

STATE OF CALIFORNIA

**CALIFORNIA LAW
REVISION COMMISSION**

RECOMMENDATION AND STUDY

relating to

**Suspension of the Absolute Power
of Alienation**

November 30, 1956

LETTER OF TRANSMITTAL

To HIS EXCELLENCY GOODWIN J. KNIGHT
Governor of California
and to the Members of the Legislature

The California Law Revision Commission was authorized by Resolution Chapter 207 of the Statutes of 1955 to make a study to determine whether the sections of the Civil Code prohibiting suspension of the absolute power of alienation should be repealed. The commission submits herewith its recommendation relating to this subject and the study prepared by its research consultant, Professor Lowell Turrentine of the School of Law, Stanford University.

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November 30, 1956



TABLE OF CONTENTS

	Page
RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION	G- 5
A STUDY TO DETERMINE WHETHER THE SECTIONS OF THE CIVIL CODE PROHIBITING SUSPENSION OF THE ABSOLUTE POWER OF ALIENATION SHOULD BE REPEALED	G-11
STATEMENT OF THE PROBLEM	G-11
THE RULE AGAINST PERPETUITIES	G-12
THE RULE AGAINST SUSPENSION OF THE ABSOLUTE POWER OF ALIENATION	G-14
Definition of "Suspension of the Absolute Power of Alienation"	G-14
Evolution of the Suspension Rule	G-14
Comparison of the Suspension Rule With the Rule Against Perpetuities	G-15
An Interest to an Unborn Person	G-15
An Interest to an Unascertained Person	G-15
An Interest to an Ascertained Person Upon a Contingency	G-16
Other Contingent Interests in Ascertained Persons	G-16
Comparison of the Suspension Rule With the Rules Against Conditions Restraining Alienation	G-17
THE EFFECT OF THE SUSPENSION RULE UPON THE DURATION OF TRUSTS	G-18
Charitable Trusts	G-18
Private Trusts Which Vest Within the Period and Are of Perpetual Duration	G-18
Private Trusts Which Vest Within the Period But May Last Beyond It	G-19
Private Trusts for Indefinite Purposes and "Honorary" Trusts	G-23
Trusts for Unincorporated Associations	G-26
Business Trusts and Trusts for Security	G-26
Business or "Massachusetts" Trusts	G-26
Trusts to Secure Creditors	G-27
CONCLUSIONS AND RECOMMENDATIONS	G-28
Repeal of the Suspension Rule	G-28
Repeal of Special Limitations on the Creation of Remainders	G-29
Background	G-29
General Policy Favoring Repeal	G-29
Civil Code Section 774	G-29
Civil Code Section 775	G-30
Civil Code Section 777	G-30
Additional Considerations Favoring Repeal	G-30



RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

Relating to Suspension of the Absolute Power of Alienation

Since at least the middle of the seventeenth century Anglo-American law has embodied a policy limiting the power of an owner of property to dispose of it in such a way as to control its use and disposition by future generations. The English courts developed for this purpose the common law "rule against perpetuities" which makes invalid any attempt to create a legal or equitable property interest which will not vest within 21 years after the termination of some life in being at the creation of the interest. Another legal device to achieve the same general purpose was enacted by the Legislature of this State as a part of the Civil Code of 1872. This was the "rule prohibiting suspension of the absolute power of alienation" (present Civil Code Sections 715.1, 716, 770 and 771). This rule was borrowed from the New York law, having been devised by the drafters of the New York Revised Statutes of 1830. The rule prohibiting suspension of the absolute power of alienation (sometimes hereinafter referred to as "the suspension rule") makes void in its creation every future interest which, by any possibility, may suspend the absolute power of alienation for a period not measured by lives in being plus 21 years. The absolute power of alienation is suspended when there are no persons in being by whom an absolute interest in possession can be conveyed.

As will appear from the discussion below, the rule against perpetuities and the rule prohibiting suspension of the absolute power of alienation have a large area of operation in common. However, as will also appear, each rule applies to certain situations not reached by the other. This caused considerable confusion in California prior to 1951 because it was not clear whether the common law rule against perpetuities was a part of our law or whether the enactment by the Legislature of the suspension rule and certain other statutory limitations on the creation of future interests manifested a legislative intention that these should constitute the only limitations on future interests in this State. This uncertainty was ended when the Legislature enacted the "American common law rule against perpetuities" as a part of our law in 1951 (Civil Code Section 715.2). At the same time the Legislature amended the rule prohibiting suspension of the absolute power of alienation to change the time limitation expressed therein to correspond to that embodied in the rule against perpetuities—i.e., 21 years after some life in being at the creation of the interest.

The enactment of the rule against perpetuities raises the question whether the Legislature should now repeal the rule prohibiting suspension of the absolute power of alienation. The commission has concluded

and recommends that the Legislature should do so for the following reasons:

1. As appears below and in the research consultant's report, the suspension rule is no longer necessary in the law of this State. Every desirable result which it achieves can be accomplished by our courts by the application of the prohibition of perpetuities in our Constitution (Article XX, Section 9), the rule against perpetuities (Civil Code Section 715.2), certain other existing statutory and common law rules which limit the creation and duration of future interests, and the statutes recommended for enactment by the commission, *infra*.

2. As appears below and in the research consultant's report, the suspension rule is unnecessarily harsh in its operation with respect to the duration of nonterminable private trusts, as compared with other and better ways of placing proper limits on such trusts.

3. The existence of both the rule against perpetuities and the rule prohibiting suspension of the absolute power of alienation in the law of this State creates ambiguity as to whether they are overlapping or mutually exclusive both in general and as applied to particular situations, thus making our law with respect to future interests unnecessarily complex and confusing to persons affected by it.

The commission has found that the rule prohibiting suspension of the absolute power of alienation does not apply to certain interests which do not vest within or which extend beyond lives in being plus 21 years. These include options, transfers made to persons ascertained and in existence whose right to take the property is dependent on a contingency which may not happen within the period, possibilities of reverter, rights of entry for condition broken, conditions restraining alienation of property by providing for forfeiture of title upon an attempted alienation, charitable trusts, business trusts (interests vested in certificate holders) and trusts to secure creditors. Since the suspension rule does not presently apply to these interests, its repeal would, of course, have no legal effect as to them.

The commission has found that the suspension rule is no longer necessary to prevent the unduly remote vesting of property interests because this matter is covered by the rule against perpetuities enacted in 1951. Thus, for example, the two rules presently overlap in invalidating both an interest given to an unborn child who may not come into being within lives in being plus 21 years and an interest given to a person not certain to be ascertained within that period. In this general area the rule prohibiting suspension of the absolute power of alienation is, therefore, superfluous.

The commission has found that the rule prohibiting suspension of the absolute power of alienation either does or may presently apply to several situations not covered by the rule against perpetuities. But repeal of the suspension rule would have no undesirable effect in these situations because they would be taken care of by other existing constitutional, statutory, or common law rules which, together with the statutes recommended for enactment by the commission, *infra*, would achieve adequate control of creation of future interests and the duration of nonterminable private trusts. Moreover, the rules and statutes referred to would reach the desired result in a more flexible and reason-

able way than does the suspension rule. These situations are the following:

1. *A transfer of an interest in property upon a condition restraining alienation of the interest created.* Such conditions, with exceptions not here material, are invalidated by Section 711 of the Civil Code which embodies the common law rule against conditions restraining alienation which are repugnant to the interest created. Thus the suspension rule is superfluous with respect to such conditions. Moreover, Section 711 merely makes the condition invalid whereas the suspension rule invalidates the interest created—a far less desirable result.

2. *The creation of private trusts which may last longer than lives in being and 21 years, either because the active duties of the trustee may continue or because termination is expressly or impliedly prohibited beyond that period.* Two groups of trusts fall into this general category. The first group is made up of special types of trusts not of frequent occurrence—trusts for indefinite, noncharitable objects, for unincorporated associations where the beneficiary is the collective entity and where the trust is to run on indefinitely with no power in the members at any time to wind it up, and “honorary” trusts, i.e., purported trusts for specific noncharitable objects without human beneficiaries. Trusts of these types may vest within lives in being plus 21 years, and thus not violate the rule against perpetuities, but last far beyond that period thus violating the present rule prohibiting suspension of the absolute power of alienation. However, the suspension rule is not needed as protection against these trusts because, as is pointed out in the research consultant’s report, the courts have struck them down under other rules of law both under the law of California and under the general law of trusts. Hence, the commission believes, repeal of the suspension rule would have no effect with respect to these trusts. Moreover, they would be controlled by the statutes recommended for enactment by the commission, *infra*.

The second and more important group of trusts in this category consists of ordinary private trusts where all the beneficial interests vest within lives in being plus 21 years and thus do not violate the rule against perpetuities but which must or may last indefinitely or at least beyond that period. Our courts have held that the rule suspending the absolute power of alienation applies to such trusts and that it requires the courts to strike down both those trust interests which may endure beyond the suspension rule period and also all other interests under the trust which are found not to be separable from those which will last too long.

Where the only objection to a trust, as in the case of those in this second group, is that the trust must or may last too long, the real problem presented, the commission believes, is one of the terminability of the trust. If the trust can be wound up by those having interests under it at a time not beyond the period of perpetuities there is no tying up of property contrary to the public interest even though the trust may in fact last longer than the period if the beneficiaries do not decide to terminate it. Eminent text writers are in substantial agreement, therefore, that the proper solution to the problem is to preserve the element of terminability, so that the assets of such a trust are not

tied up too long, by either disregarding altogether any express or implied provision in an instrument creating a trust which would prevent the beneficiaries from terminating it beyond the period of perpetuities or by limiting the provision so as not to apply beyond that period. Instead of taking this approach to the problem, however, the California courts have held that the suspension rule requires them to strike down either some or all of the trust interests involved. This has not only unnecessarily defeated the intention of persons creating trusts but it has also put California at a considerable disadvantage as a jurisdiction in which to establish trusts.

