California Law Review

Volume XVI JANUARY, 1928 Number 2

"Perpetuities" and the California Rule Against Suspension of the Absolute Power of Alienation

THE District Court of Appeal of California in *Estate of McCray*[1] has held that the 1917 amendment to section 715 of our Civil Code, which permits the suspension of the power of alienation of property for a gross term of twenty-five years, is unconstitutional. Before the 1917 amendment, under the rule of the Walkerly case[2] that a trust suspends the power of alienation, a trust could not be created for any fixed term of years. It was in apparent recognition of the desirability of being able to create a trust measured by a definite period rather than by "lives in being" that the amendment to Civil Code, section 715, was enacted.[3] If the decision of the District Court of Appeal in the McCray case is now law in this state, all trusts for any definite term of years which have been created in reliance on the amendment are invalid. In this particular case a trust for ten years was declared invalid.

The reasoning of the court in the instant case is based upon the interpretation given to Article XX, section 9, of the California Constitution which provides that: "No perpetuities shall be allowed except for eleemosynary purposes." The court held that this constitutional prohibition of "perpetuities" incorporated the common law Rule against Perpetuities into the Constitution.[4] It furthermore

---

[1] (October 25, 1927) 54 Cal. App. Dec. 625, 160 Pac. 940. Rehearing denied by the District Court of Appeal November 23, 1927. Petition for hearing in Supreme Court granted Dec. 22, 1927.

[2] Estate of Walkerly (1895) 108 Cal. 627, 41 Pac. 772.

[3] See W. N. Hohfeld, "The Need of Remedial Legislation in the California Law of Trusts and Perpetuities," 1 California L. Rev. 305, 320 (1913).

[4] A possible question as to the unconstitutionality of this amendment to Civil Code, § 715, was suggested by O. K. McMurray in an article, "A Review of Recent California Decisions in the Law of Property," 9 California L. Rev. 447, 457 (1921).

held that the original section 715 of the Civil Code enacted the common law Rule against Perpetuities eliminating only the additional twenty-one-year period as allowed by the common law, and, that inasmuch as the 1917 amendment to that section of the Civil Code, which permitted the suspension of the power of alienation for twenty-five years, provided for a longer period than that allowed by common law, namely lives in being and twenty-one years, the amendment was unconstitutional.

What Is a "Perpetuity"?

Did the constitutional prohibition of "perpetuities" incorporate therein the technical common law "Rule against Perpetuities"? It is submitted that, properly interpreted, it did not; that this provision of our constitution was simply an announcement of a policy against tying up estates and interests for long periods of time, and that it is within the province of our legislature to adopt any reasonable rule to effectuate that policy.

We shall attempt to show that the word "perpetuity" is properly to be understood to mean not the specific common law Rule against Perpetuities but the idea of an interest descendible from heir to heir indefinitely without power in the present owner to alienate the property. The familiar example of such a perpetually inalienable interest is an indestructible estate tail.[5] Such perpetuities have always been abhorent to the law, and the law has devised various rules against the creation of such interests.[6] The modern Rule against Perpetuities is merely one of several rules, the purpose of which is, to prevent the creation of a perpetuity. Mr. Gray expresses this as follows: "A perpetuity could arise in two ways, *first,* by taking from the owner the power to alienate the property; *secondly,* by allowing interests to be created *in futuro.* In the beginning these ideas were con-

---

[5] ". . . an estate tail, or an estate given to a man and the heirs of his body . . . is such an estate as will, if left to itself, descend, on the decease of the first owner, to all his lawful issue—children, grandchildren, and more remote descendants, so long as his posterity endures—in a regular order and course of descent from one to another: and, on the other hand, if the first owner should die without issue, his estate, if left alone, will then determine." Williams on Real Property, 17 ed., 100 (1894).

[6] ". . . for courts of justice will not indulge even wills, so as to create a perpetuity, which the law abhors: because by perpetuities (or the settlement of an interest, which shall go in the succession prescribed, without any power of alienation) estates are made incapable of answering those ends, of social commerce, and providing for the sudden contingencies of private life, for which property was at first established." Blackstone, Bk. II, § 242, Jones' ed. (1915).

founded; gradually they were differentiated; the *first* gave rise to the rule forbidding restraints on alienation, the *second* to the Rule against Perpetuities."[7] The Rule against Perpetuities properly restricts the creation of future interests only. Restrictions upon present interests are void because violating an entirely different rule —the rule against restraints on alienation.[8] Both of these rules, together with the rules which allowed estates tail to be barred, were devised by the common law to prevent the tying up of estates in perpetuity.[9] It was to avoid the confusion between this concept of perpetuities and the Rule against Perpetuities that Mr. Justice Gray suggested that the rule should be called the "Rule against Remoteness."[10] This suggestion will hereafter be followed in this article.

The policy of the common law from the earliest times has been in favor of the free alienation of property.[11] Opposed to this policy

---

[7] J. C. Gray, "Remoteness of Charitable Gifts," 7 Harvard L. Rev. 406, 409 (1894). Mr. Gray continues: "When this differentiation occurred, it was inevitable that a further question should arise. Is the second rule merely a form of the first? Is a remote future interest objectionable only because for too long a period there may be no one who can give a good title; or is it objectionable also because the policy of the law does not allow interests so uncertain in value to hamper a present ownership? Under many circumstances, whichever principle was applied the judgment would be the same, . . . and in them it was held that the second rule was more than merely a form of the first, and that interests, although alienable, might yet be bad for remoteness; or, in other words, that the validity or non-validity of an interest did not depend solely on whether the alienability of the property was affected, but on whether the interest was upon a remote condition."

[8] "Neither the common law nor equity allows restraints on the alienation of property, save in the case of property settled or devised to the separate use of married women or on charitable uses." Gray, The Rule Against Perpetuities, 2 ed., § 119 (1906). That the last rule is now somewhat qualified in the United States is explained by Mr. Gray, n. 1, § 119: "In many of the United States restraints against alienation can be attached to equitable life interests given to men or to unmarried women. Trusts of this sort are known as spendthrift trusts."

[9] "There is a distinction between restraints on alienation, which attempt to make impossible or void the sale of an interest by its holder, and perpetuities, which are settlements of estates by executory limitations preventing or unduly postponing the vesting of an interest. For our purposes, perpetuity may be used as a convenient term to designate devices for tying up land or other property in the hands of its holder for one or more generations or perpetually." E. Freund, The Police Power, § 371 (1904). Gray, The Rule Against Perpetuities, 2 ed., § 118a (1906): "The tying up of property, the taking of it out of commerce, can be accomplished either, first, by restraining the alienation of interests in it or, secondly, by postponing to a remote period the creation of future interests. To effectually guard against this evil, as the law considered it, both these methods had to be provided against . . . These two doctrines, though having originally a common purpose, have had a separate development."

[10] Gray, The Rule Against Perpetuities, 2 ed., § 2, n. 2 (1906).

[11] Joshua Williams on Settlement of Real Estates, p. 29 (1879): "The courts seem always to have entertained a great dread of the inconvenience likely to arise by permitting landed property to be destined in futurity for any lengthened period, in such a way as to prevent its alienation."

has been the ingrained desire of persons to preserve their property to their posterity.[12] The history of the common law has been marked by the conflict between these opposing interests.

Owing to the simplicity of the early common law the creation of a perpetuity was impossible.[13] Personalty was the subject of absolute ownership, and no future or contingent interests in it could be created.[14] All inheritances were in fee simple. The only other estates were for life or for years, and every estate in remainder was required to be vested at the time of its creation.[15] This simplicity of the early common law was broken into in 1285 by the Statute De Donis—the object of which was to make inalienable estates tail—and by the recognition of contingent remainders.[16] By the Statute De Donis estates tail could be created which descended from lineal heir to lineal heir and which were inalienable as long as such issue existed. This attempt to secure perpetual settlements of land by legislation was circumvented by the courts, by allowing common recoveries to be suffered by the tenant in tail, so as to bar the entail to his issue.[17] The undesirable effect of contingent remainders was similarly avoided by making such contingent interests destructible.[18]

---

[12] A. W. Scott, "Control of Property by the Dead," 65 Univ. of Pennsylvania L. Rev. 527 (1917): "Although in spite of us death is our inevitable goal, most of us feel a strong desire to continue to exert an influence on the affairs of the world we leave behind. We want to keep alive the race, the family, the name, through the years to come. We do not want to be forgotten . . ."

