article which I wrote, appearing in the Hastings Law Journal for January 1967, 18 Hastings L. Jour. 247. I am inclosing a copy of the article. You will find my views on Section 715.8 stated at pages 256 to 258.

As I indicate in the article, this section validates certain provisions which might, as a practical matter, tie up property for an indefinitely long time. There is no legislation like it anywhere else so far as I know. It's effect is to bring back the rule as to suspension of the power of alienation, which was undesirable and was totally repealed in 1959. Moreover, this doctrine of suspension of the power of alienation is revived in a most objectionable manner, namely by introducing a new definition of a vested interest the like of which has never been heard of before.

The last sentence of Section 715.8 is entirely unobjectionable. I refer to the following: "An interest is not invalid, either in whole or in part, merely because the duration of the interest may exceed the time within which future interests in property must vest under this title, if the interest must vest, if at all, within such time." However, that sentence expresses merely what would be good common law even if it were not enacted, and so it is unnecessary.

I strongly support an immediate repeal of Section 715.8 and do not believe any preliminary study is necessary.

Sincerely yours,

Lewis M. Simes

Perpetuities in California Since 1951

By LEWIS M. SIMES*

New Concept of Vesting

Probably the most thoroughly unique and completely revolutionary provision in the legislation of 1963 is Section 715.8, which reads in part as follows:⁴⁰

"An interest in real or personal property, legal or equitable, is vested if and when there is a person in being who could convey or

³⁸ See Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638, 644 (1938).

³⁹ CAL. CIV. CODE § 715.7 (enacted by Cal. Stat. 1963, ch. 1455, § 6, at 3009).

⁴⁰ CAL. CIV. CODE § 715.8 (enacted by Cal. Stat. 1963, ch. 1455, § 7, at 3010).

there are persons in being, irrespective of the nature of their respective interests, who together could convey a fee simple title thereto."

As a part of the legislative act in which this provision was included there was a clause repealing Sections 693-95 of the California Civil Code, which, since 1872, had constituted the definitions of vested and contingent future interests. The repealed sections are as follows:

§ 693. Kinds of Future Interests. A future interest is either:

1. Vested; or
2. Contingent.

§ 694. Vested Interests. A future interest is vested when there is a person in being who would have a right, defeasible or indefeasible, to the immediate possession of the property, upon the ceasing of the intermediate or precedent interest.

§ 695. Contingent Interests. A future interest is contingent, whilst the person in whom, or the event upon which, it is limited to take effect remains uncertain.

It would appear that, under the guise of a new definition of vested and contingent future interests, the new section has in fact eliminated any rule against remoteness of vesting, and has provided a test of suspension of the power of alienation in determining the validity of future interests. This is a step backward. As has been seen,⁴¹ suspension of the power of alienation was entirely eliminated from our code in 1959 because it was thought to be undesirable. It is true, a major objection to it at that time was that rules restricting the suspension of the power of alienation unduly restricted the duration of trusts; and clearly the new section establishes a rule of suspension of the power of alienation only with respect to contingent future interests, but does not concern itself with the duration of equitable vested interests in trusts. Nevertheless, a rule dealing solely with suspension of the power of alienation, without any restriction on those contingent future interests which do not suspend the power of alienation, is undesirable.

Two examples will show how this is so. A conveys land "to B in fee simple, but if the land is ever used for business purposes, then to C in fee simple." If the executory interest limited to C is valid, it may tie up the property and prevent a clear title for an indefinitely long period of time. It is true, B and C could unite in conveying in fee simple absolute; hence there is no suspension of the power of alienation. Moreover, C's interest is valid as a "vested" interest under the new statutory provision. But clearly it does tie up property. For while B

⁴¹ Cal. Stat. 1959, ch. 470.

⁴² SMITH, FUTURE INTERESTS 268 (2d ed. 1966).

and C could unite in conveying in fee simple absolute, they are not likely to do so, since they will have difficulty in evaluating their respective interests.⁴² Or suppose A, owning land in fee simple absolute, executes for valuable consideration, an instrument, covenanting on behalf of himself, his heirs and assigns, that B, his heirs, and assigns, shall have an option for 1,000 years to buy the land for \$10,000. Under the common law rule against perpetuities, the option would be regarded as invalid,⁴³ since A is trying to give B a contingent, equitable interest in the land, which may not vest for 1,000 years. Yet the option does not suspend the power of alienation, and, under the new statutory provision, it would apparently be good. Indeed, the new statutory provision results in this: If the only contingent, future interests found in a deed or will are limited to definite ascertained persons, the rule against perpetuities is not violated. The contingent future interests are saved by the use of a fiction in accordance with which they are deemed vested.

That a rule solely against the suspension of the power of alienation is inadequate to prevent the tying up of property for an unreasonably long time, has been recognized by the courts of this state and of other states. Thus, as has been seen, before the common law rule against perpetuities was declared in this state in statutory form, the courts concluded that the common law rule against perpetuities, as a rule of remoteness of vesting, was in force by virtue of a provision of the California constitution. And in New York and some other states, where statutory rules as to the suspension of the power of alienation have been in force, courts have seemed ready to find, on one ground or another, that there is also a rule against remoteness of vesting.⁴⁴

But even if we were to concede that the only rule restricting the tying up of property by future interests should be a rule as suspension of the power of alienation, it is most unsatisfactory to state it in the form of a new definition of vesting. From time immemorial the term "contingent," when applied to future interests, has meant "subject to a condition precedent." It is hard to see how such an interest can truly be said to be vested merely because of the new clause in the statute.⁴⁵

⁴² The leading English case to this effect is *London & S.W. Ry. v. Gomm*, 20 Ch. D. 502 (1882). To the same effect is 4 RESTATEMENT, PROPERTY §§ 393-94 (1944).

⁴³ See generally SIMS & SMITH, FUTURE INTERESTS, ch. 41 (2d ed. 1956).

⁴⁴ It is believed that the California Supreme Court, which has recognized that a rule against remoteness of vesting is declared by the California constitution, is not going to conclude that we still have a rule against remoteness of vesting enacted in the civil code, just because the legislature has re-defined vesting in terms of suspension of the power of alienation.

UNIVERSITY OF CALIFORNIA, BERKELEY

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July 16, 1969

John H. DeMouilly, Executive Secretary
California Law Revision Commission
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Dear Mr. DeMouilly:

I am writing in response to your letter of July 7, 1969, inquiring about my opinion concerning possible revision or repeal of Civil Code Section 715.8, dealing with an aspect of the rule against perpetuities. It is easy for me to give my opinion, because I am personally satisfied that this Section should be repealed.

I do not believe that the repeal of this Section must necessarily await additional legislation because the Section is severable from the other perpetuities sections, and it deals with a matter which I believe needn't have been treated at all. The Section primarily creates new and quite independent problems.

I do believe a comprehensive study of all aspects of the rule against perpetuities would be desirable at some point, and I do not believe the job was properly done at the time the new sections were added in 1963. This does not mean, however, that repeal of this Section must await such a comprehensive study. The second paragraph of Section 715.8 is unnecessary and, I think, unimportant one way or the other. The first paragraph undertakes casually to redefine the "vested" interests, without even restricting the redefinition to application for purposes of the rule against perpetuities. The risks here go beyond perpetuities matters and affect construction and classification of future interests generally, but another objection exists specifically with regard to perpetuities matters. The provision would, if taken literally, eliminate all restrictions on the creation and duration of trusts or legal life estates where the trustee or legal life tenant had a power of sale. I would expect our Supreme Court, if confronted with the problem, to avoid this interpretation in a way I shall not now venture to discuss, but the reason I would expect it to do so is that this provision should, if applied literally, be held to violate the California constitutional prohibition against perpetuities.

July 16, 1969

A literal interpretation would also be contrary to any conceivably sound notion of public policy in the perpetuities area, even if not unconstitutional.

In case you have not already done so, let me urge you to solicit the comments of Professor Jesse Dukeminier of the U.C.L.A. law faculty. He may have some simple, ready solutions to suggest, and I would certainly be interested to know whether he would concur with my suggestion that this Section could, if necessary, be repealed without a comprehensive study of the entire rule. If he disagreed with my view, I would certainly reconsider my position and wish to have all of his reasons considered. I know he has thought about this matter extensively, and he is also one of the leading experts on these problems in the country. In fact, if I were to suggest anyone in the country to do either a comprehensive or limited study of the rule against perpetuities for any state, he would be the first person to whom I would turn. A look at his writings and past work on reform in the area would solidly reinforce my own views, I'm sure. I therefore hope you will consult him on this matter before taking any action.

I hope my brief comments will be of some use to you, and I trust you will not feel that I have passed the buck by suggesting that you consult Professor Dukeminier.

Sincerely,

Edward C. Halbach, Jr.
Dean

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MCCUTCHEM, BLACK,
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515 SOUTH FLOWER STREET

TELEPHONE 581-9400
AREA CODE 415
CABLES MACPAG
TELEX 470318

July 23, 1969

California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Attention: Mr. John H. DeMouilly
Executive Secretary

Gentlemen:

In response to your letter to me of July 18,
I am in favor of repealing Section 715.8 of the
Civil Code of California, because I believe it has
caused more confusion than was resolved by its
enactment.

I am in favor of the common law rule against
perpetuities, enacted in Section 715.2.

Sincerely yours,



Memorandum 69-92

EXHIBIT IX

ALLARD, SHELTON & O'CONNOR

ATTORNEYS AT LAW

100 POMONA MALL WEST, SIXTH FLOOR

POMONA, CALIFORNIA 91766

(714) 822-1043 AND (213) 964-2393

JOSEPH A. ALLARD
(1967-1968)

LEONARD A. SHELTON
MAURICE O'CONNOR
R. CRAIG MEMANIGAL
EUGENE J. AXELROD
FERDINAND F. FERNANDEZ
JOHN B. GOODRICH
THOMAS C. BRAYTON
PAUL M. MAHONEY

July 22, 1969

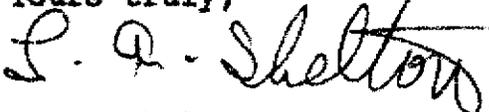
Mr. John H. DeMouilly
California Law Revision Commission
School of Law, Stanford University
Stanford, California 94305

Dear Mr. DeMouilly:

It is my opinion that Civil Code Section 715.8 should be repealed. I have read the California Law Review article by Professor Dukeminier, and I concur in his objection to the possibility that this section could be used to create private trusts of unlimited duration.

My interest in this problem has been concerned basically with avoiding death taxes, and I have generally found no desire on the part of my clients to tie up the property, as such for periods longer than lives in being plus twenty-one years, although there could be a strong argument in favor of making it lives in being plus twenty-five years inasmuch as college education now is inclined to extend beyond twenty-one years of age.

Yours truly,



L. A. Shelton
of
ALLARD, SHELTON & O'CONNOR

LAS:mel

Memorandum 69-22

EXHIBIT X

LAW OFFICES

FERGUSON, FERGUSON & NEWBURN

7548 IVANHOE AVENUE

LA JOLLA, CALIFORNIA

MAILING ADDRESS
BOX 272-92037
714-454-4233

KEITH M. FERGUSON (1903-1966)
WILLIAM E. FERGUSON
JOHN L. NEWBURN
THOMAS A. HENRY, JR.

July 24, 1969

California Law Revision Commission
Stanford University School of Law
Stanford University
Stanford, California 94305

Attention: Mr. John H. DeMouilly

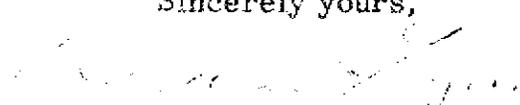
Dear Mr. DeMouilly:

In response to your letter of July 18 concerning Civil Code Section 715.8, I would report that from a practical standpoint, I have had no problems with the rule against perpetuities. As a result, I have not gone into the matter in depth and, unfortunately, do not have the time to do so right now.

It has been my general understanding, however, that California adopted the common law rule against perpetuities in 1951, and that 715.5 and 715.8 were passed in 1963 to say, in effect, that California would not be burdened with the historically severe application of the rule to void instruments which by technical construction could conceivably violate the rule, but rather the California law would be applied in such a manner as to void only those interests which by actual passage of time and happening of facts would violate the rule in actual practice.

I agree that 715.8 is wretchedly written. However, I would be reluctant to see it abolished if this would expose us to a strict historical application of the rule against perpetuities.

Sincerely yours,


William E. Ferguson

WEF/lc

UNIVERSITY OF CALIFORNIA, LOS ANGELES

BERKELEY • DAVIS • IRVINE • LOS ANGELES • RIVERSIDE • SAN DIEGO • SAN FRANCISCO



SANTA BARBARA • SANTA CRUZ

SCHOOL OF LAW
LOS ANGELES, CALIFORNIA 90024

July 22, 1969

Mr. John H. DeMouilly
Executive Secretary
California Law Revision Commission
Stanford Law School
Stanford, California 94305

Dear Mr. DeMouilly:

I am pleased to have your letter informing me that the Law Revision Commission is studying whether Civil Code Section 715.8 should be revised or repealed. If I had to choose just one section in the Civil Code that should be repealed, Section 715.8 would be it. The possible mischief and headaches it can cause once moved me to write about them. Perpetuities Revision in California: Perpetual Trusts Permitted, 55 California Law Review 678 (1967). I enclose a copy.