The view of the matter taken by the text writers, that ostensibly nonterminable trust interests which last beyond lives in being plus 21 years should be held to be terminable and thus saved, seems eminently better than the approach to the matter which has thus far been taken by the California courts. However, there is no well-established body of decisional law either in this State or elsewhere as to precisely how the question of terminability should be handled by the courts in all of the various kinds of cases in which it may arise. It is possible, of course, that the courts in California, if freed from the suspension rule, would be led by the implications of our Constitutional prohibition of perpetuities (Article XX, Section 9) and the general policy of our law against undue fettering of property to accept the position of the text writers just mentioned and the scanty authority which now exists in support thereof, and disregard any barrier to the termination of the trusts in question beyond the period of perpetuities. However, to repeal the rule prohibiting suspension of the absolute power of alienation without substituting a statutory provision with respect to the period for which a private trust may be made nonterminable, relying upon the courts to develop decisional rules for this purpose, would be to substitute a considerable measure of uncertainty for what is at present a certain, if unduly drastic, statute covering the matter. The commission therefore recommends that a statute be enacted specifying the period for which a trust may be made nonterminable. Such a statute would necessarily have to be cast in rather general terms and leave considerable discretion to the courts in order to provide sufficient flexibility to enable them to deal with the various kinds of situations which may be expected to arise.

The commission also believes that Sections 774, 775 and 777 of the Civil Code are no longer necessary. These sections were also enacted in the original Civil Code of 1872 as a part of our borrowing from the New York Revised Statutes of 1830. They limit the creation of future interests in the following ways: (1) successive life estates can only be given to persons in being at the creation of the interests (Section 774); (2) after successive life estates the remainder must be in fee (Section 775); (3) after a life estate created in a term for years, the remainder must be for the whole residue of the term (Section 775); (4) a life estate created as a remainder on a term of years can only be given to a person in being at the creation of such estate (Section 777). These provisions all invalidate future interests which are valid insofar as the rule against perpetuities is concerned. When there was doubt whether the rule against perpetuities was in effect in this State

there was some justification for them. The commission believes, however, that since we now have the rule against perpetuities there is no further need for these more restrictive rules which make California a less favorable jurisdiction for the creation of trusts and other future interests than many other states. Hence, it is recommended that Sections 774, 775 and 777 be repealed.

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

An act to repeal Sections 715.1, 770, 774, 775 and 777 and to amend Sections 715.3, 716, 724, and 771 of the Civil Code, all relating to future interests in property.

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

SECTION 1. Sections 715.1, 770, 774, 775 and 777 of the Civil Code are hereby repealed.

SEC. 2. Section 715.3 of the Civil Code is amended to read:

715.3. No trust heretofore or hereafter created forming part of a retirement system established pursuant to the laws of California authorizing such systems shall be deemed invalid as violating Section ~~715.1~~ or 715.2 of this code; and the income arising from such property, real or personal, held in such trust may be permitted to accumulate until the fund is sufficient, in the opinion of the trustee or trustees thereof, to accomplish the purposes of the trust.

SEC. 3. Section 716 of the Civil Code is amended to read:

716. ~~Every future interest is void in its creation which, by any possibility, may suspend the absolute power of alienation for a longer period than is prescribed in this chapter. Such power of alienation is suspended when there are no persons in being by whom an absolute interest in possession can be conveyed.~~ 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 existence of a ~~suspension of the absolute power of alienation or the permissible period for the vesting of an interest within the rule against perpetuities.~~

SEC. 4. Section 724 of the Civil Code is amended to read:

724. An accumulation of the income of property may be directed by any will, trust or transfer in writing sufficient to pass the property or create the trust out of which the fund is to arise, for the benefit of one or more persons, objects or purposes, ~~to commence within but may not extend beyond~~ the time in this title permitted for the vesting of future interests, ~~and not to extend beyond the period limiting the time within which the absolute power of alienation of property may be suspended as prescribed by law.~~

* Matter in italics would be added to the present law; matter in "strikeout" type would be omitted.

SEC. 5. Section 771 of the Civil Code is amended to read:

771. ~~The suspension of all power to alienate the subject of a trust, other than a power to exchange it for other property to be held upon the same trust, or to sell it and reinvest the proceeds to be held upon the same trust, is a suspension of the power of alienation, within the meaning of Section 715.1.~~

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

A provision, express or implied, in the terms of an instrument creating a trust that the trust may not be terminated is effective if the trust is limited in duration to the time within which future interests in property must vest under this title. But if the trust is not so limited in duration, such a provision is ineffective insofar as it purports to be applicable beyond the time within which future interests in property must vest under this title and the provision is wholly ineffective unless, consistently with the purposes of the trust, it may be given effect for some period not exceeding such time.

A STUDY TO DETERMINE WHETHER THE SECTIONS OF THE CIVIL CODE PROHIBITING SUSPENSION OF THE ABSOLUTE POWER OF ALIENATION SHOULD BE REPEALED *

STATEMENT OF THE PROBLEM

The common law reflects a long struggle to prevent the tying up of property. One aspect of this struggle was the development, beginning with the *Duke of Norfolk's Case*¹ in 1682, of a rule against the creation of remote unvested future interests—the rule which today we refer to as the rule against perpetuities.

As is well known, much of California's law of property, particularly of real property, derives from the New York Revised Statutes of 1830. In that monumental codification the revisers did not enact the rule against perpetuities in its common law form. Instead they substituted a rule against "suspension of the absolute power of alienation." That rule, which for convenience will often be referred to in this study as the "suspension rule" was a part of our borrowing and, with a change as to the permissible period of suspension, became Sections 715, 716, 770 and 771 of the Civil Code of 1872.

Along with the suspension rule we took over from the New York law a number of separate limitations on the creation of future interests, some of which were invented because the New York codifiers realized that the suspension rule, although in part accomplishing the same results as the rule against perpetuities, did not in fact cover the entire ground.

Our suspension rule gave rise to serious difficulties of interpretation. The Civil Code also left unsolved the question whether, in addition to that rule, we had the rule against perpetuities as a part of our common law or as implied from our constitutional prohibition of perpetuities.² This question was never answered by any decision of our Supreme Court.

In 1951 two changes of major importance were made in this area of our law. First, the common law rule against perpetuities was enacted as Civil Code Section 715.2. Second, the suspension rule, although retained, was made to conform to the common law period of lives in being and 21 years embodied in the perpetuities rule (using the term "perpetuities rule" for convenience to refer to Civil Code Section 715.2). In the light of these two changes it now is pertinent to inquire whether there is any longer any need for the suspension rule. Learned writers, cited hereinafter, have contended that the suspension rule, in the only area in which it now has independent effectiveness, namely, in regard to trusts, produces undesirable results, and that in other respects it is superfluous.

* This study was made at the direction of the Law Revision Commission by Professor Lowell Turrentine of the School of Law, Stanford University.

¹ 3 Ch. Cas. 1, 26, 22 Eng. Rep. 931, 946 (1862).

² CAL. CONST. Art. XX, § 9.

This is the problem with which the present study is concerned. We shall proceed to discuss briefly the nature and operation of the rule against perpetuities itself and the nature and operation of the suspension rule, and compare the latter with the perpetuities rule. The suspension rule will also be compared with the rule embodied in Section 711 of the Civil Code against "conditions restraining alienation." The latter is a codification of an ancient common law doctrine and requires attention in this study only to show that it takes care of certain restraints not within the scope of the rule against perpetuities in such a way as to make our suspension rule, so far as it touches those restraints, unnecessary. The paper will then proceed to a detailed discussion of the effect of the suspension rule upon trusts. This will be followed by a specific recommendation for the repeal of the suspension rule, with a summary of the reasons, and then by a recommendation for the repeal of three sections of the Civil Code dealing with remainders which also appear to be both unnecessary and undesirable.

THE RULE AGAINST PERPETUITIES

The wording of Civil Code Section 715.2 is the generally accepted statement of the rule against perpetuities:

§ 715.2. 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, and any period of gestation involved in the situation to which the limitation applies. * * *

Certain statutory qualifications of this rule will be noted later.

What kinds of "interests in real or personal property" may "vest" too late to be within the stated period? The following may be noted as typical examples:

First: Any interest given to an unborn child who may not come into being within the stated period—for example, a gift by will "to the first grandchild born to A"—is an interest which may vest too late. If A is alive at the testator's death and has no grandchild yet, one cannot be sure that any of A's children, if A has children then, will be the parent of the first grandchild. The parent may be a child of A born after the testator's death. If so, this parent is not a permissible measuring life for the period of the rule, since he is not in being when the period must commence, namely, at the testator's death. The grandchild may be born more than 21 years after the death of the testator, or of A, or of such children of A as were alive at the testator's death. This possibility makes the gift to this grandchild "too remote." It makes no difference whether the gift is of a legal interest or of an equitable interest. It also makes no difference that A at the testator's death is advanced in years and not likely to have any more children.³

Second: Any interest given to a person not certain to be ascertained within the stated period is struck down by the rule. In 1938 a case arose in which a testator had left a gift "to the four chair officers of

³ Leach and Tudor, *The Common Law Rule Against Perpetuities* in 6 AMERICAN LAW OF PROPERTY § 24.22 (1952).

San Diego Lodge No. 168 Benevolent and Protective Order of Elks, being the four chair officers in office at the time of distribution of my estate." ⁴ It was uncertain, the court reasoned, whether the estate would reach the time for distribution within 21 years after the testator's death, and the will had not restricted the vesting of the gift to any life or lives in being at the testator's death. Therefore the gift failed under the rule.

Third: The rule applies to transfers made to persons in existence and fully ascertained if the right of such persons and their successors to take is dependent on a contingency that may not happen within the period of the rule. Thus, in a conveyance or devise of property "to A absolutely, but if the property ceases at any future time to be used for residential purposes, it is to pass to B absolutely," the interest given to B cannot "vest" within the meaning of the rule until and unless the property ceases to be used for the stated purpose. This may be more than 21 years after A's death or after B's death, and therefore B's interest fails.