"But this world with its good, or at least its material things, is a world for the living and not for the dead . . . The welfare of society demands that the law should set limits to the power of the hand of the dead to control human affairs."

[13] Charles Sweet, Challis's Law of Real Property, 3 ed., p. 205 (1911); Gray, The Rule Against Perpetuities, 2 ed., § 141a (1906).

[14] Sweet, Challis's Law of Real Property, 3 ed., p. 205 (1911); Blackstone, Bk. II, § 541, Jones' ed. (1915).

[15] Sweet, Challis's Law of Real Property, 3 ed., p. 60 et seq. (1911); Williams, Law of Real Property, 17 ed., p. 411 (1894).

[16] Williams on Settlement of Real Estate, p. 29 (1879); Sweet, Challis's Law of Real Property, 3 ed., p. 205 (1911).

[17] It was first decided by Taltarum's case that estates tail were destructible by a common recovery. Williams on Settlements of Real Estates, p. 29 (1879); Sweet, Challis's Law of Real Property, 3 ed., p. 205 (1911). Before estates tail were destructible by a common recovery, they were barred by the doctrine of lineal and collateral warranties. 2 Tiffany, Real Property, 2 ed., 1676 (1920). Sometime after common recoveries were introduced estates tail became destructible by fines also. Williams on Real Property, 17 ed., 78, 109 (1894).

[18] According to the authority of Mr. Joshua Williams, contingent remainders were not recognized until the fourteenth century. Williams, Law of Real Property, 17 ed., p. 411 (1894). But see Kales, Cases on Future Interests, p. 80, n. 1, 2 (1917); Sweet, Challis's Law of Real Property, 3 ed., p. 206 (1911); Williams on Settlement of Real Estates, p. 29 (1879). After the Statute of Uses it was decided that a contingent remainder created by way of use under the statute was as liable to destruction as a contingent re-

When estates tail became destructible, the next step by the landed gentry was to include in conveyances creating such estates conditions against recoveries being suffered. Conditions creating perpetuities in such manner the courts avoided by declaring the conditions void.[19] The same principle had already been invoked to hold void any attempt to impose a general restraint on alienation by the transferee of any property.[20] In these cases involving attempts to create indestructible estates tail, the word perpetuity is first found.[21] It is found in them as early as 1595.[22] At that time, of course, the Rule against Remoteness did not exist, because, as we have seen, no indestructible interest could then be created which would come into being at a future date.

But a new method of conveyancing was introduced by the Statute of Uses,[23] and, shortly afterwards, by the Statute of Wills.[24] The Statute of Uses, by passing the legal estate to the cestui que use, created legal estates of a kind unknown to common law. Devises by the Statute of Wills operated in a similar way. By means of these statutes indestructible estates could be made to spring into existence or to shift from the present owner of the freehold to another at an indefinite period of time *in futuro*.[25] The Statute of Uses became the source of our modern methods of conveyancing.

As soon as it was settled that estates and interests created by way of shifting or springing uses or by executory devises could not

---

mainder created at common law. Chudleigh's Case, 1 Coke 120a, 113b, 76 Eng. Rep. R. 261, 270. See 1 Fearne, Contingent Remainders and Executory Devises, 290 (1844).

[19] T. C. Williams, "Contingent Remainders and the Rule Against Perpetuities," 14 Law Quarterly Rev. 234, 240, n. 1 (1898). Gray, Restraints on the Alienation of Property, 2 ed., §§ 10, 25 (1895). "This principle appears to have been first applied after it had become well settled that an estate tail might be barred by a common recovery, as a reason for holding that any contrivance to restrain a tenant in tail from suffering a recovery shall be of no effect." Williams on Real Property, 17 ed., p. 464 (1894).

[20] Gray, Restraints ou Alienation of Property, 2 ed., § 11 et seq. (1895).

[21] Gray, The Rule Against Perpetuities, 2 ed., § 140 et seq. (1906); T. C. Williams, supra, n. 19, p. 240, n. 1.

[22] Supra, n. 19; see also article on "Perpetuities" by Professor E. H. Warren of Harvard University in 30 Cyc. 1468.

[23] (1535) 27 Hen. VIII, c. 10.

[24] (1540) 32 Hen. VIII, c. 1.

[25] Gray, The Rule Against Perpetuities, 2 ed., § 52 et seq. (1906). "When a use or devise takes effect on the determination of preceding estates created at the same time, it is a remainder limited by way of use or devise.

"When a use cuts short another granted estate, it is called a shifting use.

"When it cuts short the estate of a person creating it, it is called a springing use.

"Devises are not distinguished into springing and shifting.

"All future devises which are not remainders are called executory devises.

"Conditional limitation is a common term for a shifting use or shifting executory devise." Gray, supra, § 54.

be barred or destroyed,[26] it became necessary for the courts to invent a new rule to prevent property from being tied up in perpetuity.[27] By means of such conveyances interests could be created which would not come into being and become alienable for indefinite periods of time. This method of tying up property was analogous to indestructible estates tail, and similarly objectionable. So the judges originated a new rule against the creation of future estates.[28] This rule developed into what has been called the Rule against Remoteness.

There has been a considerable dispute between historians as to what was the exact nature of the development of this rule. It has been strongly contended by Mr. Gray that although the modern Rule against Remoteness originated at the time conveyances by use and devises were introduced, nevertheless this rule was not merely applied to conveyances by way of use or of devise, but is a rule of the common law. He contended that this was the only rule in the present law on the creation of future estates.[29] The current of English authority is that the modern Rule against Remoteness applies only to devises and conveyances by way of use, and that the common law always had and still has other rules against the creation of perpetuities.[30]

---

[26] That an executory devise was not destructible was first established in Pells v. Brown (1621) Cro. Jac. 590. Fearne, Contingent Remainders and Executory Devises, 10 ed., p. 418 (1844).

[27] "The reception of executory uses into the law of England gave rise to that important part of its jurisprudence which respects the *doctrine of perpetuity, or excessive restraints on alienation.* No question of perpetuity could rise at common law, or under the statute De Donis. It has been shown, that after the statute De Donis, and before the introduction of executory uses, future estates could only be created by way of remainder. The remoteness of a remainder, however great, was no objection to it, on its creation . . . during this period, therefore, of our law, all inquiry respecting perpetuity was out of question." Butler's note to Fearne, Contingent Remainders and Executory Devises, 10 ed., p. 565 (1844); Williams on Settlement of Real Estates, p. 30 (1879); Sweet, Challis's Law of Real Property, 3 ed., p. 177 et seq., 206 (1911).

[28] Charles Sweet, 1 Jarman on Wills, 6 ed., p. 295 (1910). See Gray, The Rule Against Perpetuities, 2 ed., § 148 et seq. (1906).

[29] Gray, The Rule Against Perpetuities, 2 ed., § 123 et seq. (1906).

[30] This controversy has centered around the questions of whether contingent remainders are properly within the Rule against Perpetuities, and whether the rule of Whitby v. Mitchell (1889) 42 Ch. D. 494, 44 Ch. D. 85, that a remainder could not be limited to the children of an unborn child exists as a rule entirely separate and apart from the Rule against Perpetuities.