Section 715.8 was enacted upon recommendation of a state bar committee that was much upset by *Haggerty v. City of Oakland*, 161 Cal. App. 2d 407, 326 P.2d 957 (1958). The district court of appeals held in this case that a lease to commence upon completion of a building violated the Rule against Perpetuities. On-completion leases are standard practices in shopping center development, and it is understandable why the *Haggerty* case was unpopular with the bar. The *Haggerty* case was not appealed to the California Supreme Court.

The report of the bar committee recommending Section 715.8 dealt only with the application of the section to on-completion leases, but of course the section, not being limited to on-completion leases, has much more far-reaching effect. To any one who is today worried about the application of the Rule to on-completion leases, it should be pointed out that on-completion leases will be exempt from the Rule even if Section 715.8 is repealed. The California Supreme Court in *Wong v. DiGrazia*, 60 Cal. 2d 525, 386 P.2d 817 (1963) refused to follow the *Haggerty* case and held an on-completion lease did not violate the Rule against Perpetuities. The court reasoned that under the law of contracts there was an implied provision that the building be built within a reasonable time and that 21 years was more than a reasonable time. Therefore, unless the building is built within 21 years the lease agreement cannot be enforced. It should also be noted that on-completion leases, even if they violate the Rule against Perpetuities, will be reformed under California Civil Code § 715.5 to carry out the intention of the parties.

Civil Code § 715.8 has two desirable applications, but the disadvantages far outweigh these in my judgment. The first place where the application of Section 715.8 is sound is to commercial transactions: leases, options, oil and gas and mineral interests. Many commentators have long attacked the application of the Rule against Perpetuities to commercial transactions. Section 715.8 effectively exempts commercial transactions because there ordinarily will be persons in being who, by conveying all the separate interests, can convey a fee simple. However, since the courts have power to reform any commercial transaction that violates the Rule under Section 715.5, it does not appear that Section 715.8 is needed. Options not in a lease and unlimited in time will probably be cut back to 21 years under the cy pres power. I would not object to a statute specifically cutting back unlimited options to 21 years (See Ontario Perpetuities Act of 1966, § 13). Nor would I object to a specific provision exempting oil, gas and mineral interests from the Rule if the Commission thinks that is desirable. But these interests should not be dealt with by such a broad statute as Section 715.8.

The second sound application of Section 715.8 is to executory interests following determinable fees. Let me illustrate this by two cases.

Case 1. O transfers Blackacre to School Board, so long as used for school purposes, then to revert to O. O has a possibility of reverter exempt from the Rule.

Case 2. O transfers Blackacre to School Board, so long as used for school purposes, then to X [or to the then owner of the farm from which Blackacre was carved]. The gift over is an executory interest that violates the Rule. O has a possibility of reverter.

There is no policy reason why Cases 1 and 2 should not be treated alike. It should not matter who takes the land when it ceases to be used for church purposes. In fact, it would seem better if it did return to the owner of the farm from which it was carved rather than to the heirs of O, who will be scattered and difficult to trace. A determinable fee so long as used as a railway is really like an easement, and when the railway ceases possession of the land should go to the abutters. All the litigation stirred up by L. C. Faus trying to buy up reverters from heirs of grantors to the Pacific Electric Railway Company should serve as a warning that the law needs reform here. Under Section 715.8 Cases 1 and 2 are treated alike. If the section is repealed they will be treated at common law as stated in the cases. The common law makes no sense as policy.

I would recommend that this problem be solved by a simple statute saying possibilities of reverter and rights of entry are subject to the Rule against Perpetuities. Any such interest that violated the Rule would be reformed under Section 715.5 to carry out the intention

of the grantor. Very likely the court would lay down a rule that possibilities of reverter and rights of entry and the equivalent executory interests unlimited in time are good for 21 years. Only by subjecting possibilities of reverter and rights of entry to the Rule can we eliminate labelism without a policy base. This has been done in England.

The great objection to Section 715.8 lies in its application to trusts. It is apparently now possible in California to have a private trust of indefinite duration exempt from estate taxes during its duration. Thus:

Case 3. T bequeaths a fund in trust to pay the income to T's issue per stirpes from time to time living. Whenever there is no issue of T alive, the trustee is directed to pay the corpus to Stanford University. To vest all the interests in the trust under Section 715.8, the testator's adult issue, with the consent of the trustee and Stanford University, are given the power to appoint the trust property to whomever they please including themselves. So long as testator has adult issue alive a fee simple to the trust property can be conveyed and the trust is not subject to the Rule against Perpetuities. However, because the issue can appoint the property only with the consent of an adverse party, Stanford University, they do not have a general power of appointment for tax purposes. Moreover, the trustee of this trust, getting his fees, might be most reluctant to terminate it.

The tax avoidance possibilities are obvious here. And it cannot be expected that the Commissioner of Internal Revenue will stand by and let such a loophole develop. From the point of perpetuities policy, surely this kind of family trust going on and on indefinitely is bad. If it were a discretionary trust or a spendthrift trust, it would protect the family from creditors for generations. The problem is raised whether such a trust, and the code section permitting it, violates the California Constitution which prohibits perpetuities.

It is because of Case 3 that Section 715.8 should be repealed. If not repealed, it should be revised to state that it has no application to trusts.

In sum, I favor outright repeal of Section 715.8, regardless of what else is done. However, in addition, I hope you will consider subjecting possibilities of reverter and rights of entry to the Rule against Perpetuities.

Sincerely,

Jesse Dukeminier, Jr.
Professor of Law

JD:mj
Enclosure

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OF COUNSEL

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LAWRENCE M. STONE

BERGER & IRELL 1941-1949

EUGENE M. BERGER 1952-1966

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 ARTHUR MANELLA
 EDWARD SANDERS
 WERNER F. WOLFE
 JOHN R. COHAN
 EDMUND M. KAUFMAN
 RONALD M. LOEB
 CHARLES H. PHILLIPS
 ARTHUR O. ARMSTRONG, JR.
 ALBERT J. FINK
 HARVIN S. SHAPIRO
 RICHARD H. BOROW
 GARY J. HENDLER
 RONALD L. BLANC
 IRWIN S. BARNET
 JOHN J. COST
 RICHARD L. BERNACCHI
 LOUIS M. CASTRUCCIO
 ELLIS J. HARRISON
 RICHARD D. KIRSBERG
 ARNOLD D. KAHN
 JOHN C. FOSSUM
 ROBERT W. STEINMAN
 JOHN GAIMS
 S. PAULA CHERNOFF
 ANTHONY H. BARASH
 PAUL S. GREENBERG
 EDWARD G. VICTOR

July 24, 1969

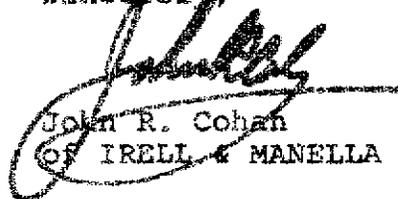
Mr. John H. DeMouilly
 California Law Revision Commission
 School of Law
 Stanford University
 Stanford, California 94305

Dear Mr. DeMouilly:

This is a joint reply to your letters to my partner Albert Fink and me concerning the proposed repeal of Civil Code Section 715.8.

My view of the statute can best be summarized by stating that one monstrosity frequently creates another. The decision in Haggerty v. City of Oakland at the D.C.A. level was in my opinion a monstrosity, and I understand that Civil Code Section 715.8 was enacted to counteract it. Since the California Supreme Court reversed the D.C.A. in the Haggerty case, it would be nice to reverse the legislative monstrosity as well. As far as this office concerned, Civil Code Section 715.8 makes no sense whatsoever.

Sincerely,



John R. Cohan
 OF IRELL & MANELLA

JRC:kk

cc: Mr. Albert J. Fink
 Mr. Arnold D. Kahn

HOMER D. CROTTY
 HERBERT F. BYRD
 FREDERIC H. STURDY
 VAN COTT NIVEN
 BERT A. LEWIS
 SHERMAN S. WELPTON, JR.
 WILLIAM FRENCH SMITH
 JULIAN D. VON KALINOWSKI
 F. DANIEL FROST
 RICHARD H. WOLFORD
 SHAMM KNIGHTORE
 DANIEL G. PRUITT, JR.
 HAZ EDDY, III
 ROBERT F. SCHWARTZ
 GEORGE H. WHITNEY
 FRANK L. HALLORY
 WILLIAM F. SPALDING
 JOHN T. RIGOTT
 JAMES R. HUTTEN
 ARTHUR W. SCHMUTZ
 JEROME C. BYRNE
 JOHN L. ENDICOTT
 NORMAN S. BARNER

J. ROBERT FOSTER, JR.
 ROBERT D. BUNCH
 WILLIAM E. GARR, JR.
 RAYMOND L. CURRAN
 GEORGE W. BERMAN
 JOHN J. HANSEN
 DEAN C. D. KLAVERY
 D. EDWARD FITZGERALD
 ROY O. HILTY
 GUY A. CLAIR
 F. LEE COLLETT, JR.
 GEORGE D. GREGORY
 RUSSELL L. JOHNSON
 ROBERT S. HARRIS
 HERBERT KRAUS
 RONALD E. BOEHR
 JEROME F. FREUNDLICH
 IRWIN F. WOODLAND
 JOHN H. SHARPE
 JAMES H. MURPHY
 CHARLES S. BATTLES, JR.
 RUSH J. SCALLON
 STEPHEN E. TALLONT

GIBSON, DUNN & CRUTCHER
 LAWYERS

604 SOUTH SPRING STREET

LOS ANGELES, CALIFORNIA 90014

AREA CODE 213

TELEPHONE 670-1900

TELEX 674400

CABLE ADDRESS: GIBTRAC

July 25, 1969

JAS. A. GIBSON, 1882-1922
 W. E. DUNN, 1881-1928
 ALBERT CRUTCHER, 1890-1931
 NORMAN S. STERRY
 HENRY F. PRINCE
 RICHARD E. DAVIS
 ET AL

BEVERLY HILLS
 9801 WILSHIRE BOULEVARD
 BEVERLY HILLS, CALIF. 90210
 AREA CODE 213
 TELEPHONE 273-8990
 NEWPORT CENTER
 NEWPORT FINANCIAL PLAZA
 800 NEWPORT CENTER DRIVE
 NEWPORT BEACH, CALIF. 92660
 AREA CODE 714
 TELEPHONE 644-2071

EUROPE
 ROBERT J. GELBER
 4 RUE SAINT FLORENTIN
 PARIS 1
 TELEPHONE 742-1961
 CABLE ADDRESS: GIBTRAC PARIS
 TELEX 2806

OUR FILE NUMBER

4394-8

John H. DeMouilly, Esq.
 Executive Secretary
 California Law Revision Commission
 School of Law
 Stanford University
 Stanford, California 94305

Dear Mr. DeMouilly:

This is in reply to your inquiry concerning my views on California Civil Code Section 715.8.

I entirely concur in the suggestion that this Code Section be repealed, and that the void be left unfilled. My view is not dictated by a dislike for lengthy trusts, and in fact I don't think that the Section has had much effect in that regard. What has always bothered me about that Section (and indeed about the Sections preceding it, which were added at the same time) is that it displays an ignorance of the historic distinction between the Rule against Perpetuities and the Rule against Restraints on Alienation.

Professor Gray labored long and hard in the 19th century to separate out these 2 rules, and to couch each in intelligible terms. With one ill-considered stroke, the Legislature has now confused the law by defining "vesting" in terms appropriate for "alienation". I had thought the Rule against Perpetuities and the Rule against Restraints on Alienation were reasonably clear in California (at least as clear as in any other state) but the legislative fiddling with 715.8 and preceding Sections made the law incomprehensible, somewhat frightening and perhaps unconstitutional.

I am reminded a bit of the Episcopal Minister who could not recall what had gone wrong with a marriage ceremony until a parishioner reminded him, rather coldly, that he had intoned "whom God has joined asunder let no man put together".

John H. DeMouilly, Esq.

July 25, 1969

By repealing the Code Section we will have made a start, at least, towards a return to good Professor Gray and his valiant effort at separation. Let us repeal it.

Very truly yours,

John T. Figott

JTP:jer

EXHIBIT XIV

PRICE, POSTEL & PARMA

COUNSELLORS AT LAW

21 E. CANON PERDIDO STREET

SANTA BARBARA, CALIFORNIA

CABLE ADDRESS "JARNETT"

MAILING ADDRESS P. O. BOX 630

AREA CODE 805

962-0011

FRANCIS PRICE
1918-1969

A. C. POSTEL
HAROLD A. PARMA
FRANCIS PRICE, JR.
ROBERT N. JONES
BERT G. WETHERBY
H. CLARKE GAINES
GERALD S. THEDE
CHARLES W. WILLEY
LILIAN M. FISH
REED STANLEY HALL
ARTHUR R. GAUDI
JAMES H. HURLEY, JR.
TIMOTHY A. WHITEHOUSE
GARY R. RICKS
DAVID A. HEARD

July 28, 1969

California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Attention: John H. DeMouilly
Executive Secretary

Gentlemen:

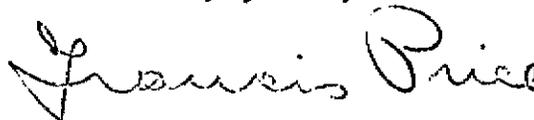
Receipt is acknowledged of your letter of July 18, 1969, asking whether Civil Code section 715.8 should be revised or repealed.