Here, in contrast to the first and second examples above, there is no difficulty about the alienability of the interests in the property. Under California law, A and B can at once convey their rights to an intending purchaser of the property and thereby clothe him with the full, unrestricted title. In other words, nothing in this third example "suspends the absolute power of alienation." Nevertheless, B's interest is void under the rule because the test under Civil Code Section 715.2 is remoteness in vesting, not alienability. The justification for a test other than alienability is that, although contingent interests such as B's are transferable, they cannot be satisfactorily valued and thus no market exists for them. They therefore are likely to run on as actual, even if not theoretical, barriers to the normal marketability of the property.

It is not important here to go further into the operation of the perpetuities rule. But two provisions, applicable both to that rule and to the suspension rule discussed below, may be mentioned. The first is restrictive in nature. The statute provides that the lives used to measure the allowed period must not be so numerous or so situated that evidence of their deaths is likely to be unreasonably difficult to obtain.⁵ The second provision, found in Civil Code Section 716, operates, where it applies, to enlarge the permissible period. In simple terms, it means that if the creator of the interest in question has reserved for himself an absolute right of revocation, or has given to some person in being an absolute power to appoint the entire property to himself at any time, the period of the two rules begins to run only at the death of the person having the right of revocation or the power of appointment. This is reasonable, for as long as the right of revocation or the power of appointment exists, the property is not actually tied up.

⁴ Estate of Campbell, 28 Cal. App. 2d 102, 82 P. 2d 22 (1938). For a critique of cases of this type see Leach and Tudor, *supra* note 3, § 24.23.

⁵ CAL. CIV. CODE §§ 715.1, 715.2.

THE RULE AGAINST SUSPENSION OF THE ABSOLUTE POWER OF ALIENATION

Definition of "Suspension of the Absolute Power of Alienation"

Civil Code Section 716 says that the absolute power of alienation is suspended when there are no persons in being who can convey an absolute interest in possession.⁶ This means that the complete title, free and clear of any trust or restriction, must be capable of being transferred to someone; otherwise the absolute power of alienation is suspended.⁷ The test is met if several persons, by conveyances, releases or surrenders of their several interests, can lodge a fee title in real property or an absolute interest in personal property in someone. Examples of cases where this could not be done and where, therefore, there is a suspension, are given below. First, a brief word as to the period of allowable suspension.

Evolution of the Suspension Rule

No change in the definition of what constitutes a suspension of the absolute power of alienation has ever occurred, but the Legislature has three times experimented with the allowable period. When the Civil Code was adopted in 1872, Section 715 departed from the New York rule of two lives, and fixed the allowable period of suspension as "lives of persons in being at the creation of the limitation or condition."⁸

In 1917 Civil Code Section 715 was amended to allow a gross period of 25 years (not 21 years as at common law) from the beginning of the interest as an alternative to lives in being, but not to be tacked onto lives in being.⁹ The constitutionality of this amendment was upheld in the leading case of *Estate of McCray*¹⁰ in 1928 where for the first time our Supreme Court clearly defined the difference between suspension of the absolute power of alienation, which is a statutory concept, and remoteness in vesting, which is the concept involved in the common law rule against perpetuities. From 1917 down to 1951 the permissible period of suspension differed from the period for vesting under the common law rule against perpetuities in two ways. First, the suspension rule allowed a gross period of 25 years from the creation of the interests; second, this gross period could not be tacked onto any lives in being. Certain results of these differences are mentioned below.

⁶ "Every future interest is void in its creation which, by any possibility, may suspend the absolute power of alienation for a longer period than is prescribed in this chapter. Such power of alienation is suspended when there are no persons in being by whom an absolute interest in possession can be conveyed. 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 existence of a suspension of the absolute power of alienation or the permissible period for the vesting of an interest within the rule against perpetuities." CAL. CIV. CODE § 716.

⁷ However, if the original interest in question is only a term of years, then, as Civil Code Section 770 indicates, it is only necessary that this original interest be completely transferable.

⁸ CAL. CIV. CODE § 715 (1872).

⁹ Cal. Stat. 1917, c. 539, § 1, p. 699.

¹⁰ 204 Cal. 399, 268 Pac. 647 (1928).

In 1951, when Civil Code Section 715.2, the perpetuities rule, was enacted,¹¹ the suspension rule proper, Civil Code Section 715, became Section 715.1¹² and the period of allowable suspension was made identical with the period limiting remoteness in vesting under the perpetuities rule. At the same time, a restrictive provision as to the number of lives which may be used to measure the period of suspension, and a liberalizing provision for omitting from the period of suspension any time when the interests created could be destroyed by someone under a power, such as of revocation, were written into the statutes.¹³

Comparison of the Suspension Rule With the Rule Against Perpetuities

An Interest to an Unborn Person. We have noted that any future interest given to an unborn person who might not come into being within the period for vesting—lives in being and 21 years—is made void by the rule against perpetuities.¹⁴ An interest given to an unborn person will also suspend the absolute power of alienation, and since the allowable period for suspension is now the same as that for vesting, there will be a violation of both rules in such a case. Putting the matter in another way, the suspension rule is unnecessary with regard to interests given to unborn persons, for any such interests which would suspend alienation too long would also violate the perpetuities rule.¹⁵

An Interest to an Unascertained Person. The same thing may be said as to an interest given to a person, whether or not born, not certain to be ascertained within the perpetuities period. Here too there would be a suspension until the individual to take the interest is identifiable, but the perpetuities rule serves equally as well as the suspension rule in preventing the creation of interests in persons who may remain unascertained too long.

Two things may be remarked as to the foregoing types of interests. First, prior to 1951 an interest given an unborn or unascertained person might offend one rule and not the other since the allowable periods for vesting and suspension differed. A bequest to the first descendant of A who enters Stanford University within 21 years after A's death would have been good under the perpetuities rule but bad under the suspension rule for the latter, prior to 1951, did not admit of any period added to lives in being. On the other hand, a bequest to the first descendant of the testator who enters Stanford University within 25 years after the testator's death would have been bad under the

¹¹ Cal. Stat. 1951, c. 1463, § 2, p. 3442.

¹² Cal. Stat. 1951, c. 1463, §§ 1, 7, pp. 3442, 3443. Civil Code Section 715.1 now provides: "The absolute power of alienation cannot be suspended, by any limitation or condition whatever, for a period longer than 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 suspension must not be so numerous or so situated that evidence of their deaths is likely to be unreasonably difficult to obtain."

¹³ See discussion p. G-00 *supra*.

¹⁴ See discussion p. G-00 *supra*.

¹⁵ It may be argued at this point that the suspension rule would not be complied with merely because the person taking the interest is born within the permissible period of suspension (as the perpetuities rule would be) since the taker would be disabled to convey until he became of age. Any impediment to conveyance because of the minority of the taker is caused by the general law, not by the instrument. *Estate of Campbell*, 149 Cal. 712, 87 Pac. 573 (1906) and is immaterial from the standpoint of the suspension rule, unless, indeed, there is a trust provision for holding up the taker's interest during minority. *Otto v. Union Nat. Bank*, 38 Cal. 2d 333, 238 P. 2d 961 (1951).

perpetuities rule but good under the suspension rule prior to 1951. No longer do these discrepancies exist.

The second remark as to interests to unborn or unascertained persons is that the perpetuities rule,¹⁶ as well as the suspension rule,¹⁷ applies to interests of this sort in personal as well as real property, and to equitable as well as legal interests.

An Interest to an Ascertained Person Upon a Contingency. The third sort of interest discussed above in connection with the rule against perpetuities¹⁸ is one given to an ascertained person, but upon a contingency which may not occur within lives in being and 21 years. Such an interest may not vest in time and therefore is bad under the perpetuities rule, but it is nevertheless a transferable interest and does not of itself create a suspension. Here, too, the suspension rule turns out to be superfluous.

Other Contingent Interests in Ascertained Persons. Three types of contingent interests do not fall within the three classifications already discussed. These types are:

1. Possibility of reverter—A conveys to B City so long as the property is used for school purposes. By such a transfer A retains a possibility that the property may revert to himself or his heirs if the city ceases to use it for school purposes.

2. Right of entry for condition broken—A conveys to B and his heirs, but A or his heirs to have the right to enter and forfeit B's title if intoxicants are sold on the premises. By such a transfer on condition, A creates in himself or his heirs a power to get back the property if the condition is broken.

At common law the two types of contingent interest just mentioned could be released to the owner in possession of the property. Under California law these interests can also be transferred to a third person.¹⁹ Neither of them, therefore, causes any suspension of alienation, and as to them the suspension rule is of no effect. On correct theory these interests, in the cases put, might be held to violate the perpetuities rule, but in this country they have been considered exceptions to that rule.²⁰

3. Option—A gives B or his assigns the right to purchase property at a stated price for 25 years. This creates in B an equitable interest in the property, contingent upon his giving the proper notice and making the proper tender. However, no suspension exists while the option is in effect, for B or his assigns can obtain the full title by the exercise of the option and can revest the unrestricted title in A by release of the option. In this country such options may be held to violate the perpetuities rule if they run too long unless they are in the form of an option to a lessee to purchase the fee during the term of the lease.²¹

¹⁶ SIMES, *FUTURE INTERESTS* 377 (Hornbook Series 1951).

¹⁷ Whiteside, *Statutory Rules: Perpetuities and Accumulations in 6 AMERICAN LAW OF PROPERTY* § 25.62 (1952).

¹⁸ See discussion p. G-00 *supra*.

¹⁹ CAL. CIV. CODE §§ 699, 1044, 1046.

²⁰ Leach and Tudor, *supra* note 3, § 24.62.

²¹ *Id.* §§ 24.56, 24.57.