Mr. Sweet in Jarman on Wills, 6 ed., pp. 281, 284, 295 (1910), expresses the view that there are three separate rules restricting the creation of future interests: namely, what he calls "The Old Rule against Perpetuities," the Rule of Whitby v. Mitchell, and "The Modern Rule against Perpetuities." These are all rules presently existing and restricting the creation of future estates. See also 7 Holdsworth History of English Law, p. 236 (1926). The

Whatever be the exact historical development, a rule of law respecting the creation of future estates called the Rule against Remoteness has now taken definite form.[31] The period of the rule has become settled at any number of lives in being and twenty-one years, with a period of gestation added in case of child *en ventre sa mere*.[32] The rule has been construed as permitting a period of twenty-one years distinct from the question of minority. As to whether this rule requires the vesting of estates within the required period, or merely requires that the estate become alienable during that period, there has been considerable conflict. It was the thesis of Mr. Gray's classic work on the Rule against Perpetuities that this rule presently and always did require the vesting of estates within the prescribed period and did not concern itself with the question of alienability.[33] This was in conflict with the statement of some of the greatest property lawyers and judges in England, numbering among them Sir Edward Sugden, that the Rule against Perpetuities concerns itself only with the time within which a future estate must be alienable.[34] Whatever may have been the scope of this rule in the early history it is now established that remoteness

---

rule of Whitby v. Mitchell was abolished by the English Law of Property Act of 1925. Stat. 15 Geo. 5, c. 20, s. 161.

This controversy becomes material for our purposes, in showing, if these writers are correct, that there exists at common law a system of rules respecting the creation of future estates. If we admit that there exists a system of rules restricting the creation of future estates, along with the rules against restricting the alienation of present interests, this tends to show that our constitution by prohibiting "perpetuities" meant to incorporate the whole common law system of rules restricting the creation of future estates, rather than merely one of those definite rules.

[31] This rule has been stated by Mr. Gray: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." Gray, The Rule against Perpetuities, 2 ed., § 201 (1906).

[32] The period was fixed upon by successive decisions. It was first decided that the devise or use might be allowed to take effect at any time during the life of a person in being at the date of the deed, if a use, or at the death of the testator, if a will. Duke of Norfolk's case (1647) 3 Ch. Ca. 1, 22 Eng. Rep. R. 931. Then a further term of twenty-one years, corresponding to the minority of the cestui qui use or devisee, was allowed. Stephen v. Stephen (1736) Cases temp. Talbot, 229, 25 Eng. Rep. R. 751. It was then further decided that any number of lives might be taken. Thellusson v. Woodford (1805) 11 Ves. 112, 32 Eng. Rep. R. 1030. It then was decided that a twenty-one year period in gross would be allowed. Cadell v. Palmer (1833) 10 Bing. 140, 131 Eng. Rep. R. 859. Beyond the period of twenty-one years the period might still be extended in case of a child *en ventre sa mere*. Cadell v. Palmer, supra. See Gray, The Rule against Perpetuities, 2 ed., § 169 et seq. (1906); Williams on Settlement of Real Estates, p. 30 (1879).

[33] Gray, The Rule Against Perpetuities, 2 ed., § 123 et seq. This view was similarly contended for by Mr. Marsden and by Mr. Lewis. Lewis, Law of Perpetuities, supp. pp. 16-19 (1849).

[34] Cole v. Sewell (1843) 4 Dr. & W. 1, 28, 6 Ir. Eg. R. 66; Sweet, Challis's Law of Real Property, 3 ed., p. 198 (1911).

of vesting is the test. Except where changed by statute the Rule against Remoteness of vesting is the rule of the courts of England,[35] and of the states of the United States.[36]

This cursory sketch of the development in the English law of the policy against the tying up of property for long periods may throw some light upon the meaning of the prohibition of perpetuities in the Constitution of California. We have seen that there has been a pervading policy in the law against the tying up of property in perpetual succession without power in persons in being to alienate it. It was the policy in favor of free alienation that caused the courts to make estates tail destructible, and then, to declare that all conditions against suffering a recovery were void. The indestructible estate tail—an inalienable interest descending in indefinite succession from heir to heir—was the common definition of a perpetuity for several centuries.[37] Lord Nottingham in the Duke of Norfolk's case, the case which is recognized by Mr. Gray as laying the foundation of the modern Rule against Remoteness, said:[38] "A perpetuity is the settlement of an estate or interest in tail, with such remainders expectant upon it, as are in no sort in the power of the tenant in tail in possession, to dock by recovery or assignment, but such remainders must continue as perpetual clogs upon the estate." The reports show that this was the meaning in which this word was used down

---

[35] London & S. W. R. Co. v. Gomm (1882) L. R. 20 Ch. Div. 562; In re Hargreaves (1890) L. R. Ch. Div. 401; Sweet, 1 Jarman on Wills, 6 ed., p. 296 (1910); R. A. Eastwood, Williams on Real Property, 24 ed., 485 (1926).

[36] Becker v. Chester (1902) 115 Wis. 90, 91 N. W. 87; Warren, Perpetuities, 30 Cyc. 1468, and cases there cited; Gray, The Rule Against Perpetuities, 2 ed., § 200 (1906).

It might be noted here that this rule against remoteness of vesting of interests is one developed solely as a result of judicial decision; it is considered by some as one of the most notable examples of judicial legislation in English history. See note by O. K. McMurray, Blackstone, Bk. II, § 242, n. 8, Jones' ed. (1915). The expression by the District Court of Appeal in the McCray case that an English statute of 1800, the Thelluson Act, enacted the rule against "restraints on the power of alienation" is, of course, erroneous. The Thelluson Act had to do only with restrictions on accumulations for a period longer than the period allowed by the Rule against Remoteness.

[37] Supra, n. 19, 20. Chudleigh's Case (1595) 1 Co. Rep. 120a, 76 Eng. Rep. R. 270. Lord Bacon's description of a perpetuity is as follows: "There is started up a devise called a perpetuity; which is an entail with an addition of a proviso conditional tied to his estates, not to put away the land from the next heir; and, if he do, to forfeit his own estate. Which perpetuities, if they should stand, would bring in all the former inconveniences of entails that were cut off by the former mentioned statutes, and far greater." Cited in Gray, The Rule Against Perpetuities, 2 ed., § 141b (1906). Chief Baron Gilbert defines a perpetuity thus: "A perpetuity is the settlement of an interest descendible from heir to heir, so that it shall not be in the power of him in whom it is vested to dispose of it, or turn it out of the channel." Gilbert, The Law of Uses and Trusts, 77 (1734). See Gray, supra, § 140.

[38] (1681) 3 Ch. Cas. 1, 31; 22 Eng. Rep. R. 931, 949.

until the eighteenth century. Fearne, writing in the latter part of the eighteenth century, used the word "perpetuity" with that same meaning.[39]

In the Duke of Norfolk's case Lord Nottingham had to do with a limitation over of a trust for a long term of years which was to take effect upon the happening of an event, which, under the facts, was bound to happen within the lifetime of a living person. Lord Nottingham's test was to consider whether it would "tend to a perpetuity," and, if so, the limitation was to be declared bad.[40] He held that since the limitation over was to happen within the lifetime of persons in being the trust was valid. The idea is clear: a perpetuity—as the word implies—was a settlement which must continue as a perpetual clog upon the estate, and any settlement which "tended" to create such an interest was bad. The Rule against Remoteness was evolved to fix the limits of what "tended to a perpetuity" in the creation of future interests by means of devises or of the new kinds of conveyances to uses, and as a fair judicial adjustment between the desires of the individual for the perpetuation of his property and the policy of the law against any transfer which "tended" to create a "perpetuity."

But we must not forget that the policy behind the creation of the Rule against Remoteness was one in favor of the free alienation of property.[41] It was this same policy that was behind the other

---

[39] "For every executory devise, so far as it goes, creates a perpetuity; that is, an estate unalienable till the contingency be determined one way or another." Fearne, Contingent Remainders and Executory Devises, 10 ed., 430 (1844). See discussion of this language by C. Sweet, "Limitations of Land to Unborn Generations," 29 Law Quarterly Rev. 304, 316 (1913). For cases in the English courts of the eighteenth century using the word perpetuities as an estate tail, see Sweet, supra, 316, n. 7.

