

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION AND STUDY

relating to

The "Vesting" of Interests Under
the Rule Against Perpetuities

October 1969

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
Stanford, California 94305

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NOTE

This pamphlet begins on page 901. The Commission's annual reports and its recommendations and studies are published in separate pamphlets which are later bound in permanent volumes. The page numbers in each pamphlet are the same as in the volume in which the pamphlet is bound. The purpose of this numbering system is to facilitate consecutive pagination of the bound volumes. This pamphlet will appear in Volume 9 of the Commission's REPORTS, RECOMMENDATIONS, AND STUDIES.

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

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Ex Officio

October 4, 1969

To HIS EXCELLENCY, RONALD REAGAN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The California Law Revision Commission was authorized by Resolution Chapter 224 of the Statutes of 1969 to make a study to determine whether Civil Code Section 715.8 (rule against perpetuities) should be revised or repealed.

The Commission herewith submits its recommendation and a research study relating to this subject. The study was prepared by Mr. Clarence B. Taylor, a member of the Commission's legal staff. Only the recommendation (as distinguished from the research study) expresses the views of the Commission.

Respectfully submitted,

SHO SATO
Chairman

RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

relating to

The "Vesting" of Interests Under the Rule Against Perpetuities

In 1969, the Legislature directed the Law Revision Commission to determine "whether Civil Code Section 715.8 (rule against perpetuities) should be revised or repealed." Section 715.8 provides:

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

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

Section 715.8, of course, is neither *the* Rule Against Perpetuities¹ nor a traditional component of that rule. Rather, it is a novel definition of "vesting" for the purposes of the rule which results in a unique and conceivably far-reaching exemption from the rule as applied at common law.

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

In the light of other legislation and a recent California Supreme Court decision, commercial transactions are adequately protected independently of Section 715.8. In *Wong v. Di Grazia*,³ the court aban-

¹ The common law Rule Against Perpetuities is expressly made applicable in California by Civil Code Section 715.2 which provides, in part: "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. . . ."

² The possibility was not a remote one. Quite recently, the Court of Appeals in *Haggerty v. City of Oakland*, 161 Cal. App.2d 407, 326 P.2d 957 (1958), had remorselessly applied the rule to invalidate an "on completion" lease. In *Wong v. Di Grazia*, 60 Cal.2d 525, 386 P.2d 817, 35 Cal. Rptr. 241 (1963), the Supreme Court not only expressly overruled, but disapproved the *entire* approach in *Haggerty*.

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

done the "fantastic possibilities" test and adopted a rule of reasonable construction. The court stated:⁴

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

Other legislation also prevents the frustration of commercial transactions. Civil Code Section 715.5 confers the power of *cy pres* upon the courts and therefore should avoid most of the harsh results obtained at common law. Section 715.5 requires an interest that violates the rule to be *construed or reformed* to carry out the intent of the parties. In addition, Civil Code Section 715.6 provides an alternative measure of the validity of an interest. Under that section, an interest which will vest, if at all, within 60 years of the creation of the interest is valid. This alternative measure is applicable even though the instrument does not so specify. In *Wong*, the California Supreme Court made it clear that it would invoke these ameliorative techniques to avoid the harshness characterized by earlier mechanistic applications of the rule to commercial transactions.⁵

Section 715.8 is not only unnecessary to achieve its objective, but its application exceeds the purpose for its enactment. Aside from commercial transactions, Section 715.8 incorrectly exempts several other kinds of transactions and arrangements, including private trusts, from the operation of the rule. This serious defect is noted in a recent survey of legal problems prepared for the Assembly Committee on Judiciary; in conclusion, the survey quotes Professor Dukeminier's statement that: "All the perpetuities experts in the state would vote to get rid of one confusing statute, California Civil Code, Section 715.8."⁶

The confusion arises principally from a basic conflict between a literal application of the section and the accepted policy underlying the Rule Against Perpetuities. It seems that some compromise between the

⁴ *Id.* at 533-534, 386 P.2d at 823, 35 Cal. Rptr. at 247 (footnote omitted).