I concur in the opinions cited in your letter and its enclosure to the effect that the statute should be repealed and not replaced or revised.

As I read 715.8, an interest is deemed vested so long as a trustee holding a legal interest in the property and with power of sale could convey a fee simple title. As your authorities point out, it would be a portion of the rule against perpetuities which would invite violation of the rule against perpetuities.

It would seem in effect to be a return to the old California rule concerning restraints upon alienation which was repealed when the rule against perpetuities was revised.

Sincerely yours,



Francis Price

FP:D

Memorandum 69-92

EXHIBIT XV

SOUTHERN CALIFORNIA FIRST NATIONAL BANK
FIFTH AVENUE AT B STREET, P. O. BOX 1211, SAN DIEGO, CALIFORNIA 92112

TRUST DEPARTMENT

JULY 29, 1969

P. O. Box 109

Mr. John H. DeMouilly, Executive Secretary
California Law Revision Commission
School of Law - Stanford University
Stanford, California 94305

Dear Mr. DeMouilly:

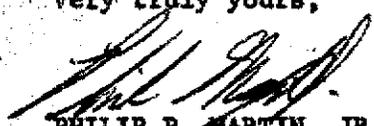
Re: Law Revision Commission's study
concerning Civil Code Sec. 715.8.

Thank you for your letter of July 28, 1969, together with the enclosures.

I have been convinced that we can do without Civil Code 715.8. I appreciated being included in the survey.

My associate and I are writing an article for Trusts and Estates Magazine, giving a bird's-eye view of "quasi-community property" to those in separate property states. We mention the work your Commission has accomplished in this area, specifically your proposal to have Civil Code Section 140.5 include real property in another state. Is it all right for us to suggest that those who want to read further on this matter could write the California Law Revision Commission for a copy of the tentative recommendation in this regard?

Very truly yours,


PHILIP P. MARTIN, JR.
Vice President and
Trust Counsel

PFM/ms

ES	
LES	

EXHIBIT XVI

UNIVERSITY OF CALIFORNIA
HASTINGS COLLEGE OF THE LAW

198 McALLISTER STREET
SAN FRANCISCO, CALIFORNIA 94102

July 29, 1969

John H. DeMoulley, Executive Secretary
California Law Revision Commission
Stanford University
Stanford, California 94305

Dear Mr. DeMoulley:

Your letter of July 7 reached me while I was enroute in the latter part of a three-months trip to the Caribbean and the East Coast.

Please accept my thanks for the copy of the legislation relating to the Powers of Appointment. I feel much gratified at the improvement of the law of California which I believe that has accomplished.

You ask whether I believe that Civil Code Section 715.8 should be repealed and if it is repealed whether the repeal should be accompanied by additional legislation.

I have no doubt whatever that Civil Code 715.8 in its present form creates uncertainties and trouble for the drafters of wills and trusts in California. The section in terms re-establishes in California as the criterion for the Rule Against Perpetuities the earlier position, namely that the rule concerns itself only with suspension of the Power of Alienation. This was the rule embodied in Civil Code 715.1 which was repealed by California Statute of 1959, Chapter 470. The 1959 legislation left untouched Civil Code 715.2 which embodies the Inclusive Rule, namely that the Rule Against Perpetuities is violated if the limitation either suspends the Power of Alienation for too long or postpones vesting for too long. Thus 715.8 contradicts an essential part of 715.2. This seems to me highly undesirable.

I am strongly of the opinion that the Rule Against Perpetuities as developed in the common law served a highly useful purpose, namely the preventing of property owners from projecting into the future their desires in a fashion which would attempt to rule the living by the hand raised from the grave. The prohibition of the too long vesting of interests accomplished in 715.2 is prevented from full efficacy by 715.8. I do not see that the elimination of 715.8 would require any other accompanying legislation. Of course, 715.5 places an unconscionable burden on our courts since it requires them in effect to remake any will which violates the rule due to the carelessness or ignorance of the scrivener. Section 715.5 was enacted to accomplish a desirable purpose, namely to permit the courts to pare down a provision couched in years when it exceeded the permissible 21. This limited



purpose has been accomplished by legislation in many states, and a revision of 715.5 to keep it within these limits would be good. That, however, does not become a necessity, if the commission finds it possible to eliminate the undesirableness injected into our law by the enactment of 715.8.

Sincerely,

A handwritten signature in cursive script that reads "Richard R. Powell". The signature is written in dark ink and is positioned to the right of the typed name.

Richard R. Powell

RRP:jb

WM. G. GRIFFITH (1867-1949)
LASELLE THORNBURGH
YALE B. GRIFFITH
ROBERT L. THORNBURGH
LLOYD E. IVERSON
JAMES BLACK
PETER J. SAMUELSON
CHARLES B. VOORNIS II
F. BRIAN RAPP
L. DONALD BODEN

EXHIBIT XVII

AREA CODE 805
TELEPHONE 988-5131

GRIFFITH & THORNBURGH
ATTORNEYS AND COUNSELORS
5 EAST FIGUEROA STREET, SUITE 300
POST OFFICE BOX 528
SANTA BARBARA, CALIFORNIA 93102

July 30, 1969

Mr. John H. DeMouilly
Executive Secretary
California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Dear Mr. DeMouilly:

I have received your letter of July 18, 1969 inquiring as to whether or not the undersigned believes Civil Code Section 715.8 should be repealed, revised, or in any way amended.

I have reviewed the section, and the article in the 1967 issue of the California Law Review, together with some other material relating to the rule against perpetuities. I would join in the comments made by the scholars in this field for the reasons given, namely, that this particular section seems to create a clear possibility of violation of the rule against perpetuities, which still has vitality and social merit.

If I read the section correctly, together with the comments made by some of the authorities, wealth can be tied up in private trusts indefinitely. While the creation of trusts under the common law rule against perpetuities should be retained, I do not feel that the reasons for circumventing the rule against perpetuities has any greater significance in present-day society than it did in England several centuries ago. If anything, modern society needs would be best served by reducing the period, rather than extending it.

I realize that this is not a learned exposition on the rule against perpetuities, which as you realize is an extremely complicated subject if one should consider all of the ramifications, but it is my belief, and also in general the reasons for that belief, which are certainly not unique, and are shared by most of the scholars and specialists in this field. I should point

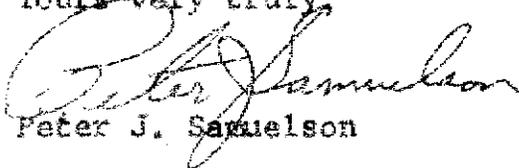
Mr. John H. DeMouilly

-2-

July 30, 1969

out that I am not a specialist in the fields of wills and trusts. Our office has a considerable probate practice, with related estate planning, will and trust drafting, etc. My own field of emphasis is civil litigation, and this necessarily involves litigation in the probate and trust fields. I felt I should point this out, since while I did work on the Continuing Education of the Bar project that you mention, it was in conjunction with one of my partners, Yale Griffith, who has emphasized to a great extent the fields of wills and trusts. Before writing the letter and reviewing the material, I did discuss the matter with Mr. Griffith, who will be writing to you separately. Incidentally, he shares my opinion.

Yours very truly,



Peter J. Samuelson

PJS:km

FROM

Richard Reoul-Duvall, Esq.
Tobin and Tobin
Hibernia Bank Building
San Francisco, California

[Memorandum 69-92]

EXHIBIT XVIII

EXTRACT FROM GOLDFARB AND SINGER,
PROBLEMS IN THE ADMINISTRATION OF
JUSTICE IN CALIFORNIA 62-63 (1969)

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."

*July 31, 1969 I am in complete
agreement
Sincerely
Richard Duvall*

Memo 69-92

EXHIBIT XIX
LAW OFFICES

NOSSAMAN, WATERS, SCOTT, KRUEGER & RIORDAN

THIRTIETH FLOOR • UNION BANK SQUARE
443 SOUTH FIGUEROA STREET • LOS ANGELES, CALIFORNIA 90017
TELEPHONE (213) 628-5221

August 1, 1969

REFER TO FILE NUMBER

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WILLIAM E. SCOTT
ROBERT B. KRUEGER
RICHARD F. RIORDAN
THOMAS E. CAPS
PAUL THOMAS GUINN
WILLIAM S. GUTMAYER, JR.
ALVIN S. KAUFER
LACHLAN J. JYDER
RODNEY C. HILL
ALAN J. BAYON
RICHARD W. MAINLAND
BOYD S. LEAFON
E. PAULY DONOVICH
JANE K. BRADY
WILLIAM D. MARRENSON
JAMES M. RUSSELL, JR.
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California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Attention: John H. DeMouilly
Executive Secretary

Gentlemen:

Referring to your letter of July 18, 1969, with respect to proposed revision or repeal of Civil Code Section 715.8, it is my opinion that 715.8 should be repealed and that no legislation should be enacted in its place. The section runs counter to the ancient and continuously followed policy against perpetuities. If Section 715.8 is interpreted literally, then there is no time limits whatsoever during which property can be tied up in trust.

Very truly yours,


PAUL T. GUINN

PTG:bf

EXHIBIT XX

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August 5, 1969

Mr. John H. DeMouilly,
Executive Secretary
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School of Law
Stanford University
Stanford, California 94305

Dear Mr. DeMouilly:

I have reviewed your letter of July 29, 1969, and enclosed material favoring repeal of Civil Code section 715.8. I have also received your letter of August 1, 1969, and its enclosures. I have no doubt that section 715.8 has raised serious theoretical problems in the perpetuities field. I am still not persuaded, however, that from a practical standpoint repeal of the section is so urgent that it should be promoted by the Law Revision Commission independent of and precedent to a study of the entire subject of perpetuities. On the contrary, some of the arguments for immediate repeal of the section appear so dubious that they point to the necessity for further study rather than hasty action. I refer particularly to Professor Dukeminier's reference to tax avoidance possibilities and possible action by the Commissioner of Internal Revenue. The perpetuities statutes are hardly the place for tax reform and, as you know, the whole question of generation skipping under the Federal estate tax laws is under intensive study.

The arguments for repeal of section 715.8 also indicate the intrusion of academic bias concerning "perpetuities policy." Professor Dukeminier's statement that "surely this kind of family trust going on and on indefinitely is bad" is not really an argument; it is a statement of social philosophy which, although it may be perfectly valid, bears further examination before becoming

the basis for legislative enactment. It is obvious, from the third to last paragraph of Professor Dukeminier's letter of July 22, 1969, that the "irreconcilable social philosophies entwined in the perpetuities subject," which I mentioned in my letter to you of July 28, 1969, are indeed involved in the proposal that section 715.8 be repealed and that, if there is to be such repeal, it should be after a study which gives due consideration to these philosophies. Certainly the proponents of repeal have not pointed to any urgency that would justify such a piecemeal approach.

In my previous letter to you, I suggested that, rather than dissipate the Commission's efforts on the ephemeral objective of tinkering with the perpetuities laws, the Commission would be better advised to do something about section 41 et seq. of the Probate Code. These sections present practical problems in the day-to-day practice of many lawyers who seldom, if ever, encounter the nuances of perpetuities and restraints on alienation, much less avail themselves of the loopholes in their structure. As a matter of fact, the "policy" behind section 41 is now so devoid of content that the section is routinely nullified in every will containing a charitable bequest by inclusion of a "charitable protection clause." See section 3.19 of California Will Drafting (Cal. Cont. Ed. Bar 1965). The resort to this ritualistic paper exercise and the necessity of explaining it to clients is, in this day and age, nothing short of a disgraceful and embarrassing waste of time. The recent opinion of the Appellate Court in Heyer v. Flagg (1969) 67 Cal.Rptr. 92; 260 A.C.A. 100 raises the specter of malpractice liability in the rare but fatal case where, due to clerical error or lack of understanding of the operation of section 41, the protective clause is omitted from or mishandled in a will. I suggest that repeal of section 41 et seq. is a far more urgent matter than repeal of section 715.8 and that it does not pose the philosophical difficulties involved in changing the law affecting perpetuities. We prepared a memorandum for the benefit of our clients concerning section 41 et seq. The necessity of such a memorandum is perhaps the best argument for repeal of these sections at the earliest possible opportunity.

Just this week I have received from two separate out-of-state law firms wills drawn in California for California residents, both now deceased, that failed to protect against the impact of section 41.

If our policy is to promote lawyers "eating" each other through suits for negligence, we can continue to "ostrachize" the whole subject.

Somebody ought to get moving for the good of the Bar and the public--and soon.