Comparison of the Suspension Rule With the Rules Against Conditions Restraining Alienation

During the medieval period and long before there was any rule against perpetuities, the common law developed a doctrine that provisions directly restraining the transfer of property interests are invalid. The doctrine would apply, for example, to a condition inserted in a transfer of a fee interest that the transferee is never to alienate the property. Such conditions are said to be "repugnant to the interest created,"²² but the true basis of the doctrine is the public policy against the freezing of property interests. The doctrine applies not only to conditions that purport to make the interest in question inalienable—the so-called "disabling restraints"—but also to conditions directly penalizing alienation by providing, for example, that upon attempted alienation the title should pass to some other person. The latter are called "forfeiture restraints." The doctrine is codified in our law as Civil Code Section 711, which provides: "Conditions restraining alienation, when repugnant to the interest created, are void." It is subject to certain well-known exceptions, of which the commonest is the recognition of the validity of "spendthrift trust" clauses and conditions against assignment in the case of leases.

Our inquiry now is whether the suspension rule serves any useful purpose in view of Civil Code Section 711 which strikes directly at "conditions restraining alienation." As to legal interests subject to such conditions the suspension rule is superfluous. This rule would of course be violated by some such conditions, namely the disabling restraints, which purport to make the interest in question inalienable ipso facto. If such a restraint were held good, no one during the period of the restraint could convey an absolute estate in possession. But disabling restraints (with the sole exception of spendthrift clauses as to equitable life interests) are emphatically within the prohibition of Section 711.²³ Therefore, with respect to such restraints, there is no need for the suspension rule.

The forfeiture restraint—A conveys "to B and his heirs but if B attempts to alien the property, A to have the right to enter and repossess the property" or "to B and his heirs but if he attempts to alien the property it is to pass to C and his heirs"—does not cause a suspension because A, or any successor of his, can either transfer or release his right of entry, and C or his successors can transfer or release his executory interest. The forfeiture restraints just put do, however, violate Section 711, because they are "repugnant to the interest created."²⁴ It results, therefore, that as to legal interests the sweep of Section 711 is broader than that of the suspension rule and the latter is not needed.

Restraints on the alienation of equitable interests are considered in the following section.

²² CAL. CIV. CODE § 711.

²³ SIMES, *op. cit. supra* note 16, at 338.

²⁴ Los Angeles Inv. Co. v. Gary, 181 Cal. 680, 186 Pac. 596 (1919).

THE EFFECT OF THE SUSPENSION RULE UPON THE DURATION OF TRUSTS

Charitable Trusts

Such trusts are treated as implied exceptions to the suspension rule. This is in accord with the general rule which permits charitable trusts of indefinite duration and is justified by reference to the California Constitution,²⁵ which prohibits perpetuities "except for eleemosynary purposes," the term "eleemosynary" being equivalent to "charitable."²⁶

Private Trusts Which Vest Within the Period and Are of Perpetual Duration

A provision intended to make a private trust last indefinitely is invalid at common law and in all American jurisdictions.²⁷ If property is left in trust for A and his heirs, with a direction to pay income but to hold the principal indefinitely, the trust is good but the restraint fails and A, if of full age, or his assignee, may require termination at once. The *Restatement of Property* says that if the law were otherwise there would be an "inconvenient fettering" of property and that even if the trustee has a power to sell and reinvest, the indestructibility of the trust "fetters the quantum of wealth subjected to the trust."²⁸ Obviously, a clause for indestructibility does not prevent vesting and thus raises no question under the perpetuities rule. Its invalidity must arise out of public policy considerations of a socio-economic nature, such as those which underlie both the perpetuities rule and the common law rule as to conditions restraining alienation.

Undoubtedly, if there were no suspension rule in this State, our law as to an indestructible private trust would conform to the general law above stated: the trust as such would be good but the provision which would prevent its termination would be disregarded or at least limited in effect to the period of the rule against perpetuities. Although there is no case on the point it is quite possible that the suspension rule may produce a wholly different result, namely, it may invalidate the trust itself. This conclusion would follow from an analogy to those trusts, the duration of which, while not perpetual, may exceed lives in being and 21 years. In such cases our courts regard the trust as suspending the absolute power of alienation if the active duties of the trustee run beyond the period of permissible suspension or if a provision of the trust would literally prevent him from winding up the trust within that period. The result is that the trust, or at least those trust interests which exceed the permissible period of suspension, fail. No good would be served by a rule in this State which would put our law as to perpetual private trusts at variance with the general law already outlined.²⁹ The possibility that our suspension rule might do so is one count against that rule.

²⁵ CAL. CONST. Art. XX, § 9.

²⁶ Estate of Hinckley, 58 Cal. 457, 471-74, 482 (1881); Estate of Sutro, 155 Cal. 727, 733, 102 Pac. 920, 922 (1909).

²⁷ SIMES, *op. cit. supra* note 16, at 403; 4 RESTATEMENT, PROPERTY § 381 (1944).

²⁸ 4 RESTATEMENT, PROPERTY § 381, comment a (1944).

²⁹ See note 27 *supra* and articles cited in Leach and Tudor, *supra* note 3, § 24.67, n. 1.

Private Trusts Which Vest Within the Period but May Last Beyond It

Here we encounter an application of the suspension rule which puts California out of harmony with the trust law of most American jurisdictions and which has given rise to a challenging demand for repeal of the suspension rule.³⁰ We may take as a typical example of the trust now under consideration the facts of a leading California case, *Estate of Maltman*.³¹ This was a testamentary trust to pay income to the testator's son A for A's life, then to A's children—born and to be born—for their lives, and finally, to distribute the principal to B and C, persons in being at testator's death. Examining these limitations, we note that the interest of A and of the ultimate remaindermen, B and C, vest at once and that the interests of A's children must vest not later than A's death. All interests therefore vest within the perpetuities rule. The only criticism to be made of the trust is that if A has children born after the testator's death, the trust by its terms may last throughout the lives of such after-born children, which may be a period more than 21 years longer than the life of any of the persons (A, B, C and existing children of A) alive at the testator's death. If this trust suspends the absolute power of alienation throughout this possible period, the suspension is too long and the suspension rule will come into play. There are two possible points of view as to whether there is a suspension after A's death during the lives of his children.

The text writers,³² supported by New York cases,³³ and now by two justices of our Supreme Court³⁴ argue that if, as here, the beneficial interests all vest in time and are all alienable, the entire beneficial interest may be assigned to an intending purchaser of the property and the trustee then may convey to such purchaser, thus ending the trust and giving the purchaser an absolute title. In cooperating to terminate the trust under these circumstances the trustee is not committing a breach of trust, it is contended, for the assignments by the beneficiaries have rendered impossible the original purpose of administering the property for their benefit. This reasoning leads to the conclusion that the trust is terminable, or as is often said, "destructible," at the death of A at the latest, and thus cannot suspend alienability too long.

The conclusion just stated, however, does not represent the California law. A series of Supreme Court cases in this State, originating in *In re Walkerly*³⁵ in 1895, and exemplified by the *Maltman* case³⁶ discussed above, assumes that in spite of the alienability of the beneficial interests there is a suspension throughout the duration of the trust.

³⁰ Fraser and Sammis, *The California Rules against Restraints on Alienation, Suspension of the Absolute Power of Alienation, and Perpetuities*, 4 HASTINGS L. J. 101, 116-17 (1953).

³¹ 195 Cal. 643, 234 Pac. 898 (1925).

³² Merryman, *Future Interests* in 3 SURVEY OF CALIFORNIA LAW 249-52 (1950-51); Merryman, *Future Interests* in 4 *id.* at 228-30 (1951-52); Whiteside, *supra* note 17, § 25.62; Fraser and Sammis, *supra* note 30, at 116-17; Gerdes, "Perpetuities" and the California Rule Against Suspension of the Absolute Power of Alienation, 16 CALIF. L. REV. 81, 102 (1928); Hohfeld, *The Need of Remedial Legislation in the California Law of Trusts and Perpetuities*, 1 CALIF. L. REV. 305, 325-26 (1913); Turrentine, *Suggestions for Revision of Provisions of the California Civil Code Regarding Future Interests*, 21 CALIF. L. REV. 1, 20-21 (1932); 4 STAN. L. REV. 598 (1952); 41 CALIF. L. REV. 549 (1953).

³³ *Vanderpoel v. Loew*, 112 N. Y. 167, 19 N. E. 481 (1889). See 1936 Report, Recommendations and Studies of the New York Law Revision Commission, p. 538.

³⁴ Traynor, J., and Carter, J. See *Otto v. Union Nat. Bank*, 38 Cal. 2d 233, 239, 238 P. 2d 961, 965 (1951) (concurring and dissenting).

³⁵ 108 Cal. 627, 41 Pac. 772 (1895).

³⁶ *Estate of Maltman*, 195 Cal. 643, 234 Pac. 898 (1925).

The result, of course, is that where the trust by its terms is to continue for the lives of the unborn children of A, the suspension is too long, both under the older period of Civil Code Section 715 and the new period of Civil Code Section 715.1.

The *Maltman* case does not explain why a trust for the lives of A's children suspends alienation during their lives, after A's death. It relies upon the *Walkerly* case, which tells us that "Trusts such as these under consideration in their very nature operate to suspend the power of alienation. That power must be suspended * * * while the trustee is distributing the rents and profits * * *." ³⁷ The *Walkerly* case thus takes the somewhat extraordinary position that if the trust is an active trust the trustee cannot rightfully do anything but pay income to the designated income beneficiaries, and therefore he cannot *rightfully* cooperate with the income and residuary beneficiaries by conveying the trust property either to them or to their assignee. Without saying so explicitly, the court construes the suspension rule (specifically Civil Code Section 716) as meaning that in the case of a trust the absolute power of alienation is suspended unless the trustee has an authorization under the instrument to terminate the trust. It is not enough, apparently, that because the material purposes of the trust are accomplished, no one would have standing to object or call the trustee to account if he were to cooperate, in terminating the trust.