⁵ The indicated application of these ameliorative doctrines can be illustrated by considering several examples of common perpetuities violations. Options to purchase property may not be limited by time and therefore violate the rule. For example, O grants to A, his heirs, and assigns an option to purchase Blackacre for \$50,000. Although this option violates the rule, it does not follow that the transaction will be declared void. Under the *cy pres* power, the court has the power to reform the instrument by limiting the option to 21, or even 60, years if this would carry out the intent of the parties. This reformation technique could also be applied to transfers contingent upon an event not related to any life in being, such as a lease to commence upon completion of a building or the discovery of oil.

⁶ R. GOLDFARB & L. SINGER, PROBLEMS IN THE ADMINISTRATION OF JUSTICE IN CALIFORNIA 62 (1969). This general conclusion is also supported by the correspondence received by the Commission on this topic and by the scholarly writing directed to the section. See Dukeminier, *Perpetuities Revision in California: Perpetual Trusts Permitted*, 55 CAL. L. REV. 678 (1967); Simes, *Perpetuities in California Since 1951*, 18 HASTINGS L.J. 247 (1967); Comment, *California Revises the Rule Against Perpetuities—Again*, 16 STAN. L. REV. 177 (1963); Comment, *The Quest for the Best Vest*, 37 SO. CAL. L. REV. 283 (1964).

two would have to be achieved, but the statute itself furnishes no guidelines towards this end and leaves to the courts the task of resolving the conflict without legislative direction or assistance.

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

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

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

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

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

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

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

Comment. Section 715.8 formerly provided an alternative test for the "vesting" of future interests under the common law Rule Against Perpetuities (Civil Code Section 715.2). See *Recommendation and Study Relating to the "Vesting" of Interests Under the Rule Against Perpetuities*, 9 CAL. L. REVISION COMM'N REPORTS 901, 905 (1969). The section was intended to free various commercial transactions from a mechanistic and capricious application of the common law rule. See Dukeminier, *Perpetuities Revision in California: Perpetual Trusts Permitted*, 55 CAL. L. REV. 678 (1967); Simes, *Perpetuities in California Since 1951*, 18 HASTINGS L. J. 247 (1967); Comment, *California Revises the Rule Against Perpetuities—Again*, 16 STAN. L. REV. 177 (1963); Comment, *The Quest for the Best Vest*, 37 SO. CAL. L. REV. 283 (1964). The section was made largely superfluous by the decision in *Wong v. Di Grazia*, 60 Cal.2d 525, 386 P.2d 817, 35 Cal. Rptr. 241 (1963), and by other reforms of the common law rule introduced in 1963. See, e.g., CIVIL CODE §§ 715.5, 715.6. Repeal of Section 715.8 leaves applicable the common law conception of "vesting" for purposes of Sections 715.2, 771, and other related sections. See 6 AMERICAN LAW OF PROPERTY § 24.3 (1952); J. MORRIS & W. LEACH, THE RULE AGAINST PERPETUITIES, Ch. 2 (2d ed. 1962). Needless to say, repeal of the section is not intended to revitalize certain anachronistic decisions rendered before, and overruled by, *Wong v. Di Grazia*, *supra*.

A STUDY RELATING TO THE "VESTING" OF INTERESTS UNDER THE RULE AGAINST PERPETUITIES *

by Clarence B. Taylor **

Introduction

In 1969, the Legislature directed the Law Revision Commission to determine "whether Civil Code Section 715.8 (rule against perpetuities) should be revised or repealed."¹ Section 715.8 provides:

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

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

Section 715.8, of course, is neither *the* Rule Against Perpetuities² nor a traditional component of that rule. Rather, it is a novel definition of "vesting" for the purposes of the rule which results in a unique and conceivably far-reaching exemption from the rule as applied at common law. Notwithstanding its comparatively recent (1963) enactment,³ the admittedly worthy objective sought by its enactment, and the fact that it has not been judicially applied or construed, Section 715.8 should be repealed. The repeal of Section 715.8, together with the substantial changes effected in 1959 and 1963, will bring the California legislation in this field to a fair state of order, both in terms of underlying policy and clarity of codification. Further innovation should be limited, at least for the foreseeable future, to measures that deal with specific factual situations and that have a clearly discernable effect.