Sincerely,


Harold I. Boucher

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August 4, 1969

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OUR FILE NUMBER

California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Attention: Mr. John M. DeMouilly

Gentlemen:

Your letter of July 18, 1969, has been received asking my views as to the possible repeal of Section 715.8 of the Civil Code. In brief, my recommendation is that it remain on the books as it now stands.

I think I should give you a brief history of this section. This section was part of a bill which was proposed to the Board of Governors of the State Bar of California in a report dated January 7, 1963. It came about as the result of the atrocious opinion in the case of Haggerty v. City of Oakland, 161 Cal. App. 2d 407. The Board of Governors appointed a committee consisting of myself as Chairman; Edward D. Landels of San Francisco, Counsel for the California Pacific Title Company; Professor John R. McDonough, Jr., of Stanford Law School and then a member of the Law Revision Commission; John M. Naff, Jr., of the firm of Brobeck, Phleger & Harrison of San Francisco; and Lawrence L. Otis, General Counsel for the Title Insurance and Trust Company of Los Angeles. The members of this Committee have had considerable experience in the perpetuities field.

The Haggerty case came as a shock to the Bar. Leases of the kind declared void were in common use throughout the State. It is agreed that our Committee should attempt to remove some of the confusion and notoriety surrounding the field of perpetuities in this State. Mr. Justice Bray said in the dissenting opinion in the Haggerty case, "After all, there has to be some common sense in the rulings of Courts".

August 4, 1969

We considered several other sections, and also the work that had been done in law reform in this field in several states of the United States, as well as in England. We concluded that we should try to recommend something which would eliminate from the perpetuities field various commercial transactions.

As you recall, the rule came about originally from judge-made law. The rule was designed, and properly so, to prevent the tying up of landed estates for long or indefinite periods of time. It was not designed to hamper commercial transactions. It is the purpose of Section 715.8 to eliminate from the rule against perpetuities commercial and contract transactions. These have parties in being who can modify or terminate the contractual relationships. It was for this reason that the Committee recommended the adoption of Section 715.8 to the Board of Governors and, in due course, the legislature in 1963 passed it.

The case of Wong v. DiGrazia, 60 Cal. 2d 525, for all that has been said about it, did not clear up the clouds surrounding the Haggerty case. To avoid a similar kind of opinion from the courts, I believe that the section should remain on the books unamended.

There is another development which I wish the Commission would consider. The Constitution Revision Commission in its preliminary conclusions has recommended that Section 9 of Article XX be eliminated from the Constitution. This section reads, "no perpetuities shall be allowed except for eleemosynary purposes". This language has been in effect since 1879. I assume that it will not be the purpose of the removal of this Section from the Constitution to eliminate charitable trusts. You will recall that Stanford University is a charitable trust, not a corporation, organized under the Act of March 9, 1885, by a deed from Mr. and Mrs. Stanford to their Board of Trustees. If Section 715.8 remained, I assume the Stanford trustees could stop worrying.

If you have any questions, I would be very happy to try to answer them.

Yours sincerely,

Homer D. Crotty

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August 6, 1969

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1937-3

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|--------------------------|------------------------|
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| HERBERT F. STURDY | ROBERT D. BURCH |
| FREDERIC H. STURDY | WILLARD J. CARR, JR. |
| VAN COTT NIVEN | RAYMOND L. CURRAN |
| BERT A. LEWIS | GEORGE K. BERNHART |
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| WILLIAM FRENCH SMYTH | DEAN C. DUNLAVEY |
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| F. DANIEL FROST | ROY D. MILLER |
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| SHARP WHITMORE | F. LEE COULTER, JR. |
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| GEORGE H. WHITNEY | HERBERT KRAUS |
| FRANK L. MALLORY | RONALD E. GOTHER |
| WILLIAM F. B. MALOIND | JEROME F. PREWORTH |
| JOHN T. FROST | IRVING F. WOODLAND |
| JAMES R. HUTTNER | JOHN H. SHARER |
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| JEROME C. BYRNE | CHARLES S. BATTLE, JR. |
| JOHN L. ENDICOTT | HUGH J. SCALON |
| NORMAN S. BARKER | STEPHEN S. TALLENT |

Mr. John M. DeMouilly
c/o California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Dear Mr. DeMouilly:

In your letter of July 18 you requested my opinion as to whether Section 715.8 of the Civil Code should be repealed.

In my opinion, the section should be retained.

My partner, Homer D. Crotty, wrote you under date of August 4 expressing his opinion that the section should not be repealed. My views accord with the reasons expressed in his letter.

Very truly yours,

Robert F. Schwarz
Robert F. Schwarz

RFS:s1

Memorandum 69-92

EXHIBIT XXIV

Dear Mr. DeMouilly,

In your communication of July 18, 1969 you requested my views with respect to the repeal of Civil Code Section 715.8.

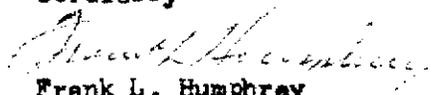
I feel rather strongly that the Section should be repealed; I see no need of substituting legislation. I have always felt the Section was confusing, conducive to litigation and in some respects, in conflict with 715.2. In my opinion it renders the latter Section uncertain. I feel somewhat the same way about 715.6 and have avoided using it in the drafting of Wills and Trusts.

At the same time, I feel Sections 693, 694 and 695, which were repealed by the same statute which added Sections 715.5 et seq., should be restored. While only definitive in nature, there are instances where these Sections have proven helpful.

I appreciate your solicitation of my views and am hopeful they will be of some assistance.

I might add, simply as a point of interest, that I retired from Security Bank last December 31st and have had the extreme good fortune to become associated with O'Melveny & Myers; it is an experience which I am thoroughly enjoying, especially since my duties are largely restricted to drafting.

Cordially


Frank L. Humphrey

August 7, 1969

WARMKE & KONIG

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LEON E. WARMKE
RICHARD W. KONIG
RICHARD W. JOHNSON

August 8, 1969

Mr. John H. DeMouilly
Executive Secretary
California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Dear Mr. DeMouilly:

Reference is made to the erudite letter of Attorney Harold I. Boucher to you dated August 5, 1969, a copy of which was forwarded to me.

Sections 40, 41, 42, and 43 of the California Probate Code have already been the subject of a study by a special committee chosen for that purpose (Committee on 1968 Conference Resolution No. 81), and in a final Report dated April 30, 1969, it was the recommendation of such Committee that these Probate Code Sections be repealed.

The desirability that Probate Code Sections 40, 41, 42, and 43 be repealed does not, however, in my opinion, derogate from the advisability that Civil Code Section 715.8 likewise be repealed.

Sincerely yours,


LEON E. WARMKE

cc: Harold I. Boucher, Esq.
Pillsbury, Madison & Sutro
Attorneys at Law
Standard Oil Building
225 Bush Street
San Francisco, California 94104

BROBECK, PHLEGER & HARRISON
ATTORNEYS AT LAW
ONE ELEVEN SUTTER STREET
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434-0900

August 11, 1969.

California Law Revision Commission,
School of Law,
Stanford University,
Stanford, California 94305.

Attention: Mr. John H. DeMouilly,
Executive Secretary.

Gentlemen:

Thank you for your letter of July 18, 1969.

I have for some time been particularly interested in the matter of the rule against perpetuities. In my opinion Civil Code Section 715.8 should be repealed. There are a number of things that are wrong with this section. Among these are:

1. The section is not clear as to its language and thus as to its application.
2. If the section is held to allow one to successively create trusts which last beyond the normal period of vesting, then problems may be created under the Internal Revenue Code so that what might otherwise be a special power of appointment for estate tax purposes becomes a general power of appointment.

California Law Revision Commission

2.

3. The section seems to try to carry over part of the old concept dealing with restraints on alienation which was removed as part of the California rule against perpetuities many years ago.

The whole concept of perpetuities in California has been made uncertain by reason of the successive amendments that have occurred to Section 715 and the sub-sections thereof. As a practitioner of the legal profession, it seems to me that the classical concept of the rule against perpetuities was wrong at the time it was created and certainly is wrong as it is applied to interests in real or personal property today. The one underlying principle that may be valid is that property should not be allowed to be tied up for an indefinite period of time. However, in California, the Legislature has recognized that the tying up of property for 60 years is within the allowable period and would conform with the public policy of this state.

It seems to me that what we should do in California is to eliminate all of the conflicting sections and have one section which would provide for the period within which property might be tied up. We should clarify the date when the creation of the interest in question starts.

California Law Revision Commission 3.

We should have a definition of vesting and we should have a provision which would provide for termination of such interest when the allowable period is exceeded. However, the one thing we should not have is a rule which makes void at the beginning a conveyance or other transfer which may violate the rule at some indeterminate time in the future.

Enclosed is a rough draft of a section which would embody the underlying thoughts which I have on what the rule against perpetuities should be. The time that I have had to devote to this has not been very substantial and consequently I fully realize that the expressions contained in this draft will require considerable thought and editing to make sure that the provision says what it was intended to say but I am submitting this only for the thought rather than the content of the provision.

If you find that the idea set forth herein has any merit and you would like to have me do so, I will be happy to cooperate in carrying this matter forward.

Sincerely,

William A. Farrell

William A. Farrell

WAF:AF

Enclosure

§715.2 [Vesting of Interest in Property: Rule Against Perpetuities]

(a) Rule for vesting:

Any interest in real or personal property shall vest not later than 60 years after the date of creation of such interest, if the interest created is in gross, or if not in gross then 21 years after some life in being at the creation of the interest and any period of gestation involved in the situation to which the limitation applies. The lives selected to govern the time of vesting must not be so numerous or so situated that evidence of their deaths is likely to be unreasonably difficult to obtain.

(b) Date of creation of interest:

The creation of an interest in real or personal property shall commence on the day following the date upon which the creator of such interest (either alone or in conjunction with any other person or persons specified in the instrument in which such interest was created) may, during the lifetime of such creator, destroy such interest either in its entirety or by changing the person or persons in whom such interest shall vest upon termination of the preceding interest.

(c) Definition of vesting:

An interest in property, real or personal, legal or equitable, shall vest when all contingencies have occurred which otherwise prevent a determination of the

particular person or persons who are entitled to possession, dominion and control over such interest if the precedent estate had terminated as of that time.

(d) Termination:

Any interest in real or personal property which extends beyond the period permitted in paragraph (a) of this section shall, upon the petition of any person beneficially interested therein to any court of competent jurisdiction be terminated upon a finding by such court that the prescribed period has been fulfilled. In such proceeding the court shall determine the person or persons then entitled to possession, dominion and control of said property or who will be entitled to possession, dominion and control of such property upon termination of the precedent interest. In determining the person or persons entitled to possession, dominion and control of such property, or property interest, the court shall select such person or persons as shall, in its opinion, best give effect to the intent of the creator of such property interest.

July 22, 1969

EXHIBIT XXVII

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JOHN H. SHARER
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STEPHEN E. TALLENT

August 11, 1969

Mr. John H. DeMouilly
Executive Secretary
California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Dear Mr. DeMouilly:

Thank you very much for your letter of August 7 and copies of other letters sent to you on the subject of Section 715.8 of the Civil Code.

The original suggestion for this section came from Mr. Ed Landels of our State Bar Committee. I do not know of any other source for it. It appealed so greatly to our Committee members that we endorsed it.

As I mentioned in my letter to you, the primary purpose of the section was to exempt commercial transactions from the operation of the rule against perpetuities. I think if you read the dissenting opinion of Mr. Justice Peters in Wong v. diGrazia you will realize that he feels very strongly on the subject, and it is more than conceivable that there are others who feel as he does. It is, therefore, obvious that the section should not be repealed. It does serve a purpose.

In his letter, Prof. Dukeminier gives the outlines of "Case 3" on Page 3. I think he would not have to worry very long about the IRS getting into action. One of the proposals of the Federal Tax Reform Proposals Report of the American Law Institute has in mind the imposition of a penalty tax on trusts for lives in being except that of a wife or a child. This, I understand, the Treasury has in mind proposing to Congress next year.

Mr. John H. DeMouilly

-2-

August 11, 1969

Have you considered whether it is necessary if the Constitutional article on perpetuities is repealed to specifically exempt charities from the rule against perpetuities?

Yours sincerely,

Homer D. Crotty

HDC:ej

EXHIBIT XVIII

MCCUTCHEN, DOYLE, BROWN & ENERSEN

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August 9, 1969

Mr. John H. DeMouilly
Executive Secretary
California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

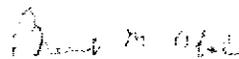
Dear Mr. DeMouilly:

This is in response to your letter of July 18 regarding the proposal to repeal Section 715.8 of the Civil Code.

I do not see how this Section can be rationally reconciled with Section 715.2. Nevertheless, I think it is imprudent to repeal a single Section of the Civil Code which obviously interrelates with a number of other Sections, without careful study of the effect of the proposed repeal. This is particularly true in the case of code provisions relating to property interests where constitutional questions arise as to the efficacy of the repeal as related to interests created while the Section is in force.

This is a nasty response to your letter, but time does not permit a more detailed reply.