One other point determined by the *Walkerly* case and never thereafter questioned deserves remark. If a trust forbids termination and sale of the property for a stated time which exceeds the permissible period of suspension (25 years in the *Walkerly* case) an attempted transfer of the trust realty by the trustee within that period would be "void" under Civil Code Section 870,³⁸ and the power of alienation therefore would be suspended by the trust. This is true even if the beneficial interests are all vested within time. The suspension rule is not treated, as it well might have been in view of the language of Civil Code Section 715.1,³⁹ as invalidating just the provision against termination but rather as knocking out the entire trust.

Civil Code Section 870 applies only to real property. The court, therefore, could not use it as a basis for invalidating the trust as to personalty in the *Walkerly* case. Instead, without clearly spelling out its grounds, the court seems, as to personal property, to adopt the broader proposition stated above, namely, that while a trustee has active duties he cannot cooperate in ending the trust and the power of alienation is suspended.

³⁷ *In re Walkerly*, 108 Cal. 627, 650, 41 Pac. 772, 777 (1895).

³⁸ "Certain Sales, Etc., by Trustees, Void. Where a trust in relation to real property is expressed in the instrument creating the estate every transfer or other act of the trustees, in contravention of the trust, is absolutely void." CAL. CIV. CODE § 870.

³⁹ At the time of the *Walkerly* case present Civil Code Section 715.1 was Section 715.

Actually, neither the *Walkerly* case, the *Maltman* case, nor any of their successors⁴⁰ are *holdings* that an active trust for the life of an unborn person suspends alienation during such life or that a provision against termination running beyond the permissible period suspends alienation so as to invalidate the trust. Each of the cases presents some special feature upon which the court might have based its conclusion. Thus, in the *Walkerly* case the beneficiaries were not certain all to be born within the then permissible period of suspension, a circumstance which unquestionably produced a violation of the suspension rule. The court, however, elected to treat the trust as if all the interests under it were certain to vest within the permissible period.

In the *Maltman* case there was a spendthrift clause, prohibiting the alienation of the beneficial interests. This, under the *Walkerly* doctrine, would have made invalid any trust interest which might extend beyond the permissible period of suspension. But the court paid no attention to the spendthrift clause in its opinion, and it is obvious that the decision against the trust would have been the same if there had been no restraint on the alienation of the beneficial interests.

What would be the California law as to the permissible duration of private trusts if the suspension rule were abolished? The evil effect of the suspension rule in striking down a trust of the *Maltman* type, which would be good by the general law, has been explained above. If the suspension rule were abolished, it is believed that private trusts would be sufficiently controlled by (1) the constitutional prohibition of perpetuities,⁴¹ (2) the rule against perpetuities,⁴² and (3) the common law of trusts. The situation may be outlined as follows:

Under modern trust law, if the beneficial interests all vest within the period of perpetuities, these interests are good.⁴³ The trust is sometimes said not to be subject to "external" attack, *i.e.*, attack by persons who would be entitled to the property if the trust were invalid. As stated in connection with private trusts of perpetual duration, the mere fact that a trust, with all the interests vested so as to avoid the perpetuities rule, may last longer than the period of the rule against perpetuities, does not make the trust invalid. This possibility of prolonged duration may, however, lead a court to disregard any clause

⁴⁰ Four cases since *Walkerly* involve trusts where the beneficial interests were not certain to vest within the permissible period. *Estate of Troy*, 214 Cal. 53, 3 P. 2d 930 (1931); *Estate of Van Wyck*, 185 Cal. 49, 196 Pac. 50 (1921); *Estate of Whitnev*, 176 Cal. 12, 167 Pac. 399 (1917); *Estate of Cavarly*, 119 Cal. 406, 51 Pac. 629 (1897). In *Sheean v. Michel*, 6 Cal. 2d 324, 57 P. 2d 127 (1936), as in the *Maltman* case, the life interests both of living and unborn beneficiaries were subject to a spendthrift clause. In *Otto v. Union Nat. Bank*, 38 Cal. 2d 233, 238 P. 2d 961 (1951), 4 STAN. L. REV. 598 (1952), 41 CALIF. L. REV. 549 (1953), the court refers to the "principles in the *Walkerly* case" with every indication of agreement, but the trust was expressly for the minority of unborn children at a time when, before 1951, no period in gross could be added to lives in being. In such a case the court might well reason, as it did, that the interests of the unborn minors were not alienable until they should reach 21, and therefore there was an illegal suspension. On the other hand, if the trust is for the life of an unborn person, it should fall within the principle of *Estate of Campbell*, 149 Cal. 712, 87 Pac. 573 (1906), where the fact that a beneficiary might be a minor was treated as a disability not created under the terms of the instruments and immaterial, therefore, under the suspension rule. See also 41 CALIF. L. REV. 549, 551-52 (1953).

⁴¹ CAL. CONST. ART. XX, § 9.

⁴² CAL. CIV. CODE § 715.2.

⁴³ 1A BOGERT, TRUSTS AND TRUSTEES § 218 (2d ed. 1951); 1 SCOTT, TRUSTS § 62.10 (1939); SIMES, FUTURE INTERESTS 401-402 (Hornbook Series 1951); 4 RESTATEMENT, PROPERTY §§ 378, 381 (1944); Leach and Tudor, *The Common Law Rule Against Perpetuities* in 6 AMERICAN LAW OF PROPERTY § 24.68 (1952); MORRAY, *The Rule Against Prolonged Indestructibility of Private Trusts*, 44 ILL. L. REV. 467, 470 (1949).

which would prevent the beneficiaries, as soon as all the interests vest, from terminating the trust. In other words, such a long lasting trust may be subject to "internal" attack. Two cases, one at either end of the scale, are clear. First, if by its terms the trust is to be of indefinite or perpetual duration, there is no doubt that the beneficiaries, if all are of age, can require its termination. This is the typical "internal" attack. This result under the general law would be reinforced by our constitutional prohibition of perpetuities.⁴⁴ Second, a Claffin-type trust, where the entire beneficial interest is vested in A, a person in being, but the trustee is directed to convey the corpus to him only when he attains a stated age, is not only a good trust under the general law, but the restriction which makes the trust unbarable by A before he attains the stated age, is also good.

The foregoing two cases represent solid ground at either end of the scale of trust duration. Between them lies an area embracing, for example, trusts of the *Maltman* type for the lives of the unborn children of a living person, where, although the validity of the trust is clear in most jurisdictions, the vulnerability of the trust to internal attack is not established by a clear course of judicial decision. Leading text writers argue that if the trust by its terms may last longer than lives in being and 21 years—the perpetuities period—public policy requires that the trust be subject to internal attack and that any clause against termination in the instrument or any restriction, such as a spendthrift clause, which would prevent termination by disabling a beneficiary from assigning or surrendering his interest, is to be disregarded.⁴⁵ The rule thus contended for is not an application of the rule against perpetuities itself, for we have assumed that all the trust interests vest in time. But, as Professor Simes points out,⁴⁶ the rule against perpetuities is a manifestation of the public policy against the tying up of property for too long a time, and the same policy should invalidate any restriction which would tie up a trust corpus for longer than the perpetuities period.

It is a reasonably safe guess that, although case authority is slight,⁴⁷ our Supreme Court would follow the views of the text writers if the suspension rule were abolished. In so doing it would find support in our constitutional prohibition of perpetuities,⁴⁸ though the bearing of that provision in this situation is less clear than in the case of a private trust made perpetual by its terms. If this prediction is correct, we would, by the abolition of the suspension rule, be freed from the sadistic doctrine of *Walkerly* and *Maltman* which strikes down a trust—that is, subjects it to external attack—merely because its duration might exceed the perpetuities period. At the same time we would run no risk of the undue tying up of property by such trusts because any barrier to their termination by the parties in interest would be disregarded.

⁴⁴ CAL. CONST. Art. XX, § 9.

⁴⁵ 1 SCOTT, TRUSTS § 62.10 (1939); SIMES, *op. cit. supra* note 43, at 405; Leach and Tudor, *supra* note 43, § 24.66; Fraser and Sammis, *supra* note 30, at 113. But GRISWOLD, SPENDTHRIFT TRUSTS §§ 290-93 (2d ed. 1947) argues that a spendthrift clause as to the life interest of an unborn person should be valid. The *Restatement* takes no position. 4 RESTATEMENT, PROPERTY § 381, caveat.

⁴⁶ SIMES, *op. cit. supra* note 43, at 401.

⁴⁷ The best treatment of the cases is Cleary, *Indestructible Testamentary Trusts*, 43 YALE L.J. 393 (1934) and Note, 34 MICH. L. REV. 553 (1936).

⁴⁸ CAL. CONST. Art. XX, § 9.

Private Trusts for Indefinite Purposes and "Honorary" Trusts

The previous discussion has covered the relationship of the perpetuities rule and the suspension rule to perpetual trusts for charitable purposes and to private trusts outlasting the permissible period where the beneficiaries are defined individuals. We come now to two other types of trusts as to which these rules, and more particularly the suspension rule, must be considered.

The first is a trust in the general form of the classic case of *Morice v. Bishop of Durham*.⁴⁹ Here property was left to the Bishop of Durham upon trust to dispose of it "to such objects of benevolence and liberality as the Bishop of Durham in his own discretion shall most approve of."⁵⁰ The Court of Chancery analyzed the gift as not limited to charitable objects and finding, therefore, that no one had a standing to enforce performance of the trust because of its indefiniteness, held the trust to fail and declared the Bishop of Durham to hold on a resulting trust for the next of kin. Such a trust as just described, if valid in other respects, would seemingly suspend the absolute power of alienation, since there would be no beneficiary capable of conveying the equitable interest. This was recognized as the law in California in *Estate of Peabody*,⁵¹ involving a gift to "an institution for old people. * * * Mr. J. Haskell is to make the choice of the institution." The court also rested its decision against the gift upon the failure of the testator to indicate the beneficiary (the gift not being limited to charities) with reasonable certainty. Other California cases have invalidated noncharitable gifts in trust where the beneficiaries were indefinite or uncertain, relying on the doctrine of *Morice v. Bishop of Durham* or on the constitutional prohibition of perpetuities, and with no reference at all to the suspension rule.⁵² We must therefore conclude that the abolition of the suspension rule would not change the law in this area.