It should be remembered that at the time Fearne wrote (1776) the constitutions of Vermont and North Carolina had been enacted prohibiting "perpetuities." When the constitution framers used that word they presumably meant not the Rule against Remoteness but the concept as expressed by Fearne.

[40] In answer to the question put by counsel as to where he would stop if the limitation over in the case at bar were held good, as it actually was, Lord Nottingham said: "Where? why everywhere, where there is not any inconvenience, any danger of a perpetuity . . ." The common law later definitely fixed the period of lives in being and twenty-one years. It is submitted that the prohibition of "perpetuities" announced in the California Constitution is an announcement of the same principle that bound Lord Nottingham, that our legislature is free to set the limits of what "tends to a perpetuity" just as Lord Nottingham felt himself free to do.

[41] "The Rule against Perpetuities is sometimes spoken of as aimed at restraints against alienation. In a sense this is true. Executory devises and other future interests, to limit which is the object of the rule, render an estate less marketable, and therefore the rule does, to this extent, favor alienation." Gray, Restraints on Alienation, 2 ed., § 8 (1895). Gray, The Rule Against Perpetuities, 2 ed., § 2 (1906). Lewis, Law of Perpetuities, 48 (1846).

rules against the creation of perpetuities. Attempts to create estates which would remain inalienable for long periods of time were made at common law in at least three ways: (1) by creating indestructible estates tail, (2) by imposing conditions against the alienation of present interests, and (3) by the creation of estates that would not vest until some remote time *in futuro*. Separate rules were devised to prevent the creation of a perpetuity by each of these means: (1) estates tail were made destructible; (2) the rule against restraints on alienation made all unreasonable restraints or conditions against alienation of a present interest void; and (3) the Rule against Remoteness made void all interests or estates which might vest beyond the prescribed period. All of these rules are the expression of the same policy.[42]

This policy of the common law against tying up property by the creation of inalienable interests and estates is, it is submitted, what was meant by the prohibition of "perpetuities" in the California Constitution. Prohibitions against perpetuities similar to that in the California Constitution are found in the constitutions—usually the Bills of Rights—of some of our older states.[43] The Constitution of Vermont of 1793[44] contained this provision: "The legislature

---

[42] Supra, n. 5. "The system of rules disallowing restraints on alienation, and the Rule against Perpetuities are the two modes adopted by the Common Law for forwarding the circulation of property which it is its policy to promote." Gray, The Rule Against Perpetuities, 2 ed., § 2a (1906). Mr. Gray treats the rule making estates tail destructible as under the rule against restraints on alienation, Gray, Restraints on Alienation, 2 ed., §§ 75-77, 132, 133. For the present purpose the rule making estates tail destructible is treated as a separate rule to illustrate that there is a system of rules against the creation of perpetuities. Supra, n. 28. "The rules disallowing restraints against alienation and the Rule against Perpetuities, have, therefore, it is true, the same ultimate end, but they serve that end by different means." Gray, The Rule Against Perpetuities, supra, § 2a; Lewis, Law of Perpetuities, p. 4 et seq. (1846). In Sweet, 1 Jarman on Wills, 6 ed. 278 (1910), the author expresses this view in announcing what he calls the general policy of the law forbidding "perpetuities": "A perpetuity, in the primary sense of the word, is a disposition which makes property inalienable for an indefinite period." Did not our constitution mean to use this word "perpetuity" in its primary sense?

[43] The Florida Constitution of 1838, Art. I (Declaration of Rights) § 24, and the Tennessee Constitution of 1834, Art. I (Declaration of Rights) § 22, contain provisions identical with the provision in the North Carolina Constitution quoted in the text. The Constitution of 1845 of Texas, Art. I, § 18, provides: "Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed; nor shall the law of primogeniture or entailments ever be in force in this state." The Oklahoma Constitution of 1907, Art. II (Bill of Rights) § 32, has a provision identical with that of the Texas Constitution. The Arkansas Constitution of 1836, Art. II (Bill of Rights, etc.) § 19, provides: "That perpetuities and monopolies are contrary to the genius of a republic, and shall not be allowed; nor shall any hereditary emoluments, privileges or honors ever be granted or conferred in this state."

[44] Ch. II, § 36.

shall regulate entails in such a manner as to prevent perpetuities." This expresses unequivocally what a perpetuity meant in the minds of the constitution framers of that state. The provisions in the constitutions of most of the other states are similar to the one found in the Declaration of Rights of North Carolina of 1776, namely: "That perpetuities and monopolies are contrary to the genius of a free state, and ought not to be allowed."[45] Although the meaning of "perpetuities" in that statement is not so obvious as it was in the Vermont Constitution, it has been interpreted to have the same meaning. The Supreme Court of North Carolina, by Chief Justice Taylor, in Griffin v. Graham,[46] in holding that the constitutional prohibition of "perpetuities" did not apply to prevent charitable bequests in perpetuity, said: "It is in reference to estates tail that the word [perpetuity] is used in the Bill of Rights, for there was no other estate that had a tendency that way. A condition not to alien, annexed to a fee simple, is void; and the rules relative to executory devises, by which their duration is limited, had effectually checked their tendency to a 'perpetuity.'"

The foregoing indicates what the word "perpetuity" meant at the time the California Constitution was adopted. Chief Justice Taylor expressed the view that the word "perpetuity" as used in the North Carolina Constitution referred to an estate tail. An inalienable estate tail — an interest descendible from heir to heir without power in such heir to alienate the interest—is the precise concept of a "perpetuity." "This," Mr. Warren tells us, "is the popular notion of a perpetuity . . ."[47] Whether we should interpret

[45] Declaration of Rights, § 23. Art. I, § 31, in the Constitution of 1868.

[46] (1820) 1 Hawks (N. C.) 96, 130, 9 Am. Dec. 619, 625. This excerpt from the opinion of Chief Justice Taylor is set out in the opinion in Estate of Hinckley (1881) 58 Cal. 457, 475. In Estate of Hinckley at p. 472 the court referred to the constitutional prohibition of "perpetuities" and said that "In the absence of any legislation adopting the common law, it is probable that the courts of this state would go to the common law definitions to ascertain the meaning of the expression 'no perpetuities shall be allowed,' as used in the Constitution." These words do not seem to throw much light on the view of the court as to what the prohibition means.

[47] 30 Cyc. 1469. The following quotations express the same view: "A perpetuity, in the primary sense of the word, is a disposition which makes property inalienable for an indefinite period." Sweet, 1 Jarman ou Wills, 6 ed., 278 (1910). "The conception of a perpetuity as it presented itself to the minds of the early judges found its typical example in the case of a fee tail, as it existed before the introduction of methods by which it could be barred . . . The word 'perpetuity' is still sometimes used in this primary sense, which is evidently the more natural signification of the word. This being so, the rule against perpetuities, of which we here treat, might, as stated by a leading authority on the subject, be more properly termed the 'rule against remoteness,' and, if this had been done, there would now exist a much more general apprehension of its true character." 1 Tiffany, Real Property, 2 ed., 598-599 (1920).

the prohibition of "perpetuities" to mean an inalienable estate tail, or whether we should interpret the constitutional prohibition as meaning to adopt the general policy of the common law against tying up of property is, it is submitted, merely a difference in emphasis. Chief Justice Taylor expressed the view that the word "perpetuities" referred to an estate tail, because, as he said, "no other estate had a tendency that way." This was so because rules had already been incorporated into the law of the state to prevent the creation of any other inalienable interests. But this does not mean that if some other estate should tend to a perpetuity, the constitutional prohibition would not prevent the creation of such an interest. It is submitted that what is meant by the reference to "perpetuities" is any interests which may be inalienable for too long a period; and that any such interests, whether they be created by estate tail or executory devise, are meant to be prohibited by the constitution.