A recent survey of legal problems prepared for the Assembly Committee on Judiciary quotes Professor Dukeminier's statement that: "All the perpetuities experts in the state would vote to get rid of one confusing statute, California Civil Code, Section 715.8."⁴ Although com-

* This article was prepared to provide the California Law Revision Commission with background information on this subject. However, the opinions, conclusions, and recommendations contained herein are entirely those of the author and do not necessarily represent or reflect the opinions, conclusions, or recommendations of the California Law Revision Commission.

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¹ Cal. Stats. 1969, Res. Ch. 224.

² The common law Rule Against Perpetuities is expressly made applicable in California by Civil Code Section 715.2 which provides, in part: "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"

³ Cal. Stats. 1963, Ch. 1455, p. 3009, § 7.

⁴ R. GOLDFARB & L. SINGER, PROBLEMS IN THE ADMINISTRATION OF JUSTICE IN CALIFORNIA 62 (1969).

plete unanimity of opinion is hardly to be expected in this field, this general conclusion is also supported by correspondence received by the California Law Revision Commission⁵ and by the scholarly writing directed to Section 715.8.⁶ However, to explain the objections that have been raised to Section 715.8 and the conclusion that the section should be repealed, it is necessary to set forth briefly California's protracted experiment with perpetuities legislation, to refer to the widespread effort to "reform" the Rule Against Perpetuities, and to recount the particular background of Section 715.8.

Historical Evolution From 1849 to 1963

Since 1849, the California Constitution has disallowed "perpetuities" except those for "eleemosynary purposes."⁷ The possible meanings of this prohibition have been much discussed, but its exact meaning has never been declared by the California Supreme Court. It may mean that the common law rule is enacted in all of its details or it may merely declare a general policy against the "fettering" of property for an unreasonable time. The best guess, however, seems to be that the constitutional provision ordains the common law Rule Against Perpetuities, but that it does so only in substance, and the Legislature may modify the rule in some particulars so long as the result can still be said to be the common law rule.⁸

This uncertainty as to the meaning of the constitutional provision did not long deter the Legislature from experimenting with novel

⁵ In connection with this study, the views of practicing estate planners, as well as law professors, concerning the repeal of Section 715.8 were solicited. The tally was overwhelmingly in favor of repeal—of the 43 persons who responded, only four opposed repeal. More importantly, the opposition apparently was based on a belief that the section is necessary to insulate commercial transactions from the Rule Against Perpetuities. The study indicates that this is not the case.

The majority favoring repeal included Professor Dukeminier, Dean Halbach, Professor Hovey, Dean Maxwell, and Professors Powell and Simes, as well as lawyers throughout the state. See, e.g., letters on file at the offices of the California Law Revision Commission from: Harold I. Boucher (Pillsbury, Madison & Sutro, San Francisco), John R. Cohan (Irell & Manella, Los Angeles), J. N. DeMeo (Santa Rosa), William A. Farrell (Brobeck, Phleger & Harrison, San Francisco), Donald E. Glass (Teeters, Palmer, Kjos & Glass, Palo Alto), Paul T. Guinn (Nossaman, Waters, Scott, Krueger & Riordan, Los Angeles), Claude H. Hogan (Pillsbury, Madison & Sutro, San Francisco), Frank L. Humphrey (O'Melveny & Myers, Los Angeles), William S. Johnstone, Jr. (Hahn & Hahn, Pasadena), Hugh L. Macneil (O'Melveny & Myers, Los Angeles), Philip P. Martin, Jr. (Southern California First National Bank, San Diego), W. S. McClanahan (United California Bank, Los Angeles), Edwin McInnis (O'Gara & McGuire, San Francisco), Paul A. Peterson (White, Price, Froehlich & Peterson, San Diego), John T. Pigott (Gibson, Dunn & Crutcher, Los Angeles), Francis Price (Price, Postel & Parma, Santa Barbara), Richard Raoul-Duvall (Tobin & Tobin, San Francisco), David L. Samuels (Palo Alto), Peter J. Samuelson (Griffith & Thornburgh, Santa Barbara), Robert P. Schifferman (Los Angeles), Leonard A. Shelton (Allard, Shelton & O'Connor, Pomona), Mortimer Smith III (McCutchen, Doyle, Brown & Eriksen, San Francisco), Leon E. Warmke (Warmke & Konig, Stockton), Philip H. Wile (Thomas, Snell, Jamison, Russell, Williamson & Asperger, Fresno).