The second type, the so-called "honorary trust," is one for specific noncharitable purposes where there is no beneficiary who can enforce performance, for example, a trust to support certain animals, or to care for graves or to erect or maintain a tombstone, or to say masses (if this last is viewed as noncharitable). Under the view expressed in the *Restatement of Trusts*,⁵³ there being no person with standing to enforce the trust and the purposes not being charitable, no trust is actually created by provisions of the sort in question nor is there an enforceable duty on the named trustee to do anything to accomplish the stated purposes. However, the provisions are considered to create a power in the named trustee to apply the money for the stated purpose, provided his authorization is not in terms so extended as to exceed the rule against perpetuities.⁵⁴ If the trustee fails for any reason to exercise the power, he will then hold on a resulting trust for the settlor or the

⁴⁹ 9 Ves. Jun. 399, 10 Eng. Rep. 656 (1804); 10 Ves. Jun. 522, 10 Eng. Rep. 947 (1805); see 1 SCOTT, TRUSTS § 123 (1939).

⁵⁰ *Ibid.*

⁵¹ 21 Cal. App. 2d 690, 70 P. 2d 249 (1937).

⁵² *Estate of Ralston*, 1 Cal. 2d 724, 37 P. 2d 76 (1934); *Estate of Sutro*, 155 Cal. 727, 102 Pac. 920 (1909); *Estate of Kline*, 138 Cal. App. 514, 32 P. 2d 677 (1934).

⁵³ 1 RESTATEMENT, TRUSTS § 124 (1935). GRAY, THE RULE AGAINST PERPETUITIES 781, n. 8 (4th ed. 1942) agrees, but Gray himself thought honorary trusts simply void. GRAY, *Gifts for a Non-Charitable Purpose*, 15 HARV. L. REV. 509 (1902).

⁵⁴ See Leach and Tudor, *supra* note 43, § 24.67.

settlor's estate.⁵⁵ Obviously, if the honorary trust is only a permissive power it produces no suspension of the absolute power of alienation. The donee of the power, by electing to turn the property over to the persons entitled to the property in the absence of the trust, can make it freely alienable.

But the "power" analysis is not accepted by some of the cases⁵⁶ nor by Professor Simes.⁵⁷ There are "trust" characteristics in this situation, at least if, as Professor Simes assumes,⁵⁸ another trustee might be appointed if the one named by the settlor were to die. The *Restatement of Trusts*⁵⁹ and Professor Scott⁶⁰ say the permissive power is invalid if exercisable after the period of perpetuities. But if it is only a power given to a named person (not a corporation) it could not be exercisable beyond that period.

A leading American case forbids us to call the thing a power in trust.⁶¹ In this perplexing situation Professor Simes' analysis seems as good as any. He says that the honorary trust is "merely a unique sort of trust."⁶² On this analysis such a trust may be said to suspend alienation. As noted in discussing *Estate of Walkerly*, earlier, our Supreme Court considers the power of alienation to be suspended unless the trustee may rightfully transfer his legal title and end the trust. The trustee, to be sure, could cooperate with the heirs to terminate the trust, but if there is a fiduciary duty on the trustee not to do so, such cooperation would involve a breach of that duty. Thus, where a material purpose of the trust is still unaccomplished, as here, the trust is not destructible and the power of alienation is suspended.

However, neither by the general law nor in California does it seem important to determine whether an honorary trust suspends alienation. It is settled by the general law that an honorary trust which may endure longer than lives in being plus 21 years is void.⁶³ Some cases⁶⁴ and text writers⁶⁵ and the *Restatement of Trusts*⁶⁶ consider the rule against perpetuities itself applicable, and this would follow from the analysis of the honorary trust as a mere power. Simes makes a convincing argument that invalidity flows from the general policy of the law against perpetuities and not from the rule against perpetuities itself except by analogy.⁶⁷ In this respect it is like the rule that prevents the creation of an indestructible trust of the ordinary type for longer than the period of perpetuities. But there is this difference: the latter rule merely eliminates any barrier to termination of the trust, whereas in the case of the overlong honorary trust the trust itself is

⁵⁵ 1 RESTATEMENT, TRUSTS § 124, comment b (1935); 2 *id.*, § 418, comment b.

⁵⁶ *Clark v. Campbell*, 82 N. H. 281, 133 Atl. 166 (1924) and the California cases cited below.

⁵⁷ SIMES, *op. cit. supra* note 43, at 408.

⁵⁸ *Id.* at 409.

⁵⁹ 1 RESTATEMENT, TRUSTS § 124, comment f (1935).

⁶⁰ 1 SCOTT, TRUSTS § 124.1 (1939).

⁶¹ *Clark v. Campbell*, 82 N. H. 281, 133 Atl. 166 (1926).

⁶² SIMES, *op. cit. supra* note 43, at 409.

⁶³ *Id.* at 407; 1 SCOTT, TRUSTS § 124.1 (1939); 1 RESTATEMENT, TRUSTS § 124 (1935); Leach and Tudor, *supra* note 43, § 24.67. For a recent case see *Alexander v. House*, 133 Conn. 725, 54 A. 2d 510 (1947), 46 MICH. L. REV. 707 (1948).

⁶⁴ See, e.g., *Hartson v. Elden*, 50 N. J. Eq. 522, 526; 26 Atl. 561, 562 (1893) on the "permissive power" theory.

⁶⁵ 1 SCOTT, TRUSTS § 124.1 (1939); Smith, *Honorary Trusts and the Rule Against Perpetuities*, 30 COLUM. L. REV. 60 (1930).

⁶⁶ 1 RESTATEMENT, TRUSTS § 124 (1935).

⁶⁷ 2 SIMES, LAW OF FUTURE INTERESTS § 555 (1936); see also KALES, *ESTATES AND FUTURE INTERESTS* § 658 (2d ed. 1920).

invalid.⁶⁸ Simes sums up the nature of the honorary trust and the rule that limits it as follows:

Indeed, it would seem preferable to regard the honorary trust as a unique sort of trust, and to say that the rule which restricts its duration is a unique sort of rule which follows the analogy of the rule against perpetuities, but is not the same thing.⁶⁹

No case in California seems to have accepted the "permissive power" analysis of the *Restatement of Trusts*. Honorary trusts are deemed invalid, at least if they would run beyond the period of the rule against perpetuities and perhaps regardless of how long they are to run.⁷⁰ This result has in no case been rested simply on the theory that such a trust would suspend the power of alienation. In *Estate of Gay*,⁷¹ a trust for the upkeep of the testator's grave was declared invalid, the court relying upon Article XX, Section 9 of the Constitution. However, one sentence in the opinion suggests that the court thought that the trust was also a violation of the rule against suspension of the absolute power of alienation.⁷²

In another case a gift to keep a grave in repair for at least 25 years was held invalid, without mentioning suspension, on the ground that the gift was "entirely too indefinite ever to be enforced."⁷³ California's Health and Safety Code makes provision for private endowment-care cemeteries accepting gifts for general endowment care⁷⁴ and gifts or trusts for special endowment care,⁷⁵ that is, for the improvement of the whole cemetery or of a particular plot or plots. The code exempts such gifts and trusts from "any law against perpetuities or the suspension of the power of alienation of title to property,"⁷⁶ and further declares authorized gifts and bequests to the fund to be charitable and eleemosynary and not invalid by reason of any indefiniteness or uncertainty of the persons designated as beneficiaries.⁷⁷ But if a gift is made to some trustee for the perpetual care of a plot in a public cemetery not operated under the above-mentioned provisions of the Health and Safety Code, such a gift fails as a violation of Article XX, Section 9 of the Constitution.⁷⁸

It would seem, therefore, that the handling of honorary trusts in this State may properly be left to judicial decision and that the suspen-

⁶⁸ In the well-known case of *Matter of the Estate of Kelly* [1932] 1 Ir. R. 255 (High Court of Justice), 46 HARV. L. REV. 1036 (1933), a fund was left for the care of the testator's dogs at £4 per dog per year, with a gift of the residue of the fund after the death of the last dog to the parish priest for masses. The court held the gift of the residue void for remoteness but upheld the use of the fund for a period of 21 years, since the trustee was willing to perform. The decision, cutting the indefinite trust down to one for an allowable period, is justified, if at all, by the annual amount allowed to be spent, so that the court may treat the case as if it involved a series of trusts or powers, those up to 21 years good, the balance invalid.

⁶⁹ SIMES, FUTURE INTERESTS 409 (Hornbook Series 1951).
⁷⁰ Gifts for saying masses, however, are now seemingly upheld, either as outright gifts if to a priest, or as charitable trusts, if to a high ecclesiastic. See RESTATEMENT, TRUSTS, CALIF. ANNOT. § 371, comment g (1940).

⁷¹ 138 Cal. 552, 71 Pac. 707 (1903).

⁷² *Id.* at 553, 71 Pac. at 708.

⁷³ *Estate of Koppikus*, 1 Cal. App. 84, 87, 81 Pac. 732, 733 (1905). But a gift of \$1000 for erecting a monument over the grave of the testatrix was upheld as a funeral expense, binding on the administrator.

⁷⁴ CAL. H. & S. CODE § 8735.

⁷⁵ *Id.* § 8775.

⁷⁶ *Id.* § 8737.

⁷⁷ *Id.* § 8776.

⁷⁸ *Estate of Pfund*, 93 Cal. App. 2d 444, 209 P. 2d 52 (1949).

sion rule is not essential as a restriction upon such trusts. It is also clear that if our courts ever follow the *Restatement of Trusts* in upholding honorary trusts as discretionary powers (where not lasting too long) no suspension would in fact occur, since the holder of the power, by refusing to exercise it and by reconveying the property to those entitled upon nonexercise of the power, could enable an outright transfer of the property to be made.