The foregoing seems to be the meaning in which the framers of the California Constitution used the word "perpetuities." The following appears in the Debates in the Convention of California on the Formation of the State Constitution:[48]

"Mr. Lippitt. I have a very short section to offer here:

"*No perpetuities shall be allowed.*

"It is to prevent perpetuities of lands from families to families. It is upon perpetuities that aristocracies are built up. Democracy would soon be overturned if this was allowed. The principle is so well established that all our courts of law have made it a rule, in the absence of any statute upon the subject. Whenever they could possibly put any such construction upon any deed or instrument they have deemed themselves bound to do it."

"The section was adopted."

The above quotation explains the evil that the constitution framers desired to prevent and should be considered by the courts in inter-

---

[48] Debates in the Convention of California on the Formation of the State Constitution, by J. Ross Brown, p. 272 (1850). The following was proposed in the Bill of Rights: "That perpetuities and monopolies are contrary to the genius of a republic, and shall not be allowed; nor shall any hereditary emoluments, privileges, or honors, ever be conferred in this state." The discussion of the section, which was a copy from one of the other state constitutions that have been quoted, was in general terms as prohibiting privileges which should continue from generation to generation. The proposed amendment was voted down apparently because, as one member of the committee said, "the subject properly came in another part of the Constitution." Supra, p. 46.

The next appearance of the amendment is that quoted in the text. The next after that is where the provision "No perpetuities shall be allowed" was amended by adding "except for eleemosynary purposes"; and as so amended it was adopted without debate. Supra, p. 376.

preting the meaning of the constitution.[49] "Perpetuities of lands from families to families," which the constitution framers desired to prevent, is the precise concept of an estate tail. We can draw the conclusion that they meant to prohibit estates tail. But we have seen that at common law a "perpetuity" could be created not only by an inalienable estate tail, but also by restraining the alienation of a present interest, or by a remotely vesting interest. The reasonable interpretation seems to be that the constitutional provision meant to prevent the creation of "perpetuities" by any and by all of these means. It would seem that the constitution meant to incorporate the whole system of rules that the common law has devised to prevent "perpetuities."[50] Mr. Lewis in his work on the Law of Perpetuities says: "Throughout the body of this work, the *Rule* rather than, the *Rules,* against Perpetuities, is spoken of, as well, for greater convenience of reference, as, because mention is made of the prohibitory law, more frequently in its character of a provision *fixing a definite period of time,* than as a *system* serving an important end of public policy. In this enlarged sense, the law was considered in the introductory remarks."[51] Is not this "enlarged sense" of a perpetuity of which Mr. Lewis speaks the meaning that must be ascribed to the prohibition of "perpetuities" in our constitution?

The difficulty of giving to the constitutional prohibition of "perpetuities" some concrete meaning must now be faced. It might be urged in objection to the definition of a perpetuity that has been

---

[49] Where a term used in the constitution is ambiguous, constitutional debates are referred to in order to determine historically the evil which it was intended to guard against. Older v. Superior Court (1910) 157 Cal. 770, 109 Pac. 478; People v. Chapman (1882) 61 Cal. 262.

[50] "In obedience to the declaration of the Bill of Rights [prohibiting perpetuities], and to the injunction in the constitution, the [North Carolina] legislature of 1784 abolished entails—giving as a reason that they tended to raise the wealth and importance of particular families, and to give them an undue influence in the republic." Griffin v. Graham, supra, n. 46 at p. 131.

In California during the period between adoption of the Constitution of 1849 and the enactment of the statute prohibiting entails in 1872, would indestructible estates tail have been valid in California? It is submitted that this is the very thing that our constitutional prohibition of "perpetuities" was designed to prevent. If you adopt the narrow construction of "perpetuities" as given by the District Court of Appeal in the McCray case that this incorporated the Rule against Perpetuities, then the anomalous result follows that the Constitution restricted limitations over at a period greater than lives in being and twenty-one years, but laid no restriction whatever upon the creation of estates tail, which, as we have seen, are the worst example of a perpetuity.

[51] P. 162, n. (1). Mr. Lewis seems to mean by the "Rules against Perpetuities" or, as otherwise expressed, "a system serving an important end of public policy" the same as Mr. Gray meant, supra, n. 9, when he said that the Rule against Perpetuities and the rule against restraints on alienation were both devised to prevent the creation of a perpetuity. See Lewis, supra, pp. 4, 5, 70-85.

submitted here that if the legislature were permitted to extend the period of the Rule against Remoteness from twenty-one to twenty-five years, that, similarly, the legislature could extend the period to a thousand years. This by no means follows. The Rule against Remoteness was evolved because the creation of certain estates "tended to a perpetuity." The common law finally adopted the period of a life or lives in being, and twenty-one years, plus the period of gestation, as a convenient but nevertheless arbitrary test. But the legislature need not be bound by the precise period fixed by the courts at common law; it would seem open to our legislature to express the public policy of our state and to determine what "tends to a perpetuity," just as the common law judges fixed the period of the Rule against Remoteness, as long, of course, as the constitutional prohibition is not made meaningless. The courts of our country are familiar with limits on legislative action expressed in such general terms as this.[52]

The precise limits to the legislative determination of the policy against perpetuities announced in our constitution must be left for the courts to decide. It is for the courts to say whether the legislature in the 1917 amendment to section 715 of the Civil Code, in permitting the suspension of the power of alienation for twenty-five years instead of adopting the common law period of lives in being and twenty-one years, violated that policy. Although technically and on occasions twenty-five years may be longer than lives in being and twenty-one years,[53] the common law rule in most cases results in allowing a period far longer than twenty-five years. The period allowed by the legislature does not seem to be an unreasonable one. Whether the period fixed by the legislature is reasonable in view of the policy announced in the constitution must be the test.

---

[52] The "due process of law" clause of our federal and state constitutions has not been given the precise meaning the similar clause had at common law; but has been interpreted to allow our legislature a certain field within which to express the policy of the state, though beyond that field they cannot go. "The words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in Magna Charta," Justice Curtis in Doe ex dem. Murray v. Hoboken Land and Improvement Co. (1855) 59 U. S. (18 How.) 272, 276. But that the "due process clause" has been interpreted to protect merely the substance of rights rather than the form by which those rights were protected at common law is familiar. Cooley, Constitutional Limitations, 7 ed., 507 (1903).

Art. I, § 9, of the Federal Constitution forbids the passage of any "bill of attainder" by either the state or federal government. This clause has been interpreted to forbid not merely that which was a "bill of attainder" at common law, but anything which partakes of the nature of "bills of pains and penalties." Ex parte Garland (1866) 71 U. S. (4 Wall.) 333; Cummings v. Missouri (1866) 71 U. S. (4 Wall.) 277.

[53] This is because all lives in being might terminate immediately.

This interpretation of the constitutional prohibition of "perpetuities" as meaning to announce the familiar common law policy against the tying up of property is the interpretation which our legislature has apparently given to that constitutional dictate. The legislature has enacted rules similar to the rules that the common law devised to prevent the creation of such perpetuities. All interests which would have been estates tail at common law have been made fee simple interests by the Civil Code.[54] That Code also has enacted a rule similar to the common law rule against restraints on alienation.[55] A rule at least analogous to the common law Rule against Remoteness has been enacted by the other Civil Code sections, which in effect prohibit the creation of interests in persons who will not come into being until a distant future date.[56] It is submitted that all these rules have been enacted to prevent the creation of perpetuities, whether it be by attempting to create an estate tail, by prohibiting the alienation of a present interest, or by creating remote future interests.

The common law rule against restraints on alienation was that there should be no unreasonable restraints. Under this rule the legislature has seen fit to permit as a reasonable restraint a qualified "spendthrift trust" which was unknown to the common law.[57] The precise period of the common law Rule against Remoteness should be no more binding. In defining the policy of the state, the legislature should be permitted to adopt any reasonable period within which the power of alienation may be suspended. This, it is sub-

---

[54] Cal. Civ. Code, § 763.