⁶ Section 715.8 is discussed in detail in Dukeminier, *Perpetuities Revision in California: Perpetual Trusts Permitted*, 55 CAL. L. REV. 678 (1967); Simes, *Perpetuities in California Since 1951*, 18 HASTINGS L. J. 247 (1967); Comment, *California Revises the Rule Against Perpetuities—Again*, 16 STAN. L. REV. 177 (1963); Comment, *The Quest for the Best Vest*, 37 SO. CAL. L. REV. 283 (1964).

⁷ CAL. CONST., Art. XI, § 16 (1849); CAL. CONST., Art. XX, § 9 (1879) ("No perpetuities shall be allowed except for eleemosynary purposes.").

⁸ See Simes, *supra* note 6, at 259-261.

restrictions upon perpetuities, restraints on alienation, suspensions of the power of alienation, accumulations of income, and related matters. Even before adoption of the codes in 1872, legislation touched this field;⁹ and a more complete scheme was attempted with the enactment of the Civil Code. The "rule against suspension of the absolute power of alienation" was borrowed from New York and distributed in various former sections of the Civil Code.¹⁰ The essence of the suspension rule was contained in former Sections 715 and 716 which provided, respectively, that: "The absolute power of alienation can not be suspended, by any limitation or condition whatever, for a longer period than [that prescribed]" and "Every future interest is void in its creation which, by any possibility, may suspend the absolute power of alienation for a longer period than [that prescribed]." Significantly, former Section 716 also provided that: "Such power of alienation is suspended when there are no persons in being by whom an absolute interest in possession can be conveyed." The similarity of this provision to the first paragraph of Section 715.8 should be noted.

Although the Legislature twice changed the allowable period under the suspension rule,¹¹ that rule remained in existence until 1959.¹² In general, the suspension rule gave rise to difficulties of interpretation at least as great as those that arise under the common law Rule Against Perpetuities. As Dean Halbach has observed, "Over the years the pattern was amended and patched, a process that had the over-all appearance of a struggle to be freed from a straitjacket."¹³ Moreover, the Civil Code left entirely unresolved the question whether, in addition to the suspension rule, California also had the Rule Against Perpetuities as a matter of common law. The courts during this period applied both rules.¹⁴ The Legislature resolved the issue in 1951 by enacting the "Model Rule Against Perpetuities Act" proposed by the Commissioners on Uniform State Laws. The model act simply makes effective in this state the "American common-law rule against perpetuities" and is embodied in its entirety in Section 715.2.

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

As best as could be determined, after 1951, the suspension-of-the-power-of-alienation provisions added nothing to the statutorily adopted common law Rule Against Perpetuities except that the suspension rule made void certain vested, beneficial interests under private trusts that

⁹ See *Morrison v. Rossignol*, 5 Cal. 64 (1855).

¹⁰ See Fraser & Sammis, *The California Rules Against Restraints on Alienation, Suspension of the Absolute Power of Alienation, and Perpetuities*, 4 HASTINGS L.J. 101 (1953).

¹¹ Cal. Stats. 1917, Ch. 539, p. 699, § 1; Cal. Stats. 1951, Ch. 1463, p. 3442, § 1.

¹² Cal. Stats. 1959, Ch. 470, p. 2405, § 1.

¹³ CALIFORNIA WILL DRAFTING, Halbach, *The Rule Against Perpetuities*, § 15.5 (Cal. Cont. Ed. Bar 1965).

¹⁴ *E.g.*, *Dallapi v. Campbell*, 45 Cal. App.2d 541, 114 P.2d 646 (1941).

would have been valid under the common law rule.¹⁵ And, needless to say, endless confusion arose from the dual existence of the distinct, but overlapping, rules. Accordingly, in 1959, the Legislature, acting on the recommendation of the Law Revision Commission,¹⁶ repealed all provisions relating to suspension of the power of alienation. The common law Rule Against Perpetuities (Civil Code Section 715.2) was left intact. The single additional change made at that time was the enactment of Civil Code Section 771 to deal specifically with the duration and termination of private trusts. Section 771 was added because, before 1959, the validity of beneficial interests under trusts had been determined by application of the suspension rule, and there was no judicial authority in California as to the way in which the common law rule affects the duration of private trusts.¹⁷ Section 771 was framed to incorporate the much-discussed "wait and see" application of the perpetuities restriction and provides, in effect, that one must wait and see whether a trust exists longer than lives in being and 21 years. If it does so, it is thereafter terminable by the beneficiaries or other interested parties.