Trusts for Unincorporated Associations

This caption covers trusts of different types. If, for instance, the beneficiary is a charitable institution, no trouble arises under the suspension or perpetuities rules.⁷⁹ If the beneficiary is noncharitable, for example a fraternity, lodge, partnership or club, we encounter a question of construction. Perhaps only the members at the time the trust is created are the intended beneficiaries. If so, again there is no trouble under the stated rules since all the interests vest at once and the trust cannot last beyond lives in being. On the other hand, perhaps the intent is to benefit an indefinite succession of members. In such a case the interests are in effect at all times vested—as in a typical business trust, discussed below—and such interests pass, perhaps very informally, to successive members.⁸⁰ In such a case it may nevertheless be found that the trustees or the members at any particular period are intended to have the power to wind up the trust and distribute it among the then members. If so, no invalidity under the perpetuities or suspension rules appears.

Suppose, however, it is found to have been the settlor's intent that the trust continue indefinitely or beyond lives in being and 21 years for the benefit of the association with no power in the trustees or the members to terminate the trust and divide the property within the permissible period of suspension. Clearly such a trust violates the suspension rule. But that rule is unnecessary for the trust would fail anyway under the general law of trusts.⁸¹ As Professor Scott says:

Such a trust, the courts hold, is invalid if it is required to continue beyond the period of the rule against perpetuities. By the creation of such a trust the property would be so tied up that no one could set it free.⁸²

Business Trusts and Trusts for Security

Up to this point the trusts considered from the standpoint of the suspension rule have been chiefly of the "income beneficiary" type. It remains to consider business trusts and trusts created as security.

Business or "Massachusetts" Trusts. The distinguishing features of the business trust are two: (1) it is created for the management of an enterprise by trustees who function like the directors of a corporation; and (2) the beneficial interests are represented by transferable certificates or shares.⁸³ Such trusts generally contain a provision either

⁷⁹ Estate of McDole, 215 Cal. 328, 10 P. 2d 75 (1932).

⁸⁰ This was probably the assumption of the court in Ruddick v. Albertson, 154 Cal. 640, 98 Pac. 1045 (1908).

⁸¹ See 1 RESTATEMENT, TRUSTS § 119 (1935); Leach and Tudor, *The Common Law Rule Against Perpetuities* in 6 AMERICAN LAW OF PROPERTY § 24.67 (1952).

⁸² 1 SCOTT, TRUSTS § 119 (1939).

⁸³ See 2 BOGERT, TRUSTS AND TRUSTEES § 291 (2d ed. 1953).

for termination after some specified period such as lives of specific persons,⁸⁴ or more commonly for termination upon the concurrence of a majority⁸⁵ or a stated percentage of the certificate holders.⁸⁶ Even if no time or other provision for termination is stated in the trust such a trust has been said to be terminable by action of all the certificate holders and for this reason not to create any suspension of alienation.⁸⁷ Sears,⁸⁸ Wrightington,⁸⁹ Simes,⁹⁰ Bogert⁹¹ and Castle⁹² take the view that, if there is no prohibition against termination in the trust instrument, business trusts with transferable shares create no suspension of the absolute power of alienation. *Baker v. Stern*,⁹³ decided under statutes similar to California's, is flatly to this effect. This view is also supported by leading cases in Massachusetts and Illinois where courts have said that such trusts do not suspend the power of alienation.⁹⁴ It is true, however, that there is no statute like Civil Code Section 715.1 in either of these jurisdictions and the courts were considering the trusts either under the common law rule against perpetuities or the more general principles applicable where a trust may outlast the perpetuities period.⁹⁵

None of the California cases involving business trusts discuss the application of the suspension rule or suggest any question of invalidity under this rule. It is a safe assumption, in view of these cases and the general law, that no question of invalidity of a business trust under the suspension rule will arise because it will be held terminable by the beneficiaries unless some provision of the trust will require its continuance beyond lives in being and 21 years.⁹⁶ In a case of the latter type we would be better off with simply the common law approach to nonterminable trusts of long duration than with our suspension rule. As already stated, the common law would strike down whatever provision stands in the way of the beneficiaries' terminating the trust,⁹⁷ whereas the suspension rule may lead a court to the conclusion that the whole trust is invalid.

Trusts to Secure Creditors. Deeds of trust used in place of mortgages are not violations of the rule against suspension because, as earlier held, they are implied exceptions to that rule,⁹⁸ or, as later

⁸⁴ *E.g.*, *Goldwater v. Oltman*, 210 Cal. 408, 292 Pac. 624 (1930); *Koenig v. Johnson*, 71 Cal. App. 2d 739, 163 P. 2d 746 (1945).

⁸⁵ *Schiffman v. Richfield Oil Co.*, 8 Cal. 2d 211, 64 P. 2d 1081 (1937).

⁸⁶ *Bernesen v. Fish*, 135 Cal. App. 538, 28 P. 2d 67 (1933).

⁸⁷ *Liberty Nat. Bank & Trust Co. v. New England Investors Shares*, 25 F. 2d 493 (D. Mass. 1928); *Hart v. Seymour*, 147 Ill. 598, 35 N. E. 246 (1893); *Baker v. Stern*, 194 Wis. 233, 216 N. W. 147 (1927).

⁸⁸ SEARS, *TRUST ESTATES AS BUSINESS COMPANIES* § 112 (2d ed. 1921).

⁸⁹ WRIGHTINGTON, *UNINCORPORATED ASSOCIATIONS AND BUSINESS TRUSTS* § 19 (2d ed. 1923).

⁹⁰ SIMES, *FUTURE INTERESTS* 406-407 (Hornbook Series 1951). Simes makes the point that such a trust is terminable upon the demand of all the beneficiaries "even though the trust instrument expressly provides against termination." *Ibid.*

⁹¹ 2 BOGERT, *TRUSTS AND TRUSTEES* § 304 (2d ed. 1953).

⁹² Castle, *Legal Phases of Co-operative Buildings*, 2 SO. CALIF. L. REV. 1, 16 (1928).

⁹³ 194 Wis. 233, 216 N. W. 147 (1927).

⁹⁴ *Wechter v. Chicago Title & Trust Co.*, 385 Ill. 111, 126-28, 52 N.E. 2d 157, 164 (1943); *Hart v. Seymour*, 147 Ill. 598, 614-15, 35 N.E. 246, 250 (1893); *Howe v. Morse*, 174 Mass. 491, 503-506, 55 N.E. 213, 214 (1899).

⁹⁵ See SIMES, *op. cit. supra* note 90, at 406-407; Leach and Tudor, *supra* note 81, § 24.67.

⁹⁶ If, as is true in some cases, the first certificate holders are in effect the settlors of the trust, it may be that they in their dual role as settlors and beneficiaries, and their successors in interest, may wind up a business trust in spite of an express prohibition against termination. See 2 RESTATEMENT, TRUSTS § 338, comment a (1935).

⁹⁷ Leach and Tudor, *supra* note 81, § 24.67, say that a business trust is valid though not restricted to the period of perpetuities.

⁹⁸ *Sacramento Bank v. Alcorn*, 121 Cal. 379, 53 Pac. 813 (1898).

determined, they create no suspension, because it is always possible for the trustor-debtor, the trustees, and the beneficiary-creditor to join and convey an absolute interest to the purchaser or for the trustor to be reinvested with full title by paying the secured debt.⁹⁹

CONCLUSIONS AND RECOMMENDATIONS

Repeal of the Suspension Rule

It is proposed that the rule against suspension of the absolute power of alienation be repealed. This means outright repeal of Civil Code Sections 715.1, 770 and 771. It means that Civil Code Section 715.3 should be amended by striking out the reference to Section 715.1, and that Civil Code Section 716 should be amended by striking out everything except the provision relating to the perpetuities rule.

The reasons for this recommendation are the following:

1. Our suspension rule served as a useful protection against the tying up of property by the creation of remote unvested future interests throughout the long period prior to 1951 when it was doubtful whether we had any other safeguard against this evil apart from the constitutional prohibition of "perpetuities." With the enactment of the rule against perpetuities in 1951 and the amendment of the suspension rule to correspond as to time with the perpetuities rule, the suspension rule became superfluous in this connection.

2. The tying up of property by means of conditions against its alienation or provisions for forfeiture of title if alienation is attempted is an area of the law adequately covered by Civil Code Section 711 and the common law. Insofar as the suspension rule would apply to such cases it is superfluous.

3. With respect to trusts the suspension rule has an important and undesirable effect. If the trust is good under the perpetuities rule because all interests therein vest in time but may continue longer than lives in being and 21 years, the suspension rule in many cases invalidates either the whole trust or at least those interests thereunder which may outlast lives in being and 21 years. This is contrary to the general law of trusts which would merely assure the terminability of the trust and thus prevent any undue tying up of property by disregarding any provision, such as a direction that the trustee must hold for a stated time or a spendthrift clause, which would be a barrier to termination beyond the period of perpetuities. The suspension rule, in short, strikes down good trusts and makes California a less favorable jurisdiction for the creation of trusts than many other states.

4. A study of special types of trusts, namely, private trusts for indefinite beneficiaries, honorary trusts, business trusts, and trusts for security, does not indicate any need for the suspension rule.

5. The recent trend in states which, like California, borrowed the suspension rule from New York has been to repeal that rule. Since 1945 it has been repealed in Indiana,¹⁰⁰ Michigan,¹⁰¹ and Wyoming.¹⁰²

⁹⁹ Estate of Gump, 16 Cal. 2d 535, 107 P. 2d 17 (1940); Balfour-Guthrie Co. v. Woodworth, 124 Cal. 169, 56 Pac. 891 (1899); Priddel v. Shankie, 69 Cal. App. 2d 319, 328, 159 P. 2d 433, 443-44 (1945); Withers v. Bousfield, 42 Cal. App. 304, 183 Pac. 855 (1919).

¹⁰⁰ Ind. Acts 1945, c. 216, § 6.

¹⁰¹ Mich. P. A. 1949, No. 38.