[55] Cal. Civ. Code, § 711. The following quotation shows that the Florida court has interpreted the constitutional prohibition of "perpetuities" to prevent restraints against the alienation of present interests. "The most of the state constitutions seem to have reference to this subject, by declaring 'that perpetuities and monopolies are contrary to the genius of a free state, and ought not be allowed. . . . Indeed one of the fruits of the glorious revolution was connected in some degree in the public regard with this question of unfettering of estates. Our legislature seems to have provided against this danger, by declaring in the law to secure the right of married women, that husband and wife shall join in all sales, transfers, and conveyances of the property of the wife, and the real estate shall only be conveyed by deed attested." Maiben et al. v. Bobe (1855) 6 Fla. 381, 398.

[56] Cal. Civ. Code, §§ 715, 716. As to whether Civil Code, §§ 715 and 716, adopts the common law Rule against Remoteness see infra, pp. 96-100.

[57] Spendthrift trusts are recognized in California to the extent needed for the education and support of the cestui. McColgan v. Magee (1916) 172 Cal. 182, 155 Pac. 995; Magner v. Crooks (1903) 139 Cal. 640, 73 Pac. 585; Seymour v. McAvoy (1898) 121 Cal. 438, 53 Pac. 946. This result is based upon Civil Code, § 859.

mitted, is permitted by the meaning in which the word "perpetuity" was used in our constitution.

The Relation Between the Rule Against Perpetuities and the Rule of Civil Code Section 715

The decision of the District Court of Appeal in the McCray case may be questioned on another ground. Assuming that the prohibition of "perpetuities" incorporated the common law Rule against Remoteness into the constitution, do sections 715 and 716 of the Civil Code which prohibit the suspension of the power of alienation beyond a fixed period necessarily conflict with that rule?[58] That the common law Rule against Remoteness concerns itself with the fact of remoteness of vesting and not at all with alienability is, as has been before mentioned, now generally recognized.[59] The statutory rule, on the other hand, is expressly concerned only with the question of whether an estate becomes alienable within the designated period.[60] In order to satisfy the statutory rule an interest need only become alienable during the statutory period; in order to satisfy the common law rule the interest must vest during the period fixed by that rule. The contention may, then, be made that these are entirely different

---

[58] Cal. Civ. Code, § 715: *"Restraints upon alienation.* Except in the single case mentioned in section seven hundred seventy-two, the absolute power of alienation cannot be suspended, by any limitation or condition whatever, for a longer period than as follows:

"1. During the continuance of lives of persons in being at the creation of the limitation or condition; or

"2. For a period not to exceed twenty-five years from the time of the creation of the suspension."

Cal. Civ. Code, § 716: *"Future interests void, which suspend power of alienation.* 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."

[59] Supra, n. 36.

[60] A contingent interest is alienable when the person who possesses the contingent interest can release it. Therefore such a contingent interest, although not vested, does not violate the rule against suspension of the power of alienation. In re Wilcox (1909) 194 N. Y. 288, 87 N. E. 497. The distinction is illustrated by Blakeman v. Miller (1902) 136 Cal. 138, 68 Pac. 587. A lease for twenty years, with an option to purchase within the term and after fifteen years, did not, as the court there held, suspend the absolute power of alienation, because "there were persons in being by whom an absolute interest in possession can be conveyed." Yet an option to purchase which might be exercised beyond the limits of the Rule against Remoteness, is contrary to that rule. London, etc. R. Co. v. Gomm (1882) 20 Ch. D. 562. But see 1 Tiffany, Real Property, 2 ed., 607 (1920) and cases there cited for decisions in this country on whether the Rule against Remoteness applies to option contracts.

rules, and that, even if it be assumed that our constitution incorporates the technical Rule against Remoteness, the statutory rule permitting the suspension of the power of alienation for twenty-five years does not conflict therewith.

It is a mooted question whether there are not in California two rules restricting the creation of future estates, one, the Rule against Remoteness, the other, the rule against suspension of the power of alienation.[61] The problem is a heritage from the New York Revised Statutes of 1830 from which sections 715 and 716 of our Civil Code were taken.[62] Whether the revisers understood that the common law Rule against Remoteness was properly concerned only with remoteness of vesting has been much debated. There are certain sections of the New York Revised Statutes, identical provisions also appearing in the California Civil Code, which can be interpreted as laying down a rule against remoteness of vesting entirely separate from, and in addition to, the rule against suspension of the power of alienation.[63] Mr. Chaplin in his work on Suspension of the Power

---

[61] "It has not infrequently been assumed that the rule as to unlawful suspension of the power of alienation, as defined by Civil Code, § 715, and related provisions, is the only rule against 'perpetuities' now prevailing in California; and that, consequently, 'the common law' rule against remoteness of vesting is not in force. There are even judicial dicta to this effect. Estate of Caverly (1897) 119 Cal. 406, 409, 51 Pac. 629; Blakeman v. Miller (1902) 136 Cal. 138, 68 Pac. 587.

"But in these cases the learned judges seem to have overlooked Art. XX, § 9, of the California Constitution, reading: 'No perpetuities shall be allowed except for eleemosynary purposes.' And, in the same connection, it may be remarked that various provisions of the Civil Code—especially § 724(2) and § 773—seem to recognize the rule as to remoteness of vesting." Hohfeld, supra, n. 3, 320, n. 38. See McMurray, "A Review of Recent California Decisions in the Law of Property," 9 California L. Rev. 447, 457 (1921).

[62] N. Y. Rev. Stats., 1828, pt. 2, c. 1, tit. 2, §§ 14 and 15. "In Michigan, Wisconsin, and Minnesota, the first and second parts of the New York system have been adopted with scarcely an alteration." Gray, Rule Against Perpetuities, 2 ed., § 751 (1906). See citations there given. "California has borrowed largely from the New York Statutes; it has not, however, restrained the time for creating future estates to two existing lives . . . North Dakota and South Dakota have adopted the California Statutes on these subjects, bodily, and Idaho has taken some provisions from the same source." Gray, supra, § 752. Citations are there given.

[63] The following sections of the statutes have been principally relied upon to establish the existence of a separate Rule against Remoteness: "Section 16 [of the N. Y. Rev. Stats.; § 772 of the Cal. Civ. Code] provides that a contingent remainder in fee may be created on a prior remainder in fee, if limited to take effect as prescribed in that section, and it may be argued that a contingent remainder not so limited would be void, whether it involved a suspension of the power of alienation or not . . . Section 24 [of the N. Y. Rev. Stats.; § 773 of the Cal. Civ. Code] provides that 'a fee may be limited upon a fee upon a contingency, which, if it should occur, must happen within the period prescribed in this article.' This, it must be conceded, is ambiguous, and it may be claimed that it means that a fee may be limited upon a fee, provided that it must vest within the statutory period . . ." G. F. Canfield, "The New York Revised Statutes and the Rule Against Perpetuities," 1

of Alienation contends that the revisers meant to establish by the statutes two separate rules restricting the creation of future estates.[64] This view has the distinction of being followed by the Court of Appeals of New York in the Wilcox case.[65]

Without entering into any considerable discussion of this question, it may be said that there has been much criticism of the view that both the Rule against Remoteness and the rule against suspension of the power of alienation were meant to be adopted by the New York Revised Statutes.[66] The code sections on which the New York decision is based are far from clearly establishing its soundness. The explanation of Mr. Gray is that the New York Revised Statutes of 1830 were enacted at a time when the common law Rule against Remoteness was not yet settled and that the statutes crystalized what is now recognized as an erroneous concept of that rule.[67] This seems to be a reasonable explanation when we remember that it was not until about half a century after the Revised Statutes were written that the courts definitely settled that remoteness of vesting is the test of the common law rule.[68] Whether the Wilcox case will be followed in California has never been decided.[69]

Columbia L. Rev, 224, 228 (1901). This writer comes to the conclusion that these sections were not meant to enact a separate Rule against Remoteness.