Sincerely,



Brent M. Abel

DAVID L. SAMUELS
P. O. Box 1119
PALO ALTO, CALIFORNIA 94302

California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

August 12, 1969

Attention: Mr. John H. De Moully
Executive Secretary

Gentlemen:

This is in reply to your request for comments as to possible revisions or repeal of California Civil Code, Section 715.8.

At the outset, please note that two separate questions seem to be raised. The question of whether or not Section 715.8 should be revised appears to necessitate consideration of the advisability of retaining the Rule Against Perpetuities, in its present form, that is, as the common-law rule. While there are of course strong arguments in favor of the rule, the possibility of its revision is inherent in the question as to whether Section 715.8 should be retained or revised.

Because the requirements of California Constitution Article XX, Section 9, prohibiting perpetuities must have been intended to mean something, and the common-law rule prevailed, I find it difficult to believe that we did not have a common-law rule against perpetuities in effect in this state, even before adoption of C.C. 715.2. Several California decisions which are reviewed in Estate of Sahlender (89 Cal. App. 2d, 329, 201, p. 2d 69, 1948) give a resume of this and the decision itself comes to the conclusion that the common-law rule is in effect. However, there is some confusion on the point. In Estate of Michelett (24 Cal. 2d 904, 151, P. 2d 833), which is also mentioned in the Sahlender decision, the California Supreme Court has indicated that perhaps the matter is not settled yet.

A literal reading of C.C. 715.8 indicates an intent to remove from the rule, trusts in which the trustee has a power of sale. In such cases there is always a person--the trustee--who can convey fee simple title to the assets of the trust, even though the trust itself continues in existence. There is, of course, some doubt as to this interpretation, since it would mean that the section violates the common-law rule against perpetuities, which is probably in effect in California, but it is the possibility of some merit in a change which would permit this extended life of trusts which I wish to explore hereafter. (See Dean Halbach's comments in C.E.B.'s California Will Drafting at #15.6 as to the above interpretational problem.)

Even if C.C. 715.8 is interpreted as not freeing from the rule, trusts containing powers of sale, it appears to violate the common-law version of the rule, because of the possibility of there being in esse persons who could combine in the conveying of their interests so as to terminate the trust or at least free certain assets from it. (See 16 Stanford Law Review 179 et seq.)

In other words, if the common-law version of the rule is in effect under Constitution Art. XX, Sec. 9, it seems clear that the section violates that provision and is therefore invalid. On the other hand, even if the Constitution is finally interpreted so as to be compatible with C.C. 715.8, the latter seems inconsistent with C.C. 715.2. As a result of this, and the need for a decision as to whether or not power of sale trusts fall within the rule, C.C. 715.8 creates a highly undesirable state of confusion, all aside from the doubts as to its constitutionality.

Under the circumstances, I have no hesitancy in recommending that the section be repealed, unless the rule against perpetuities as stated in the Constitution and C.C. 715.2 is clarified so as to be compatible.

Before conceding the desirability of the common-law rule against perpetuities, at least as applied to trusts, perhaps there should be some review of the situation. The arguments in favor of the rule generally are well stated in the Restatement of the Law of Property, at Introduction Note 2129-32, which is quoted verbatim in the aforementioned article in 16 Stanford Law Review (at p. 180, n. 13). I accept these arguments as to restraints which prevent conveyances of fee simple title to specific assets for various reasons which probably should not take up much space here. (A case can be made to the effect that there is a public interest against keeping assets tied up regardless of the discretion of the trustee since, in the case of realty, this may have an effect on surrounding areas, and, in the case of securities, it is conceivable that mergers and sales of corporations may be in the public interest but may be deterred by such restraints.) However, where there is power of sale in the trustee, and it is only the trust which can continue indefinitely, the situation may be different. Since the Devil appears in need of an advocate, let me submit the following:

If the legislature meant what it said when it adopted C.C. 715.8, an attempt was being made to free trusts from the restraints of the rule, as long as power of sale was vested in the trustee. This in itself is not conclusive as to what is best, but it does warrant renewed consideration of the problem.

As applied to trusts, the arguments for the existing rule of C.C. 715.2 (the common-law rule), appear to be based on the thought that it is foolish for a trustor to attempt to "rule from the grave," and the trustor should be saved from his own folly. The possible argument that if assets are freed of trust they will eventually fall into the hands of someone who will stupidly dissipate the wealth, thus spreading it about, is apparently so distasteful that it is difficult to find a frank statement of this point of view. Perhaps there is no support for it and, in any case, the adoption of C.C. 715.8 by the California legislators indicates that at least these representatives of the public do not accept it.

With the uncertainties which always exist as to the future, it is probably unwise generally to tie up wealth for long periods. Nevertheless, there remains a doubt as to the propriety of governmental action to prevent individuals from doing stupid things.

It would be a brave, though probably not a wise, legislator who would propose a law preventing unwise marriages. Yet, if unsuccessful ones are evidence of lack of wisdom in choosing mates, mistakes in this area are not uncommon.

Similarly, we assume as a right the privilege of selecting our own lines of endeavor and the right to enter into business ventures based entirely upon our own judgment. I believe that we would object violently to legislation providing that a computer or some impersonal board could determine to thwart our decision to practice law on the ground that we were better suited to digging ditches. And in the past might not some such decision have resulted in a determination that Mr. Henry Ford should not be permitted to form a company to manufacture automobiles on an untried basis which assumed that mass-production could be profitable, particularly in view of his poor record in business and his age?

It seems likely that the right to gamble on one's ability to succeed in a given business or profession, the right to invest in ways disapproved by more experienced persons, etc., are all indicia of independence and freedom which lawmakers should be very slow to eliminate. Does this not apply to the action of lawmakers in attempting to control the terms of a trust solely for the purpose of preventing the trustor from making unwise dispositions? That this has taken place in the past, in connection with wills (see Chapter III, California Will Drafting--especially Section 3.19 limiting charitable devises and bequests) does not in itself appear to justify expansion of the practice.

If it should once be determined that it is desirable to prevent title to particular assets from being tied up indefinitely, but that testators and other trustors should otherwise be free to make foolish dispositions of their estates, it would seem to follow that what has been attempted in C.C. 715.8 would find support.

To re-state this, if the present constitutional provision and C.C. 715.2 are left intact, C.C. 715.8 should be repealed to avoid the confusion that exists when a statutory enactment conflicts with another such enactment, or with an overriding constitutional provision. C.C. 715.8 seems guilty of one or both.

However, with regard to the constitutional rule against perpetuities as confirmed in C.C. 715.2, it is possible that some of the confusion results from uncertainty in the minds of the lawmakers as to just what

August 12, 1969

they feel the rule should be. If so, a further study of the background of the old common-law rule and possible alternative provisions seems justified. The object, of course, would be to adopt clarifying provisions to avoid the present confusion. Possibly this might result in adoption of the rule which was intended to be put into effect when C.C. 715.8 was adopted. If so, the clarification should go a step beyond the existing code section and clarify whether it is intended to apply only to legal and equitable interest in specific assets, or whether it is also intended to limit the terms of private trusts.

Respectfully submitted,



David L. Samuels

DLS:f

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EDWARD E. WEISSMAN

SOL PRICE
OF COUNSEL

August 12, 1969

Mr. John H. DeMouly
Executive Secretary
California Law Revision Commission
Stanford University School of Law
Stanford, California 94305

Dear Mr. DeMouly:

In reference to your letter of July 18, 1969 relating to the rule against perpetuities, I concur in the conclusion that the rule should be repealed and that we need nothing in its place.

In my opinion, it is a trap for the unwary and accomplishes no useful purpose.

Very truly yours,



Paul A. Peterson

PAP:bk

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August 12, 1969

California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Attention: John H. DeMouilly,
Executive Secretary

Gentlemen:

Your letter of July 18 concerning Civil Code Section 715.8 is acknowledged.

Within the time available I was not able to reach a final conclusion as to whether or not the above-numbered section could be repealed without harm to other sections and concepts in the area of the rule against perpetuities.

Such brief investigation as I was able to make causes me to doubt the correctness of the sweeping conclusions expressed by Professor Dukeminier. Under these circumstances I would recommend against any action being taken without full consideration of all aspects of the problem.

Very truly yours,

A. R. Kimbrough

Teeters, Palmer, Kjos & Glass

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 JACK EUGENE TEETERS
 JAMES D. PALMER, JR.
 ANDREW B. KJOS
 WILLIAM C. BOURKE
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August 15, 1969

Mr. John H. DeMouilly
 Executive Secretary
 California Law Revision
 Commission
 School of Law
 Stanford University
 Stanford, California 94305

Re: Civil Code Section 715.8

Dear Mr. DeMouilly:

Your letter of July 18, 1969 asks my opinion on the above Section. I believe it should be repealed. If repealed, hopefully the legislative history will make it clear that there is no intent thereby to limit Civil Code Section 715.5.

Actually, there may be lurking behind the confusing language of Section 715.8 the germ of a meritorious idea. A person's legitimate desire to provide for his grandchildren may outweigh a possible violation of the rule against perpetuities. If so, could not Section 715.8 be amended rather than repealed? The amendment could provide that a property interest created by a transfer is not invalid during the lifetime of the transferor's grandchildren. To prevent unnecessary infringement on the rule against perpetuities, the amendment could be qualified. Thus, it could be limited to transfers without consideration by gift or will and only where during the extended vesting period there is a substantial present interest in the transferor's spouse, children or grandchildren.

Sincerely,

Donald E. Glass

lh

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E. JAMES MCGUIRE
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August 15, 1969

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G. G. SANDERS
OF COUNSEL

Mr. John H. DeMouilly
Executive Secretary
California Law Revision Commission
School of Law
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Stanford, California 94305

Dear Mr. DeMouilly:

As I participated in the C.E.B. project which published California Will Drafting, I received the memo of July 18, 1969.

I have read the McNeill case, the case of Prime v. Hyne, and the article in the California Law Review in 1967 by Professor Dukeminier.

I am convinced that Civil Code section 715.8 should be repealed.

I note the observation in West's code on page 78 of the Cumulative Pocket Part of Vol. 7 of the Civil Code that 715.6, 715.7, and 715.8 were adopted at the same time. Further down on the page there is a reference to a Stanford Law Review article "California Revises Rule Against Perpetuities," (16 Stan. L.R. 177-1963).

The thought comes to mind that if a commission in 1963 decides that all three sections are necessary: 60 years, "spouse" as a "life in being," and 715.8, is it wise to repeal one and not the "package?"

Very truly yours,

O'GARA and MCGUIRE

Edwin McInnis

EM:ea

EXHIBIT XXXIV

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OUR FILE NUMBER

530,660

August
15th
1969

John H. Desouilly, Esq.
Executive Secretary
California Law Revision Commission
Stanford University School of Law
Stanford, California 94305

Dear Mr. Desouilly:

I think Section 715.3 should be repealed, and
that no additional legislation is required.

Yours very truly,

Hugh L. Macneil
Hugh L. Macneil

llm:mm

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SANTA BARBARA • SANTA CRUZ

SCHOOL OF LAW
LOS ANGELES, CALIFORNIA 90024

August 14, 1969

Mr. John H. DeMouilly, Secretary
California Law Revision Commission
Stanford Law School
Stanford, California 94305

Dear Mr. DeMouilly:

Mr. Harold Boucher was kind enough to send me a copy of his letter to you concerning repeal of Civil Code section 715.8. I agree with Mr. Boucher that section 41 of the Probate Code should be repealed, but I think that is a separate matter that should not distract us from the perpetuities problem.

In response to Mr. Boucher's letter I would like to make three points. First, perpetuities policy is a question of social philosophy as Mr. Boucher states. However, in California, it is also a constitutional question in view of the California Constitution's prohibition of "perpetuities." Dean Halbach of UC Berkeley and Professors Powell and Simes of Hastings have all pointed out that section 715.8 is probably unconstitutional if it permits a private trust to run on indefinitely. I agree with them that a most serious constitutional question is raised. It seems to me a good idea to avoid such a constitutional question regardless of one's personal views of perpetuities policy.

Second, an examination of the social philosophy underlying perpetuities policy will bog the commission down in a swamp from which it will not likely emerge with any agreement or legislation. I have served for several years now on the Committee on Rules against Perpetuities of the ABA Section of Real Property, Probate and Trust Law. We have been unable to come to any agreement either on perpetuities policy or desirable legislation, and the Chairman of the Committee informs me he sees no prospect of agreement except on very limited matters. It appears that change will most likely come in this field bit by bit.