¹⁰² Wyo. Laws 1949, c. 92, § 1. See the discussion of all such recent legislation by Munson, *Recent Changes in Statutory Rules Against Perpetuities*, 38 CORNELL L.Q. 543 (1953).

6. The present Supreme Court is divided as to the applicability of the suspension rule in the only area in which it has any longer any significance, namely, as to private trusts which may outlast the period of lives in being and 21 years although all beneficial interests vest within that period.¹⁰³

7. Professor Everett Fraser, an authority in the field of property law, and Professor Arthur M. Sammis have called for a repeal of the suspension rule in a challenging article.¹⁰⁴

Repeal of Special Limitations on the Creation of Remainders

Background. Civil Code Sections 774,¹⁰⁵ 775¹⁰⁶ and 777,¹⁰⁷ enacted in 1872 and amended only in 1873,¹⁰⁸ were borrowed from the New York Revised Statutes of 1830. The counterpart of these sections is still in the New York Real Property Law as Sections 43 to 47 although there is some difference in wording from the California provisions. Certain consequences of the California sections are clear, namely, that as to legal estates in real property: (1) successive life estates can be given only to persons in being at the creation of the interests; (2) after two such life estates the remainder must be in fee; (3) after a life estate created in a term of years the remainder must be for the whole residue of the term; and (4) if the first limitation is a term of years, a remainder for life after such term must be to a person in being at the creation of the estate. These sections in the New York Revised Statutes were obviously put in for the same general reason as the specific provision limiting the vesting of a fee upon a fee to a period of two lives, namely, that no general rule as to remoteness in vesting (as distinguished from alienability) was discerned in the common law by the Revisers. They therefore set up a series of ad hoc rules limiting the creation of specific sorts of future interests which either involve some degree of remoteness in vesting or which seemed to the Revisers to fragment the title and postpone the time of its integration into a fee too long.

General Policy Favoring Repeal. Since we now have a general statute against remoteness in vesting,¹⁰⁹ and since this limits all the types of remainders covered by the provisions of Sections 774, 775 and 777—although not in the same way—no reason for the special limitations in these sections appears.

Civil Code Section 774. At modern common law it is possible to limit as many successive life estates as the grantor or deviser desires,

¹⁰³ *Otto v. Union Nat. Bank*, 38 Cal. 2d 233, 238 P. 2d 961 (1951), 4 STAN. L. REV. 598 (1952), 41 CALIF. L. REV. 549 (1953).

¹⁰⁴ Fraser and Sammis, *The California Rules Against Restraints on Alienation, Suspension of the Absolute Power of Alienation, and Perpetuities*, 4 HASTINGS L.J. 101 (1953).

¹⁰⁵ "Successive estates for life cannot be limited, except to persons in being at the creation thereof, and all life estates subsequent to those of persons in being are void; and upon the death of those persons, the remainder, if valid in its creation, takes effect in the same manner as if no other life estate had been created." CAL. CIV. CODE § 774.

¹⁰⁶ "No remainder can be created upon successive estates for life, provided for in the preceding section, unless such remainder is in fee; nor can a remainder be created upon such estate in a term for years, unless it is for the whole residue of such term." CAL. CIV. CODE § 775.

¹⁰⁷ "Remainder of Estates for Life. No estate for life can be limited as a remainder on a term of years, except to a person in being at the creation of such estate." CAL. CIV. CODE § 777.

¹⁰⁸ § 774: Code Am. 1873-74, c. 612, § 106, p. 219. § 775: Code Am. 1873-74, c. 612, § 107, p. 219.

¹⁰⁹ CAL. CIV. CODE § 715.2.

whether to persons in being or to unborn persons, subject only to the rule against perpetuities.¹¹⁰ The effect of the rule is, of course, to require contingent remainders to vest in interest, although not necessarily in possession, within the period of perpetuities. If this is a satisfactory limitation as to the vesting of a contingent remainder in fee and as to the contingency of a fee upon a fee or a springing interest, why is it not also satisfactory as a limitation upon successive remainders for life?

Civil Code Section 775. The first clause of this section is covered by the foregoing discussion. The second clause requires that after a life estate in a term for years the remainder be for the whole residue of the term. Assume that T dies possessed, as a tenant, of a term for 99 years which has 90 years yet to run. T would like to devise these remaining years to his widow for life and then to his son for life. Both his widow and his son are of considerable age and T would like to devise the balance of the term after the death of his widow and his son to a named child of the son or perhaps to any children which the son may have. At modern common law T can do this. Under Section 775, however, the remainder to the son for life, not being for the whole balance of the term after the life estate of the widow, would be invalid. There is no justification for such a restriction.

Civil Code Section 777. A grantor or testator will probably very seldom wish to create a life interest in an unborn person following a term of years, but it could happen. For instance, Mrs. T is unhappy over the fact that her son A has not married and settled down. With this in mind, in her last illness, she devises Blackacre to A for 10 years, remainder to the first child A may have for the life of that child, remainder to Stanford University. Since Blackacre is valuable property, Mrs. T hopes in this way to give A an incentive to have a family and thus keep the benefit of the property for the life of a child. Apart from Civil Code Section 777 there would be no invalidity in the contingent remainder for life given to the unborn child, since Civil Code Section 773 expressly permits a contingent remainder to be created after a term of years. If A should have no child by the end of the ten-year term given to A, the contingent remainder to A's first child would not fail in California but would vest in a child of A born thereafter.¹¹¹ It is difficult to see any reasonable objection to the life interest devised to the unborn child. It would certainly be valid so far as the rule against perpetuities is concerned, although the rule against suspension as construed in California would strike it down, at least if it were created by way of trust. Civil Code Section 777 destroys the remainder for life to the unborn child, where created as a legal interest—and wholly without justification.

Additional Considerations Favoring Repeal. In addition to the fact that these sections, as above pointed out, serve no useful purpose, there is a practical reason for their repeal: These sections seem to have

¹¹⁰ The so-called "rule of *Whitby v. Mitchell*," which at English common law forbade a remainder to be created to the child of an unborn person, after a life estate in the unborn person, is here disregarded since it has never been applied in the United States. Leach and Tudor, *supra* note 81, § 24.63.

¹¹¹ CAL. CIV. CODE § 742.

escaped construction¹¹² throughout the 83 years of their existence and attorneys, it is believed, have often ignored them in drafting instruments. Several important questions about these sections remain unanswered. For example: (1) These sections occur in a title headed "Estates in Real Property." Do they have any application to remainders in personal property, and, if not, why should there be a distinction between real and personal property as to them? (2) These sections do not in terms refer to equitable remainders. Are they to be so construed,¹¹³ and again, if not, why should there be a distinction?

In their discussion of the rule against suspension and the rule against perpetuities already mentioned, Professors Fraser and Sammis recommend the repeal of Civil Code Sections 774, 775 and 777,¹¹⁴ and Professor Orrin B. Evans in 1955¹¹⁵ reinforced this recommendation, adding: "§§ 774, 775 and 777, not having been amended when the period of suspendability was increased, are a trap, partially nullifying the amendments to § 715."¹¹⁶ In a review of recent legislation regarding the suspension rule and other restrictions on the creation of future interests derived from the New York Revised Statutes of 1830, it is said of the three sections now under consideration: "No one has been able to offer a cogent explanation for their existence. * * * They are anomalous to any scheme restricting perpetuities."¹¹⁷

Minnesota repealed sections substantially identical with the three in question in 1947,¹¹⁸ and Michigan in 1949 repealed its sections corresponding to Civil Code Sections 774 and 775 in connection with its repeal of the suspension rule.¹¹⁹ A recent writer has deprecated the failure of Michigan to repeal its section corresponding to our Civil Code Section 777, saying:

It is submitted that restricting the creation of a life estate upon a term of years to a person in being at the time of such creation does not serve any useful purpose or further any social policy that is not already taken care of by the common law rule against perpetuities.¹²⁰

¹¹² CAL. CIV. CODE § 774 is referred to, in connection with trust interests, in *Estate of Lux*, 149 Cal. 200, 205, 85 Pac. 147, 148 (1906) and *Estate of Sahlender*, 89 Cal. App. 2d 329, 349, 201 P. 2d 69, 81 (1948), in the former to remark that the section has no applicability and in the latter to remark that the section is not violated because the succeeding interests are not life estates but estates for years. Neither case considers whether the section would apply to equitable life interests in any event, although in the *Sahlender* case the court apparently assumes that it might.

¹¹³ See note 112 *supra*.

¹¹⁴ *Supra* note 104, at 116-17.

¹¹⁵ Evans, *Observations on the State, etc., of the California Laws of Uses and Trusts*, 28 So. CALIF. L. REV. 111 (1955).

¹¹⁶ *Id.* at 115, n. 27.

¹¹⁷ Munson, *Recent Changes in Statutory Rules Against Perpetuities*, 38 CORNELL L.Q. 543, 553 (1953).

¹¹⁸ Minn. Laws 1947, c. 207, repealing MINN. STAT. ANN. § 500.13, subs. 3, 4, 5 and 6 (1945), but not repealing the suspension rule.

¹¹⁹ Mich. P.A. 1949, No. 38, repealing MICH. COMP. LAWS §§ 554.17-554.20 (1948), but not repealing Section 554.21 which is our Civil Code Section 777. As already noted, the Mich. P.A. No. 38 of 1949 repealed the Michigan rule against suspension, MICH. COMP. LAWS §§ 554.14, 554.15 (1948).

¹²⁰ Munson, *supra* note 117, at 558.

Indiana in 1945 repealed a section corresponding to our Civil Code Section 774.¹²¹ It had repealed a section corresponding to our Civil Code Section 777 in 1852.¹²² It seems not to have any statute corresponding to our Civil Code Section 775.

¹²¹ Ind. Acts 1945, c. 216, § 6, repealing IND. STAT. ANN. § 56-143 (Burns, 1943).

¹²² IND. REV. STAT. c. 23, §§ 37, 40 (1852); see also Munson, *supra* note 117, at 546.

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