[64] 2 ed. (1911): "Section 1. The provisions of the Real Property Law furnish two separate rules, one dealing with suspension of the absolute power of alienation, and the other with postponement of the vesting of certain future estates."

[65] In re Wilcox (1909) 194 N. Y. 288, 87 N. E. 497. In that case the court, speaking through Chief Justice Cullen, said (194 N. Y. 298): "It seems to me clear that the revisers did intend, so far as remainders were concerned, in addition to the provision against inalienability, to provide against remoteness of vesting, which, as already said, was the test of validity under the common law rule with which they were familiar." The rule of the Wilcox case was apparently extended iu Walker v. Marcellus O. L. R. Co. (1919) 226 N. Y. 347, 123 N. E. 736.

[66] E. Fraser, "The Rules Against Restraints on Alienation, and Against Suspension of the Absolute Power of Alienation in Minnesota," 8 Minnesota L. Rev. 185, 295, 300, n. 30 (1924). See Canfield, supra, n. 63; 9 Columbia L. Rev. 338 (1909); 22 Harvard L. Rev. 520 (1909). O. S. Rundell, "The Suspension of the Absolute Power of Alienation," 19 Michigan L. Rev. 235 (1921). It has also been suggested that because the revised statutes intended to adopt the common law Rule against Remoteness, that the statutes should be interpreted by the courts as introducing the common law rule as it is now understood. N. Trottman, "Perpetuities Under the Wisconsin Statutes," 2 Wisconsin L. Rev. 14 (1923).

[67] Gray, The Rule Against Perpetuities, 2 ed., § 748.

[68] Supra, notes 34 and 35.

[69] It should be noted that the decision of the New York court in the Wilcox case has no bearing on the question of whether the California constitutional prohibition of "perpetuities" incorporated the common law Rule against Remoteness. The importance of the Wilcox case is only to show that the New York Court of Appeal holds that there are two rules found in the statutes themselves, namely, the Rule against Remoteness, and the rule against suspension of the power of alienation. It should be noted that similar provisions are found in the California Civil Code. (See supra, n. 63.)

The question as to whether there are two separate rules restricting the creation of future interests in California may be suggested in somewhat different form. Apart from the Wilcox case, and assuming that the rule against suspension of the power of alienation is the only rule provided by our statutes, does the common law Rule against Remoteness exist in this state entirely separate from, and in addition to, the statutes?[70] This would seem to be the case if we accept simply the reasoning of the McCray case that the constitutional prohibition of "perpetuities" incorporated the common law Rule against Remoteness as part of the constitution of California. If this reasoning is correct, the common law Rule against Remoteness exists in this state by virtue of the constitution. In as much as our statutory rule is a rule against suspension of the power of alienation and not against remoteness of vesting, it would seem to follow that we have two rules restricting the creation of future estates, each operating independently and not conflicting with the other. For a future interest to be valid it must satisfy the requirements of both rules; not only must the interest become alienable during the statutory period, but it must vest during the period of lives in being and twenty-one years, as required by the common law rule. Until this question is decided in California, it would be well to observe the requirements of both of these rules in drawing a property settlement.

The McCray case would seem to be wrong on its own reasoning. The court reached its result by ignoring the distinction between alienability and vesting and held that the statutory rule conflicted with the constitution. Whether the court can properly ignore the distinction may be questioned. The purpose of the two rules is the same, namely, to restrict the creation of estates that may not come into being until some remote time in the future; but they establish different tests as to what interests are valid.[71] Practically, the two rules effect the same result except in that class of cases in which the future interest becomes alienable but does not vest during the re-

---

[70] See O. K. McMurray, "A Review of Recent California Decisions in the Law of Property," 9 California L. Rev. 447, 456 (1921). See also Hohfeld, supra, n. 3. In Strong v. Shatto (1919) 45 Cal. App. 29, 187 Pac. 159, the court said (p. 35): "We recognize the distinction which counsel for respondent have so clearly pointed out between a perpetuity resulting from suspension of the power of alienation and remoteness of time for the vesting of estates, as contemplated by the rule against perpetuities, as well as the confusion that has resulted in the decisions by failure to distingnish between the two doctrines." See Estate of Caverly (1897) 119 Cal. 406, 409-410, 51 Pac. 629; Blakeman v. Miller (1902) 136 Cal. 138, 142, 68 Pac. 587.

[71] See supra, n. 66.

quired priod. The legislature very possibly thought they were adopting the common law rule in Civil Code sections 715 and 716, with the period of that rule cut down; but the fact remains that they were not.[72] The Supreme Court of California has recognized the distinction between the statutory and common law rule. In Estate of Caverly that court said:[73] "Our statute is not, strictly speaking, against perpetuities. It simply prohibits restraints upon alienation. The declaration that a future estate is void in its creation, which thus suspends the power of alienation, is to the same end. It is void if by any possibility it may suspend the absolute power of alienation beyond the prescribed period . . . The doctrine of remoteness, therefore, has no materiality, except as it affects alienability." Unless we are to ignore the distinction recognized by the Supreme Court in the Caverly case, there can be no question as to the constitutionality of section 715 (2) of our Civil Code, since the rules of the code and constitution are separate and unconflicting—and the decision of the District Court of Appeal in the McCray case must be erroneous. That decision, it is submitted, can only be sustained by reasoning that the test of alienability expressed in Civil Code sections 715 and 716 was impliedly adopted by the Constitution of 1879 as the test of what is a "perpetuity".[74]

The Rule of the Walkerly Case

In the McCray case a present interest in trust of real property to last ten years was held invalid because it violated the rule against suspension of the absolute power of alienation. The common law Rule against Remoteness applies only to future interests.[75] As has been

---

[72] Supra, n. 66.

[73] Supra, n. 70.

[74] See O. K. McMurray, supra, n. 61, p. 457. It might even he argued with some plausibility that even though the 1917 amendment is unconstitutional in attempting to authorize a term in gross longer than that permitted at common law, it is not unconstitutional *in toto* but only insofar as it authorizes terms of more than twenty-one years; in other words, that the authorization in the statute for the suspension of the power of alienation for a term not to exceed twenty-five years is separable into authorization of such suspension for all the various possible periods from one day to twenty-five years, and it is only as to the particular periods in excess of twenty-one years that it is invalid. Cf. Harter v. San Jose (1904) 141 Cal. 659, 667, 75 Pac. 344.

[75] Supra, n. 7. Under the will in the McCray case the three sons took remainders in fee following a trust estate for ten years. No qualification of any kind preceded their right to possession of the property except the termination of the trust estate for years. Beyond all question the interest of the sons vested on the death of the testatrix. In the language of section 694 of the Civil Code, there were at the moment the testatrix died "person(s) in being who would have a right . . . to immediate possession of the prop-

before mentioned, restrictions imposed on present interests did not violate the Rule against Remoteness, because such restrictions were usually void as violating the rule against restraints on alienation. Present interests settled in trust did not violate this principle because such interests were freely alienable.[76] It was the duty of the trustee to recognize the rights of the transferee of the beneficiary.

Our statutory rule against suspension of the power of alienation expressly applies to future interests.[77] But that this statutory rule applies to present interests in trust as well as to future interests is the rule announced in the Estate of Walkerly.[78] This is another of the heritages of the New York Revised Statutes. The court in the Walkerly case followed certain New York cases, decided shortly after the New York Revised Statutes were adopted, which held that interests in trust were within the statutory rule against suspension

---

erty, upon the ceasing of the intermediate or precedent interest." Unless the trust in the instant case can be sustained as a spendthrift trust (supra, n. 57) it seems that it might be terminated by the court before the end of the ten year period. See Fletcher v. Los Angeles Trust etc. Bank (1920) 182 Cal. 177, 187 Pac. 425, wherein (at p. 179) the court said: "Where the beneficiaries of a trust are all sui juris, and seek the termination of a trust, a court of equity may terminate the same even if the period for such termination fixed by the instrument creating the trust has not yet arrived." What effect will this decision have upon the question of whether a trust suspends the absolute power of alienation within the meaning of Civ. Code, §§ 715 and 716? See Hohfeld, supra, n. 3, p. 328, n. 53.