Third, Mr. Boucher misunderstands my reference to tax avoidance possibilities when he says "the perpetuities statutes are hardly the place for tax reform." My point is this. Tax avoidance possibilities are now open in California that, if extensively used, the Commissioner of Internal Revenue could not overlook. His action would be to get the tax laws amended so that Californians were not given a preferred treatment. There would not be tax reform, but a statutory change

Mr. John H. DeMouilly,

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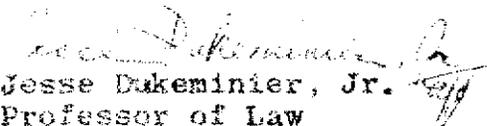
August 14, 1969

to close a loophole caused by California law. Back in the 1940s the Internal Revenue Code was amended to take care of a quirk in Delaware's perpetuities law. (I am on the Big Sur and do not have a copy of the Code handy, but the Delaware tax trap provision is in the powers of appointment section, 2041.) The amendment applies in all states and has proved a nuisance. For example, if you exercise a special power of appointment by creating a general inter vivos power, you are treated as having exercised a general power of appointment for federal estate tax purposes. The appointive property is in your federal gross estate. This is a tax trap for the California draftsman caused by a peculiarity in Delaware perpetuities law. A peculiar California perpetuities loophole will likely lead to similar amendment of the Code. The opinion of the Supreme Court of California in *Heyer v. Flaig* should convince the bar that it is best to avoid making these traps for themselves.

I agree wholeheartedly with Mr. Boucher that the Law Revision Commission should start looking into all the traps for the will draftsman. *Heyer v. Flaig* calls for getting rid of useless statutes and rules. (It is *McPherson v. Buick* in the will-drafting field.) I myself would make a small start by repealing Civil Code section 715.8.

I am sending this letter to my secretary in Los Angeles to type and send on to you.

Sincerely,


Jesse Dukeminier, Jr.
Professor of Law

JD:mj

Xerox copy to Mr. Harold Boucher

EXHIBIT XXXVI

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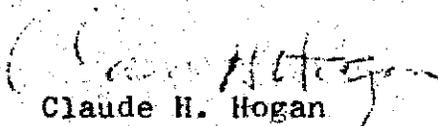
August 18, 1969

Mr. John H. DeMouilly
Executive Secretary
California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Dear Mr. DeMouilly:

I am sorry to be so long in replying to your letter of July 18, 1969, requesting my opinion whether Civil Code Section 715.8 should be repealed. In my opinion this section should be repealed. My reasons for this conclusion are well stated in the extract from Goldfarb & Singer which was attached to your letter.

Sincerely,


Claude H. Hogan



UNITED CALIFORNIA BANK

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AUGUST 29, 1969

Mr. John H. DeMouilly
Executive Secretary
California Law Revision Commission
School of Law, Stanford University
Stanford, California 94305

Dear Mr. DeMouilly:

This is in reply to your letter of July 18, with reference to the Commission's assignment to study Civil Code Section 715.8, a part of the California Rule against Perpetuities.

While I have not had the opportunity to research this problem in depth, I am in agreement with Professor Dukeminier, and the other respected scholars cited, that Section 715.8 should be repealed and not amended or revised.

As I understand the section, or rather if I understand the section, it does change the common law rule and does violate the reasons behind the original rule. One of the clearer explanations of the rule against perpetuities is contained in Leach, Perpetuities in a Nutshell, 51 Harv.L.Rev.638 (1938), revised and reprinted as Chapter 10, Leach, Cases and Text On The Law of Wills, (2d ed.1960).

In this chapter, Professor Leach gives several examples of gifts which are valid and gifts which are invalid under the rule. The example given in his book at page 205 seems to fall within the scope of Section 715.8. The gift would be invalid under the common law rule, but would apparently be valid under Section 715.8. It seems to me that repeal of Section 715.8 would be advisable.

I would like to take this opportunity to request that you change my address on your records. I am taking early retirement from United California Bank on October 1, of this year and will devote my time to legal writing, teaching at the University of Southern California School of Law, and some part time practice. My address will be:

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Beverly Hills, California
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Telephone (213) CR6-8975

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Wallenstein and Field
6505 Wilshire Boulevard Ste 512
Los Angeles, California 90048
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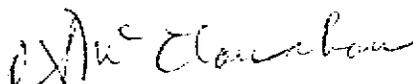
Page #2

Mr. John H. DeMouilly

I would prefer that correspondence be sent to my home address.

Will you also please send me a current list of the studies and reports of the Commission which are available.

Sincerely yours



W. S. McClanahan
Trust Officer

WSMcC:gom

TENTATIVE RECOMMENDATION OF THE CALIFORNIA
LAW REVISION COMMISSION

relating to

THE "VESTING" OF INTERESTS UNDER THE RULE AGAINST PERPETUITIES

INTRODUCTION

The Legislature has directed the Law Revision Commission to determine "whether Civil Code Section 715.8 (Rule Against Perpetuities) should be revised or repealed." Section 715.8 provides:

715.8. An interest in real or personal property, legal or equitable, is vested if and when there is a person in being who could convey or there are persons in being, irrespective of the nature of their respective interests, who together could convey a fee simple title thereto.

An interest is not invalid, either in whole or in part, merely because the duration of the interest may exceed the time within which future interests in property must vest under this title, if the interest must vest, if at all, within such time.

Section 715.8, of course, is neither the rule against perpetuities¹ nor a traditional component of that rule. Rather, it is a unique and conceivably far-reaching exemption from the rule stated in terms of a novel definition of "vesting" for the purposes of the rule.

Notwithstanding the comparatively recent (1963) enactment of Section 715.8, the admittedly worthy objective sought by its enactment, and the fact that it has not been judicially applied or construed, the Commission concludes that it should

1. The common law rule against perpetuities is expressly made applicable in California by Civil Code Section 715.2 which provides, in part, that "No interest in real or personal property shall be good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest"

be repealed and that no other legislation should be enacted in its place. More broadly, the Commission concludes that, with repeal of Section 715.8 and with deletion of Section 9 of Article XX of the California Constitution ("No perpetuities shall be allowed except for eleemosynary purposes") as proposed by the Constitution Revision Commission, the California statutory law on "perpetuities" will have attained the optimum expectable benefit from a century of intermittent experimentation. Largely because of substantial changes effected in 1959 and 1963, the California legislation in this field has been brought to a fair state of order both in terms of underlying policy and clarity of codification, and further innovation should be limited, at least for the foreseeable future, to measures that deal with specific factual situations and that have a clearly discernable effect.

A recent survey of legal problems prepared for the Assembly Committee on Judiciary observes that "All the perpetuities experts in the state would vote to get rid of one confusing statute, California Civil Code, Section 715.8."² The survey also notes that Section 715.8 may make "it possible to create private trusts of unlimited duration," that "this is a clear violation of the classic rule against perpetuities," and that the section may allow "wealth to be tied up in trusts indefinitely." Although complete unanimity is hardly to be expected in the field of "perpetuities," those general conclusions are supported by the correspondence

2. Goldfarb & Singer, Problems in the Administration of Justice in California 62 (1969).

received by the Commission on this topic and by the scholarly writing that has been devoted to Section 715.8.³ However, to explain the objections that have been raised to Section 715.8 and the conclusion that the section should be repealed, it is necessary to set forth briefly California's protracted experiment with perpetuities legislation, to refer to the widespread effort to "reform" the rule against perpetuities, and to recount the particular background of Section 715.8.

3. Section 715.8 is discussed in detail in Dukeminier, Perpetuities Revision in California: Perpetual Trusts Permitted, 55 Cal. L. Rev. 678 (1967); Simes, Perpetuities in California Since 1951, 18 Hastings L. J. 247 (1967); Comment, California Revises the Rule Against Perpetuities--Again, 16 Stan. L. Rev. 177 (1963); Comment, The Quest for the Best Vest, 37 So. Cal. L. Rev. 283 (1964).

BACKGROUND

Historical Evolution From 1849-1963

Since 1849, the California Constitution has disallowed "perpetuities" except those for "eleemosynary purposes."⁴ The possible meanings of this prohibition have been much discussed, but its exact meaning has never been declared by the California Supreme Court. It may mean that the common law rule is enacted in all of its details or it may merely declare a general policy against the "fettering" of property for an unreasonable time. The best guess, however, seems to be that the constitutional provision ordains the common law rule against perpetuities, but only in substance, and the Legislature may modify the rule in some particulars so long as the result can still be said to be the common law rule.⁵

This uncertainty as to the meaning of the Constitution did not long deter the Legislature in experimenting with novel restrictions upon perpetuities, restraints on alienation, suspensions of the power of alienation, accumulations of income, and related matters. Even before adoption of the codes in 1872, legislation touched this field;⁶ but with enactment of the Civil Code, California sought a complete statutory substitute for the common law rule against perpetuities. The infamous "rule against suspension of the absolute power of alienation" was borrowed from New York and distributed in various former sections of the Civil Code.⁷ With

4. Cal. Const., Art. XI, § 16 (1849); Cal. Const., Art XX, § 9 (1879).

5. See Simes, supra note 3, at 259.

6. See Morrison v. Rossignol, 5 Cal. 64 (1855).

7. See Fraser & Sammis, The California Rules Against Restraints on Alienation, Suspension of the Absolute Power of Alienation, and Perpetuities, 4 Hastings L. J. 101 (1954).

respect to that suspension rule it has been aptly said:⁸

In the United States, many state legislatures have thought they could supplant the Rule against Perpetuities by statutes based on different principles. The experience with these supplanting statutes has been generally unsatisfactory. State after state has repealed its statute and re-established the common law rule. It is believed that this is a sequence of events unique in the history of the common law. It is extraordinary that a rule having its origin nearly three centuries ago has proved more workable than modern attempts to provide substitutes for it. This is not to say that anyone believes the Rule against Perpetuities to be perfect; some legislatures have sought to improve its operation in detail while retaining its major structure, and others might well make the attempt.

The essence of the suspension rule was contained in former Sections 715 and 716 which provided, respectively, that "The absolute power of alienation cannot be suspended, by any limitation or condition whatever, for a period longer than [that prescribed]" and "Every future interest is void in its creation which, by any possibility, may suspend the absolute power of alienation for a longer period than [that prescribed]." Significantly, Section 716 also provided that "Such power of alienation is suspended when there are no persons in being by whom an absolute interest in possession can be conveyed." The similarity of this provision to the first paragraph of Section 715.8 should be noted.

Although the Legislature changed the allowable period under the suspension rule on several occasions, that rule remained in existence until 1959. In general, the suspension rule gave rise to difficulties of interpretation at least as great as those that arise under the common law rule against perpetuities. As Dean Halbach has observed, "Over the

8. Morris & Leach, The Rule Against Perpetuities 13 (2d ed. 1962).

years, the pattern was amended and patched, a process that had the overall appearance of a struggle to be freed from a straight jacket."⁹ Moreover, the Civil Code left entirely unresolved the question whether, in addition to the suspension rule, California also had the rule against perpetuities as a matter of common law. This question was resolved in 1951 by adoption of the "Model Rule Against Perpetuities Act" proposed by the Commissioners on Uniform State Laws. The "model act" simply makes effective in this state the "American common law rule against perpetuities" and is embodied in its entirety in Section 715.2.

Until 1951, the permissible period in the various code sections forbidding suspension of the power of alienation never coincided with the period of the common law rule against perpetuities (lives in being and 21 years). Thus in the era from 1872 until 1951, the California lawyer had not only to be concerned with two differing substantive rules, but also with two distinct permissible periods. In 1951, the permissible period in the suspension provisions was changed to conform to that of the common law rule, leaving only the question whether both of these overlapping restrictions on the creation of future interests were necessary.

As best as could be determined, after 1951, the suspension-of-the-power-of-alienation provisions added nothing to the statutorily adopted common law rule against perpetuities except that the suspension rule made void certain vested, beneficial interests under private trusts that would have been valid under the common law rule.¹⁰ And, needless

9. Halbach, The Rule Against Perpetuities, § 15.5, in California Will Drafting (Cal. Cont. Ed. Bar 1965).

10. See Turrentine, The Suspension Rule and Other Statutory Restrictions on Trusts and Future Interests in California, 9 Hastings L. J. 262 (1958).

to say, endless confusion arose from the dual existence of the distinct, but overlapping, rules. Accordingly, in 1959, the Legislature, acting on the recommendation of the Law Revision Commission,¹¹ repealed all provisions relating to suspension of the power of alienation. The common law rule against perpetuities (Civil Code Section 715.2) was left intact. The single additional change made at that time was the enactment of Civil Code Section 771 to deal specifically with the duration and termination of private trusts. Section 771 was added because, before 1959, the validity of beneficial interests under trusts had been determined by application of the suspension rule, and there was no judicial authority in California as to the way in which the common law rule affects the duration of private trusts.¹² Section 771 was framed to incorporate the much-discussed "wait and see" application of the perpetuities restriction and provides, in effect, that one must wait and see whether a trust exists longer than lives in being and 21 years. If it does so, it is terminable by the beneficiaries or other interested parties.

11. See Recommendation and Study Relating to Suspension of the Absolute Power of Alienation, 1 Cal. L. Revision Comm'n Reports at G-1 (1957).

12. See Recommendation and Study Relating to Suspension of the Absolute Power of Alienation, 1 Cal. L. Revision Comm'n Reports at G-1, G-8 (1957).