Thus, for a period following 1959, California had only the common law rule (Section 715.2) and a special "wait and see" provision relative to the duration and termination of private trusts (Section 771). But this state of affairs was short lived. In 1958, the Court of Appeal rendered the widely noted decision in *Haggerty v. City of Oakland*.¹⁸ In a taxpayer's suit, the court held invalid a lease from the city to a concessionaire to begin after completion of a certain building. In writing its opinion, the majority made the dubious choice of resurrecting Professor Gray's infamous precept of "remorseless application" of the perpetuities rule¹⁹ and of forcefully reminding the bar that the rule deals with possibilities, however remote, rather than with either probabilities or actualities. This, however, was not the aspect of the case that most disturbed practitioners. Rather, the decision served as a jolting reminder that, although the 17th century rule appertained as a practical matter only to the devolution of landed wealth, the modern rule applies to any indefinitely "contingent" interest in property and therefore must concern the commercial lawyer as well as the estate planner. No hearing was requested in the Supreme Court; the city and the concessionaire simply remade the lease. Only five years later in *Wong v. Di Grazia*,²⁰ the Supreme Court expressly overruled the result in *Haggerty* and broadly disapproved the *entire* approach of that case in applying the rule to "commercial transactions." Nonetheless, *Haggerty* had made its impression and, at least to some California lawyers, had evoked the nostalgic memory that the "on completion" lease presumably would

¹⁵ See Turrentine, *The Suspension Rule and Other Statutory Restrictions on Trusts and Future Interests in California*, 9 HASTINGS L.J. 262 (1958).

¹⁶ See *Recommendation and Study Relating to Suspension of the Absolute Power of Alienation*, 1 CAL. L. REVISION COMM'N REPORTS at G-1 (1957).

¹⁷ See *id.* at G-8.

¹⁸ 161 Cal. App.2d 407, 326 P.2d 957 (1958); noted in Leach, *Perpetuities: New Judicial Absurdity, Judicial and Statutory Corrections*, 73 HARV. L. REV. 1318 (1960); and Notes, 47 CAL. L. REV. 197 (1959), 10 HASTINGS L.J. 439 (1959), 6 U.C.L.A. L. REV. 165 (1959).

¹⁹ See J. GRAY, *THE RULE AGAINST PERPETUITIES* § 629 (4th ed. 1942); compare 4 RESTATEMENT OF PROPERTY § 375 (1944).

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

have been valid under the old suspension rule if that rule had ever existed to the exclusion of the Rule Against Perpetuities.

Next, in 1961, the California Supreme Court was presented with a legal malpractice suit based upon an alleged violation of the Rule Against Perpetuities. In *Lucas v. Hamm*,²¹ a bequest allegedly failed because it was made to take effect five years after the distribution of an estate. Although the alleged flaw was of the simplest kind—running afoul of the so-called administrative contingency application of the rule—the defendant was completely absolved, the court observing that:²²

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

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

Finally, beginning in the 1950's, there had been a veritable deluge of literature in which legal scholars had advocated and commented upon reform of the common law rule.²³

Against this background, the California Legislature dealt with the perpetuities field in 1963 by enacting Section 715.8 as well as several other provisions.²⁴

The Legislation of 1963

The innovations of 1963 were proposed by a special committee of the State Bar and were enacted as proposed. A brief report²⁵ of the committee clarifies the objectives sought to be attained by the legislation. The report referred to *Haggerty v. City of Oakland* and noted that, "This opinion came as a shock to the bar, for leases of this same commercial character were of common occurrence." The report also observed that:

Whether in common law or statutory form, the rule against perpetuities is designed, and properly so, to prevent the tying up of landed estates for long or indefinite periods of time. It is not designed to hamper commercial transactions. It is the purpose of the proposed Section 715.8 to be added to the Civil Code, to eliminate from the rule virtually all commercial and contract transactions inasmuch as there are ordinarily in such cases parties in being who can modify or terminate the contractual relationships. . . .

* * * * *

Modern property transactions should not be hampered by these very old decisions [under the rule]. Commercial transactions never were intended to be affected by them.