[76] Equitable interests are subject to the Rule against Remoteness just as legal interests. But only future interests in trust are properly subject to the rule. Gray, The Rule Against Perpetuities, 2 ed., § 411 et seq. (1906).

The question of whether restraints may be imposed on the enjoyment of present interests is sometimes confused with the Rule against Remoteness. Of this doctrine Gray, supra, says: "§ 121c. A local doctrine, adopted in Massachusetts in 1889, calls for notice. In Claflin v. Claflin [(1889) 149 Mass. 19, 20 N. E. 454] the Supreme Judicial Court of Massachusetts decided that if property is held by trustees for the sole absolute interest of A, but there is a proviso that they shall not transfer it to him until he reaches twenty-five, he cannot demand it till he arrives at that age."

"§ 121f. Now, we may say . . . That the proviso does not violate the Rule against Perpetuities; that the rule is concerned only with the *beginning* of interests; that as the son's interest vests within the prescribed limits the rule is satisfied and has nothing more to do with the matter; but that then another question arises, with which the Rule against Perpetuities has nothing to do, viz.: Can the possession of a vested interest be postponed?"

The California courts seem to have adopted the rule of Claflin v. Claflin in Estate of Yates (1915) 170 Cal. 254, 149 Pac. 555. The court reasoned that as long as the restraint on enjoyment was not for a longer period than allowed by Civil Code, § 715, that the restraint was valid. But it seems that the validity of this trust, as pointed out by Gray in the above quotation, should be determined by consideration entirely apart from the rule against suspension of the power of alienation.

[77] Cal. Civ. Code, § 716.

[78] (1895) 108 Cal. 627, 41 Pac. 772. See discussion of this case and criticism by Hohfeld in his article on "The Need of Remedial Legislation in the California Law of Trusts and Perpetuities," 1 California L. Rev. 305, 320 (1913).

of the power of alienation.[79] The New York cases were decided on the ground that by statute the interest of the beneficiary of a trust was made inalienable and so the power of alienation would be suspended during the term of the trust. The provisions of the California statutes are now somewhat different from the New York Revised Statutes.[80] But section 870 of the Civil Code provides in substance that every transfer or other act of the trustee of a trust of real property in contravention of the trust is void. Estate of Walkerly construed this section to mean that a trustee not expressly authorized could not convey during the period of the trust, and that therefore a trust suspends the power of alienation within the meaning of the Civil Code section 715. This interpretation of the statute which provides that all conveyances by a trustee "in contravention of the trust" are void has been much criticized.[81] It has the somewhat peculiar result of making interests in trust inalienable by statute, a result the settlor may never have intended, and then declaring the whole conveyance void because of the inalienability which the statute imposes.

This broad rule of the Walkerly case has been followed by many subsequent cases in this state.[82] In New York the rule has since been restricted to trusts to pay over the rents and profits of land.[83] Section 870 of the California Civil Code on which the decision of the Walkerly case is based expressly applies only to trusts of real property. It is a question whether a present interest in trust of personal property would be held to violate the rule against suspension of the power of alienation. The Walkerly case is not decisive as to a trust of personal property. There would seem to be no reason to extend the much criticized rule of the Walkerly case beyond the limits to which its reasoning applies.

---

[79] Coster v. Loullard (1835) 14 Wend. 265; Hawley v. James (1836) 16 Wend. 61. See 30 Cyc. 1503 and cases cited. The Revised Statutes, sections 63 and 65, prevented trustee and beneficiary from conveying their interest.

[80] Cal. Civ. Code, § 867, depriving the beneficiary of an income trust of the power to alienate his beneficial interest was crucially modified in 1874, so that "it follows directly from the terms of this amended provision that the interest of a beneficiary under an income trust is now subject to his power of alienation, that is, when the latter is not affirmatively limited by the creating instrument." Hohfeld, supra, n. 78, 323.

[81] Hohfeld, supra, n. 78.

[82] Estate of Heberle (1908) 153 Cal. 275, 95 Pac. 41 (five years); Cambell v. Cambell (1908) 152 Cal. 201, 204, 92 Pac. 184 (thirty years); Estate of Fay (1907) 5 Cal. App. 188, 190, 89 Pac. 1065 (twenty-five years); Crew v. Pratt (1897) 119 Cal. 139, 51 Pac. 38 (seven years).

[83] Wells v. Squires (1909) 117 N. Y. App. Div. 502, 102 N. Y. Supp. 567, affirmed 191 N. Y. 529, 84 N. E. 1122. See Hohfeld, supra, n. 78.

CONCLUSION

It will perhaps be profitable to sum up, rather dogmatically, the foregoing discussion.

1. The landowners of England exhibited a desire to have their estates kept intact and in possession of their families from generation to generation as long as possible. Three principal devices were employed to accomplish this end: (1) they attempted to create indestructible estates tail, (2) they imposed restraints upon the alienation of present interests, and (3) they attempted to create estates which would not vest until some remote time in the future.

2. The common law judges were convinced that the tying up of land for long periods of time was opposed to the spirit of the common law, and they frustrated the attempts above enumerated, as follows: (1) they permitted various devices to be employed whereby estates tail were rendered destructible, (2) they evolved a rule against restraints on alienation which rendered void all unreasonable restraints or conditions against alienation of present interests, and (3) they evolved the Rule against Remoteness whereby all estates which might vest beyond a somewhat arbitrary period (lives in being plus twenty-one years) were rendered void.

3. Unfortunately the word "perpetuities" was used not only in naming the general policy of the common law against the tying up of land for long periods of time, but also, in the phrase the "Rule against Perpetuities" (which rule should have been named, and has herein been called "The Rule against Remoteness"), to designate only one of the means adopted to prevent the tying up of land for long periods.

4. A provision was placed in the California Constitution, Article XX, section 9, that "No perpetuities shall be allowed except for eleemosynary purposes." It is submitted that the provision just quoted was intended to incorporate into our constitution not the technical Rule against Remoteness, but rather the general policy of the common law against the tying up of land for long periods of time. If this contention be sound, then the amendment to Civil Code, section 715, is obviously valid, since it simply enacts a reasonable rule in aid of the policy laid down in the constitution. The rule thus inserted in the code was clearly adopted under the influence of the similar Rule against Remoteness which the common law judges had evolved in aid of the similar common law policy against perpetuities.

5. If it were to be decided that the provision of our constitution

was an incorporation by reference, so to speak, of the technical common law Rule against Perpetuities, then it would be necessary to decide what the common law Rule against Perpetuities was; and the following conclusions are possible: (a) if, as is probably correct, the common law Rule against Perpetuities was simply a rule against remoteness of vesting of interests and had no concern with suspension of the power of alienation, then, clearly, the 1917 amendment to the code section is valid; (b) until recently there has been considerable confusion over the precise test which the Rule against Perpetuities imposed, and at one time the Rule was no doubt understood by some as prohibiting the suspension of the power of alienation beyond the designated period. Although it now seems settled that the Rule is simply against remoteness of vesting, it would nevertheless be logically possible to decide that the authors of our constitution believed, mistakenly or otherwise, that the Rule against Perpetuities was a rule against suspension of the power of alienation, and that in adopting the constitutional provision in question they intended to incorporate into our constitution their understanding of the technical Rule against Perpetuities.

It is apparent that it is only under this last of the several possible interpretations of our constitutional provision, that there is any conflict between that provision and the 1917 amendment to Civil Code, section 715. It follows that the amendment to section 715 is valid unless this somewhat strained interpretation is adopted.

Robert H. Gerdes.

Berkeley, California.