Thus, following 1959, California had only the common law rule (Section 715.2) and a special "wait and see" provision relative to the duration and termination of private trusts (Section 771). At least three events coincided to bring an end to this state of affairs. First, in 1958, the Court of Appeals rendered the widely noted decision in Haggerty v. City of Oakland.¹³ In a taxpayer's suit, the court held invalid a lease from the city to a concessionaire to begin after completion of a certain building. In writing its opinion, the majority made the dubious choice of resurrecting Professor Gray's infamous precept of "remorseless application" of the perpetuities rule¹⁴ and of forcefully reminding the bar that the rule deals with possibilities, however remote, rather than with either probabilities or actualities. This, however, was not the aspect of the case that most disturbed practitioners. Rather, the decision served as a jolting reminder that, although the 17th century rule appertained as a practical matter only to the devolution of landed wealth, the modern rule applies to any indefinitely "contingent" interest in property and therefore concerns the commercial lawyer as well as the estate planner. Nothing of consequence resulted from the Haggerty decision;¹⁵ the city and the concessionaire simply remade the lease, no hearing was requested in the Supreme Court, and only five years later in Wong v. Di Grazia,¹⁶

13. 161 Cal. App.2d 407, 326 P.2d 957 (1958); noted 47 Cal. L. Rev. 197 (1959); 10 Hastings L. J. 439 (1959); U.C.L.A. L. Rev. 165 (1959).

14. See Gray, Rule Against Perpetuities § 629 (4th ed. 1942); compare 4 Restatement, Property § 375 (1944).

15. See Leach, Perpetuities: New Absurdity, Judicial to Statutory Correctives, 73 Harv. L. Rev. 1318 (1960).

16. 60 Cal.2d 525, 386 P.2d 817, 35 Cal. Rptr. 241 (1963) noted 16 Hastings L.J. 470 (1965); 12 U.C.L.A. L. Rev. 246 (1964).

the Supreme Court expressly overruled the result in Haggerty and broadly disapproved the entire approach of that case in applying the rule to "commercial transactions." Nonetheless, Haggerty had made its impression and, at least to some California lawyers, had evoked the nostalgic memory that the "on completion" lease presumably would have been valid under the old suspension rule if that rule had ever existed to the exclusion of the rule against perpetuities.

Second, in 1961, the California Supreme Court had the almost unique occasion to dispose of a legal malpractice suit based upon an alleged violation of the rule against perpetuities. In Lucas v. Hamm,¹⁷ a bequest allegedly failed because it was made to take effect five years after the distribution of an estate. Although the alleged flaw was of the simplest kind--running afoul of the so-called "administrative contingency" application of the rule--the defendant was completely absolved, the court observing that:

Of the California law on perpetuities and restraints it has been said that few, if any, areas of the law have been fraught with more confusion or concealed more traps for the unwary draftsman

The result of the case, however, probably did very little to allay the apprehension the incident caused.

17. 56 Cal.2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961).

Third, beginning in the 1950's and continuing to date, there has been a veritable deluge of literature in which legal scholars endlessly advocate and comment upon "reform" of the common law rule. Although this literature defies summary, the remedial ideas it has produced are succinctly set forth in the Perpetuity Legislation Handbook promulgated by the Committee on Rules Against Perpetuities of the American Bar Association's Section on Real Property, Probate and Trust Law.¹⁸

Against this background, the California Legislature last dealt with the perpetuities field in 1963 by enacting Section 715.8 and several other provisions.¹⁹

18. Third Edition, 2 Real Prop., Prob. & Trust J. 176 (1967). This handbook includes a bibliography of 51 law review articles and 15 textbooks on reforming the rule against perpetuities.

19. Cal. Stats. 1963, Ch. 1455, §§ 1-8. See also the special provisions relating to the permissible period under the rule against perpetuities when an interest is sought to be created by the exercise of a power of appointment (Civil Code Sections 1391.1-1391.2) enacted in 1969.

The Legislation of 1963

The innovations of 1963 were proposed by a special committee of the State Bar and were enacted as proposed. A brief report²⁰ of the committee clarifies the objectives sought to be attained by the legislation. The report referred to Haggerty v. City of Oakland and noted that "This opinion came as a shock to the bar, for leases of this same commercial character were of common occurrence." The report also observed that:

whether in common law or statutory form, the rule against perpetuities is designed, and properly so, to prevent the tying up of landed estates for long or indefinite periods of time. It is not designed to hamper commercial transactions. It is the purpose of the proposed Section 715.8 to be added to the Civil Code, to eliminate from the rule virtually all commercial and contract transactions inasmuch as there are ordinarily in such cases parties in being who can modify or terminate the contractual relationships. . . . Modern property transactions should not be hampered by these very old decisions [under the rule]. Commercial transactions never were intended to be affected by them.

Thus, although the report also noted that "the confusion and mystery surrounding the field of perpetuities should be clarified" it seems clear that the only purpose of Section 715.8 was to exempt "commercial" transactions.

In addition to introducing a novel concept of vesting by adding Section 715.8 and repealing former Sections 693, 694, and 695, the 1963 legislation made four other notable changes. The legislation (1) requires the so-called "cy pres reformation" approach in applying the common law rule,²¹ (2) provides

20. The report of the Committee is reprinted, in full, in Comment, 37 So. Cal. L. Rev. 283, 284 n.8 (1964).

21. Civil Code Section 715.5 provides:

715.5. No interest in real or personal property is either void or voidable as in violation of Section 715.2 of this code if and to the extent that it can be reformed or construed within the limits of that section to give effect to the general intent of the creator of the interest whenever that general intent can be ascertained. This section shall be liberally construed and applied to validate such interest to the fullest extent consistent with such ascertained intent.

an alternative 60-year period in gross as the permissible period,²² (3)
abolishes the so-called "unborn widow" snare in the operation of the rule,²³
and (4) adds an extraordinary "savings clause"²⁴ which again brings to
California a dual set of perpetuities rules. The legislation thus may run
counter to the admonition of the Perpetuity Legislation Handbook

that while a legislature may pick and choose among the propriety of
perpetuity amendments which have appeared in recent years, any
comprehensive scheme of perpetuity reform must not only rest upon a
careful evaluation of its scope, but also must be framed with due
regard for the relationship between its component parts.

The "cy pres" principle introduced in Civil Code Section 715.5 is
generally regarded as the most sweeping of the proposed reforms of the rule
against perpetuities because it requires the court in all cases first to
construe, and then to reform, any interest that violates the rule--the objec-
tive of the construction or reformation being to declare such disposition as
will most nearly effectuate the grantor's stated or inferred intention within
the limits of the rule.²⁵ It is generally regarded as a more cogent reform

22. Civil Code Section 715.6 provides:

715.6. No interest in real or personal property which must vest,
if at all, not later than 60 years after the creation of the interest
violates Section 715.2 of this code.

23. Civil Code Section 715.7 provides:

715.7. In determining the validity of a future interest in real
or personal property pursuant to Section 715.2 of this code, an
individual described as the spouse of a person in being at the
commencement of a perpetuities period shall be deemed a "life in
being" at such time whether or not the individual so described was
then in being.

24. Cal. Stats. 1963, Ch. 1455, § 8.

25. See Browder, Construction, Reformation and the Rule Against Perpetuities,
62 Mich. L. Rev. 1 (1963); Leach, Perpetuities: Cy Pres on the March,
17 Vand. L. Rev. 1381 (1964).

than the celebrated and controversial "wait and see" doctrine because it affords a basis for immediate relief as to a disposition whereas under the "wait and see" principle one must literally wait and see if events occurring after the disposition cause a questionable interest to fail, to vest, or become certain to vest within the perpetuity period.

The 60-year period "in gross" provided by Civil Code Section 715.6 is an innovation seldom made in connection with the common law rule, but the California version of the alternative period is thought to be an especially effectual one because there is no requirement that the instrument specify that this 60-year period is being used or that it is being used to the exclusion of the common law period.

Apart from the new concept of vesting, the most remarkable feature of the 1963 legislation was the uncodified savings clause which provides that:

This act does not invalidate, or modify the terms of, any interest which would have been valid prior to its enactment, and any such interest which would have been valid prior to its effective date is valid irrespective of the provisions of this act.

On the surface, this section appears to be merely an unusual "retroactivity" or "effective date" clause, but that is not its purpose or effect. Its apparent purpose was to make sure that all of the legislation of 1963 would operate to relax, rather than make more stringent, the then-existing perpetuities rules. In other words, the 1963 legislation can "save" or effectuate a disposition, but it can never operate to invalidate a disposition that would

26. See Perpetuity Legislation Handbook, supra note 18, at 181. See also Fletcher, A Rule of Discrete Invalidity: Perpetuities Reform Without Waiting, 20 Stan. L. Rev. 459 (1968).

27. See Simes, supra note 3, at 254.

have been effective under the rules that existed in 1963 (essentially, the common law rule in Section 715.2 and the trust duration provision in Section 771);

The effect of the clause, however, gives California a dual set of perpetuities rules again. But this time, unlike the long era in which an interest had to satisfy both the rule against perpetuities and the suspension rule, the interest need satisfy only one rule or the other. This simple analysis goes awry, however, because the new definition of "vested" in Section 715 (interest conveyable by one or more persons) is apposite only to the discarded suspension rule; the only concept of "vested" that makes sense in connection with the perpetuities rule (not "contingent") was expressly repealed.

The New Concept of Vesting

The change made in 1963 by enactment of Section 715.8 and repeal of former Sections 693, 694, and 695 has been described as "thoroughly unique and completely revolutionary"²⁸ and as "drastic and sweeping."²⁹ To understand this emphasis, it is necessary to recall that the rule against perpetuities (as continued in effect by Section 715.2) is a rule forbidding the creation of "contingent" interests that may "vest" too remotely. It is not a rule against the creation of interests which may last too long nor against the imposition of direct restraints on alienation. More pertinently, it is not a rule against suspension of the power of alienation through the creation of interests in unborn or unascertained persons. Remotely contingent interests questionable under the rule may be, and usually are, freely alienable at all times.³⁰

Applying the rule has always involved the initial constructional problem of determining whether an interest is vested, vested subject to divestment, or contingent. This problem of construction is especially acute in dealing with "homemade" wills and conveyances, and is intrinsically difficult in connection with such interests as leases,³¹ options,³² and oil and gas interests.³³ Nonetheless, from time immemorial, the term "vested"

28. Simes, supra note 3, at 256.

29. Dukeminier, supra note 3, at 678.

30. See Morris & Leach, supra note 8, Ch. 1; Simes, supra note 3, at 256.

31. See, e.g., Fisher v. Parsons, 213 Cal. App.2d 829, 29 Cal. Rptr. 210 (1963).

32. See Berg, Long-Term Options and the Rule Against Perpetuities, 37 Cal. L. Rev. 1, 235 (1949).

33. See Jones, The Rule Against Perpetuities as it Affects Oil and Gas Interests, 7 U.C.L.A. L. Rev. 261 (1960).

has basically meant "not subject to a condition precedent," and "contingent" has meant "subject to a condition precedent." In general, an interest is "vested" for the purposes of the rule when the recipient is ascertained, any condition precedent is satisfied, and--in the case of class gifts--the members and their amounts or fractions have been determined. ³⁴ These concepts were reflected in former Sections 693, 694, and 695, but those sections were repealed in the legislation of 1963. ³⁵ Hence, "it would appear that, under the guise of a new definition of vested and contingent interests, the new section has in fact eliminated any rule against remoteness of vesting, and has provided a test of the suspension of the power of alienation in determining the validity of future interests." In terms of California's experience

34. See Morris & Leach, supra note 8, at 38. The following examples are given in 6 American Law of Property § 24.3 (1952):

- a. A remainder is "vested" when the persons to take it are ascertained and there is no condition precedent attached to the remainder other than the termination of the prior estates.
- b. An executory interest (that is, an interest which cuts off a previous estate rather than follows after it when it has terminated) is not "vested" until the time comes for taking possession.

* * * * *

- d. Most important of all, a class gift is not "vested" until the exact membership in the class has been determined; or to put it differently, a class gift is still contingent if any more persons can become members of the class or if any present members can drop out of the class.

35. Those repealed sections provided:

693. Kinds of future interests. A future interest is either:
1. Vested; or,
2. Contingent.

694. Vested interests. A future interest is vested when there is a person in being who would have a right, defeasible or indefeasible, to the immediate possession of the property, upon the ceasing of the intermediate or precedent interest.

