

9/10/68

Memorandum 68-83

Subject: Suggested New Topic--Rule Against Perpetuities

The staff suggests that the Commission should request authority to make a study of whether the rule against perpetuities should be revised. The present statement of the rule was enacted upon recommendation of the Law Revision Commission in 1959 but was amended in 1963 to create serious problems. Several recent law review articles (cited in Exhibit I attached) suggest that study of the 1963 amendments is needed.

Attached as Exhibit I is the statement that could be included in our Annual Report if the Commission determines that it wishes to study this topic.

Respectfully submitted,

John H. DeMouly  
Executive Secretary

EXHIBIT I

A Study to Determine Whether the Rule Against Perpetuities Should Be  
Revised

The rule against perpetuities is designed to prevent unreasonable control of the future ownership of property. The basic rule in California requires that every interest in property "vest" not later than 21 years after some life in being at the time when the interest is created.<sup>1</sup> Serious problems were created in 1963 when Civil Code Section 715.8 was added, unintentionally furnishing a definition of "vesting" that permits the creation of interests of perpetual existence. Section 715.8 provides that an interest in property is vested if "there are persons in being, irrespective of the nature of their respective interests, who together could convey a fee simple title" to the property. The following is merely one example of a very simple device that conforms perfectly to Section 715.8 but completely thwarts the purpose of the rule against perpetuities.

T places property in trust, directing the trustee to pay the income from the property to T's issue from time to time living. When there is no issue of T surviving, the trustee is to convey the property to Stanford University. The adult income beneficiaries and Stanford University, acting jointly, have the power to convey fee simple title to the property.

It would often be impractical to secure the consent of even all the adult income beneficiaries, but the existence of the adverse interest in Stanford virtually precludes such a conveyance. Nevertheless, under Section 715.8 the interests are "vested," and the rule against perpetuities is "satisfied."

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<sup>1</sup> Cal. Civil Code § 715.2.

The existing statute clearly invites not only undue fettering of property but also schemes for avoidance of both federal and state taxes. It seems imperative, therefore, that a study be made to determine whether the California statute stating the rule against perpetuities should be revised.<sup>2</sup>

Prepared by:

Jack Horton  
Junior Counsel

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<sup>2</sup> For an article strongly recommending the repeal of Civil Code Section 715.8, see Luedemann, California Revises the Rule Against Perpetuities-- Again, 16 Stanford L. Rev. 177 (1963). See also Fletcher, A Rule of Discrete Invalidity: Perpetuities Reform Without Waiting, 20 Stanford L. Rev. 459 (1968).