695. Contingent interests. A future interest is contingent, whilst the person in whom, or the event upon which, it is limited to take effect remains uncertain.

with perpetuities legislation, as Professor Simes notes, "This is a step
backward."³⁶

Thus, the basic change made by Section 715.8 is this: future interests are valid, however contingent, and however remotely contingent those interests may be, if there are ascertainable persons who collectively can "convey a fee simple title." Examples given of this novel operation of the section include the following:

(1) "A conveys land to B in fee simple, but if the land is ever used for business purposes, then to C in fee simple."³⁷

(2) "T to A in fee simple until Puerto Rico becomes an American state, then to B until Canada becomes a part of the United States, and then to C, but if the events happen in the opposite sequence, then to D."³⁸

The historical irony of these results is that Section 715.8 restores the common law position between 1620 (so-called "executory interests" recognized as indestructible) and 1682 (the rule against perpetuities had its beginning in the Duke of Norfolk's case).³⁹ The policy objection to these and similar results of the section is that a technical "conveyability" of fragmented interests does not prevent the practical "fettering" of specific property and this, in addition to restricting "dead hand control," was the very reason the courts created the common law rule.⁴⁰

36. Simes, supra note 3, at 257.

37. Simes, supra note 3, at 257.

38. Comment, 37 So. Cal. L. Rev. 283, 288 (1964).

39. See note 30, supra.

40. See notes 3 and 8, supra. See also Simes & Smith, Future Interests, Ch. 41 (2d ed. 1956).

The second paragraph of Section 715.8 provides, in effect, that an interest is not invalid because of its duration, and, therefore, merely states a well-settled rule under the common law rule against perpetuities. That rule is satisfied if an interest must "vest" within the perpetuity period; it is not concerned with the duration of the interest and it does not require that the interest come to an end within the period.⁴¹ If the law were otherwise, of course, all "fee simple" interests would fail as would lesser, long-term interests such as leases, profits, easements, restrictive covenants, and the like.

It may be that the paragraph was intended to validate such "commercial" transactions as very long-term options. It will not have this effect, however, because the perpetuities objection to a temporally unlimited option is not to the timelessness of the power to demand the property. Rather, the objection is that a contingent, equitable interest in the property will "vest" only upon the possibly remote exercise of the option. It is more likely that the second paragraph was intended to overcome a few appellate decisions in which the courts have construed certain instruments as creating contingent interests that arise only in the future, rather than as being present interests subject to divestment or uncertain duration.⁴² It seems certain, however, that merely restating the settled common law principle will not have the intended effect. Moreover, the dubious decisions arose under the old suspension of the power of alienation rule, and by seemingly resurrecting that rule, Section 715.8 may do more to revive such decisions than to avoid the occurrence of such decisions in the future.

41. See Morris & Leach, supra note 8, at 95.

42. See, e.g., Victory Oil Co. v. Hancock Oil Co., 125 Cal. App.2d 222, 270 P.2d 604 (1954); Epstein v. Zahloute, 99 Cal. App.2d 738, 222 P.2d 318 (1950). Compare Brown v. Terra Bella Irrigation District, 65 Cal.2d 33, 330 P.2d 775 (1958); Fisher v. Parsons, 213 Cal. App.2d 829, 29 Cal. Rptr. 210 (1963).

Application of Section 715.8 to Trusts and Powers of Appointment

The most serious practical objection that has been raised to Section 715.8 is the possibility that it may permit the creation of private trusts that can continue indefinitely and avoid estate and gift taxes through the existence of the trust.⁴³ If the section has this effect, the result is anomalous because the old rule against suspension of the power of alienation (seemingly resurrected by Section 715.8) operated more stringently in its application to trusts than does the common law rule and Civil Code Section 771 (private trust termination). Indeed, that operation of the suspension rule was the principal reason for its being repealed.⁴⁴ It is also possible that, in view of the origin of Section 715.8 and notwithstanding its literal import, the courts will construe it only as exempting certain "commercial transactions" and as having no operation in the field of "trusts and estates."⁴⁵

It has been convincingly shown, however, that, in its applications to trusts, Section 715.8 logically can be construed in only one of three ways: (1) it may merely require that the trustee have a power of sale; (2) it may require that one or more persons have the power to "convey" a fee simple without consideration--a power on the part of the trustee to convey the trust assets to the trust beneficiaries would satisfy this

43. See, in particular, Dukeminier, supra note 3.

44. See Turrentine, supra note 10; Fraser & Sammis, supra note 7.

45. See Wong v. Di Grazia, supra note 17; Prime v. Hyne, 260 Cal. App.2d 397, 67 Cal. Rptr. 179 (1968).

requirement; or (3) it may require that one or more persons have the power to convey a fee simple title to anyone without consideration to anyone. It has been suggested that the most restrictive construction of Section 715.8 would still permit the following trust:⁴⁶

T bequeaths a fund to the Security Trust Company, in trust, to pay the income to his issue per stirpes from time to time living. Whenever there is no issue of T alive, the Security Trust Company is directed to convey the trust property to The Regents of the University of California. The trustee is given the power to sell the trust property. T gives the adult income beneficiaries, acting jointly, the power to appoint the trust property to whomsoever they see fit, but the power can be exercised only with the consent of the Regents.

These powers of the "issue" and the Regents technically may permit the "conveyance" of a "fee simple," but it seems obvious that with such trusts there is no longer "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."⁴⁷

Although the power of these income beneficiaries would satisfy Section 715.8, it would not be a taxable "general power of appointment" under the Internal Revenue Code since it can be exercised only with the consent

46. See Dukeminier, supra note 3, at 683.

47. See Simes, Public Policy and the Dead Hand 58 (1955). See also Morris & Leach, supra note 3, at 15, 17:

Whatever may have been the position in past centuries, it is plain that the modern Rule [Against Perpetuities] is primarily directed not against the inalienability of specific land but against the remote vesting of interests in a shifting fund. . . . It is a natural human desire to provide for one's family in the foreseeable future. The difficulty is that if one generation is allowed to create unlimited future interests in property, succeeding generations will receive the property in a restricted state and thus be unable to indulge the same desire. The dilemma is thus precisely what it has been throughout the history of English law, namely, how to prevent the power of alienation from being used to its own destruction.

of the Regents who have a substantial adverse interest.⁴⁸ It has been urged that this tax avoidance possibility may lead to restrictive tax legislation (analogous to Internal Revenue Code Section 2041(a)(3) which was designed to deal with "Delaware Trusts") that will more than overcome any conceivable benefits afforded by Section 715.8.⁴⁹

With respect to powers of appointment generally, one person who holds a general power is treated, both for tax and perpetuities purposes, as an absolute owner. This principle has wide and fairly clear application in the field of power and taxation, as well as perpetuities. Section 715.8 seemingly makes the precept applicable, whatever number of persons hold the power and however adverse their interests may be. Thus, Section 715.8 conflicts with such related provisions as recently enacted Civil Code Section 1391.1, which governs the application of the rule against perpetuities to the exercise of powers,⁵⁰ and the time-honored provision in Civil Code Section 716, which excludes from the perpetuities period any period during which one person may totally "destroy" the questioned interest.⁵¹

In sum, in the fields of trusts, estates, and powers, the "two can convey" principle of Section 715.8 simply does not "fit" even if the section is charitably considered to be only an "alternative" to the traditional concept of "vesting" under the rule against perpetuities (Section 715.2).

48. Int. Rev. Code of 1954, § 678 (income tax)(donees not treated as owners for income tax purposes because the power is lodged in more than one person); Treas. Reg. § 20.2041-3(c)(2)(1958)(estate tax); Treas. Reg. § 25.2514-3(b)(2)(1958)(gift tax).

49. See Dukeminier, supra note 3, at 684.

50. See Cal. Stats. 1969, Ch. 155, p. _____. Notice, in particular, the Comment to Section 1391.1 which provides, in effect, that the section "overrides" Section 715.8.

51. Section 716 provides:

716. The period of time during which an interest is destructible pursuant to the uncontrolled volition and for the exclusive personal benefit of the person having such a power of destruction is not to be included* in determining the permissible period for the vesting of an interest within the rule against perpetuities.

RECOMMENDATION

Section 715.8 was enacted in an effort to overcome the possibility of mechanistic and purposeless application of the rule against perpetuities to commercial transactions. Assuredly, this is a worthy objective. The section, however, is seriously objectionable on at least three grounds: (1) it has been and will be productive of endless confusion; (2) it is unnecessary to achieve the desired objective; and (3) it operates in areas other than those intended and thereby undercuts the time-honored perpetuities policy of preventing the power of disposition from being used to radically curtail the existence of that same power in the future.

The choice made in restoring an element of the discarded and discredited suspension-of-the-power-of-alienation rule was a dubious one. However, even if an exclusion or exemption from the common law rule was to have been created and cast in terms of the old rule, Section 715.8 is defective. The section should have been made an express exception from the common law rule (Section 715.2) as is Section 715.5 (the cy pres principle), rather than a redefinition of "vesting" for the purposes of the common law rule.

Perhaps, more importantly, in the light of other legislation and a recent California Supreme Court decision, commercial transactions are adequately protected independently of Section 715.8. In Wong v. Di Grazia⁵² tremendous strides toward infusing common sense into the application of the rule against perpetuities were made when the court abandoned the

52. 60 Cal.2d 525, 386 P.2d 817, 35 Cal. Rptr. 241 (1963).

"fantastic possibilities" test and adopted a rule of reasonable construction. The court indicated that henceforth in applying the rule to commercial transactions the rule will not be interpreted so as to create commercial anomalies. In Wong the court reasoned that, since under contract law there is an implied provision that a contract will be performed within a reasonable time (certainly less than 21 years), this implied provision prevents the contract from violating the rule against perpetuities. As the court stated:

Certainly our function is not to interpret the rule [against perpetuities] so as to create commercial anomalies. . . . Surely the courts do not seek to invalidate bona fide transactions by the imported application of esoteric legalisms. Our task is not to block the business pathway but to clear it, defining it by guideposts that are reasonably to be expected. . . . We therefore do not propose to apply the rule in the rigid or remorseless manner characterized by some past decisions; instead we shall seek to interpret it reasonably, in the light of its objectives and the economic conditions of modern society.

Other legislation also prevents the frustration of commercial transactions. Civil Code Section 715.5 confers the power of cy pres upon the courts and therefore should avoid most of the harsh results obtained at common law. Section 715.5 requires an interest that violates the rule to be construed or reformed to carry out the intent of the parties. In addition, Civil Code Section 715.6 provides an alternative measure of the validity of an interest. Under this section an interest which will vest, if at all,, within 60 years of the creation of the interest is valid. This alternative measure is applicable even though the instrument does not so specify.

The indicated application of these ameliorative doctrines can be illustrated by reference to common perpetuities violations. Options to purchase property may not be limited by time and therefore violate the rule. For example,

O grants to A, his heirs and assigns an option to purchase Blackacre for \$50,000.

Although this option violates the rule, it does not follow that the transaction will be declared void. Under the cy pres power, the court has the power to reform the instrument by limiting the option to 21, or even 60, years if this would carry out the intent of the parties. This reformation technique could also be applied to transfers contingent upon an event not related to any life in being, such a lease to commence upon completion of a building or the discovery of oil. In Wong, the California Supreme Court made it abundantly clear that it would invoke such ameliorative techniques to avoid the harshness characterized by earlier mechanistic applications of the rule to commercial transactions.

Aside from these considerations, the essential defect of Section 715.8 is that its application exceeds the purpose for its enactment. As Dean Maxwell has put it, "the legislature used an atomic cannon to kill a gnat."⁵³ Aside from commercial transactions, Section 715.8 incorrectly exempts several other kinds of transactions and arrangements, including private trusts, from the operation of the rule.

The Commission concludes that Section 715.8 may be, and should be, repealed. At least for the foreseeable future, there appears to be no need for substitutional or additional legislation in the perpetuities field.

53. See Dukeminier, supra note 3, at 678.

PROPOSED LEGISLATION

The Commission's recommendation would be effectuated by the enactment of the following measure:

An act to repeal Section 715.8 of the Civil Code, relating to
future interests in property.

The people of the State of California do enact as follows:

Section 1. Section 715.8 of the Civil Code is repealed.

~~715.8. An interest in real or personal property, legal or equitable, is vested if and when there is a person in being who could convey or there are persons in being, irrespective of the nature of their respective interests, who together could convey a fee simple title thereto.~~

~~An interest is not invalid, either in whole or in part, merely because the duration of the interest may exceed the time within which future interests in property must vest under this title, if the interest must vest, if at all, within such time.~~

Comment. Section 715.8 formerly provided an alternative test for the "vesting" of future interests under the common law rule against perpetuities (Civil Code Section 715.2). See Recommendation Relating to the "Vesting" of Interests Under the Rule Against Perpetuities, 10 Cal. L. Revision Comm'n Reports at ____ (1970). The section was intended to free various commercial transactions from a mechanistic and capricious application of the common law rule. See Dukeminier, Perpetuities Revision in California: Perpetual Trusts Permitted, 55 Cal. L. Rev. 678 (1967);

Simes, Perpetuities in California Since 1951, 18 Hastings L.J. 247 (1967); Comment, 16 Stan. L. Rev. 177 (1963); Comment, 37 So. Cal. L. Rev. 283 (1964). The section was made largely superfluous by the decision in Wong v. Di Grazia, 60 Cal.2d 525, 386 P.2d 817, 35 Cal. Rptr. 241 (1963), and by other reforms of the common law rule introduced in 1963. See, e.g., Civil Code §§ 715, 716. Repeal of Section 715.8 leaves applicable the common law conception of "vesting" for purposes of Sections 715.2, 771, and other related sections. See 6 American Law of Property § 24.3 (1952); Morris & Leach, The Rule Against Perpetuities, Ch. 2 (2d ed. 1962). Needless to say, repeal of the section is not intended to revitalize certain anachronistic decisions rendered before, and overruled by, Wong v. Di Grazia, supra.