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

²² *Id.* at 592, 364 P.2d at 690, 15 Cal. Rptr. at 826.

²³ Although this literature defies summary, the remedial ideas it has produced are succinctly set forth in the third edition of the "Perpetuity Legislation Handbook"—promulgated by the Committee on Rules Against Perpetuities of the American Bar Association Section of Real Property, Probate and Trust Law—and republished in 2 REAL PROP., PROB. & TRUST J. 176 (1967). The handbook includes a selective bibliography of 51 law review articles and 15 textbooks on reforming the Rule Against Perpetuities.

²⁴ Cal. Stats. 1963, Ch. 1455, p. 3009, §§ 1-8. See also the special provisions enacted in 1969 relating to the permissible period under the Rule Against Perpetuities when an interest is sought to be created by the exercise of a power of appointment. CIVIL CODE §§ 1391.1-1391.2.

²⁵ The report of the committee is reprinted in full in Comment, *The Quest for the Best Vest*, *supra* note 6, at 284-285 n.8 (1964).

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

In addition to introducing a novel concept of vesting by adding Section 715.8 and repealing former Sections 693, 694, and 695, the 1963 legislation made four other notable changes. The legislation (1) requires the so-called *cy pres* reformation approach in applying the common law rule,²⁶ (2) provides an alternative 60-year period in gross as the permissible period,²⁷ (3) abolishes the so-called unborn widow snare in the operation of the rule,²⁸ and (4) adds an extraordinary "savings clause."²⁹

The *cy pres* principle introduced in Civil Code Section 715.5 is generally regarded as the most sweeping of the proposed reforms of the Rule Against Perpetuities because it requires the court in all cases first to construe, and then to reform, any interest that violates the rule—the objective of the construction or reformation being to declare such disposition as will most nearly effectuate the grantor's stated or inferred intention within the limits of the rule.³⁰ It is generally regarded as a more cogent reform than the controversial "wait and see" doctrine because it affords a basis for immediate relief as to a disposition whereas under the "wait and see" principle one must literally wait and see if events occurring after the disposition cause a questionable interest to fail, to vest, or become certain to vest within the perpetuity period.³¹

The 60-year period "in gross" provided by Civil Code Section 715.6 is an innovation seldom made in connection with the common law rule, but the California version of the alternative period is thought to be an especially effectual one because there is no requirement that the instrument specify that this 60-year period is being used or that it is being used to the exclusion of the common law period.³²

Apart from the new concept of vesting, the most remarkable feature of the 1963 legislation was the uncodified savings clause which provides that:³³

²⁶ Civil Code Section 715.5 provides:

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

²⁷ Civil Code Section 715.6 provides:

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

²⁸ Civil Code Section 715.7 provides:

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

²⁹ Cal. Stats. 1963, Ch. 1455, p. 3009, § 8.

³⁰ See Browder, *Construction, Reformation, and the Rule Against Perpetuities*, 62 MICH. L. REV. 1 (1963); Leach, *Perpetuities: Cy Pres on the March*, 17 VAND. L. REV. 1381 (1964).

³¹ See 2 REAL PROP., PROB. & TRUST J., *supra* note 23, at 181. See also Fletcher, *A Rule of Discrete Invalidity: Perpetuities Reform Without Waiting*, 20 STAN. L. REV. 459 (1968).

³² See Simes, *supra* note 6, at 254.

³³ Cal. Stats. 1963, Ch. 1455, p. 3009, § 8.

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

On the surface, this section appears to be merely an unusual "retroactivity" or "effective date" clause, but that is not its purpose or effect. Its apparent purpose was to make sure that all of the legislation of 1963 would operate to relax, rather than make more stringent, the then-existing perpetuities restrictions. In other words, the 1963 legislation can "save" or effectuate a disposition, but it can never operate to invalidate a disposition that would have been effective under the rules that existed before 1963 (essentially, the common law rule in Section 715.2 and the trust duration provision in Section 771).

The effect of the clause, however, gives California a dual set of perpetuities rules again. But this time, unlike the long era in which an interest had to satisfy *both* the Rule Against Perpetuities and the suspension rule, the interest need satisfy *only one rule or the other*. The scheme goes awry, however, because the new definition of "vested" in Section 715.8 (interest conveyable by one or more persons) is apposite only to the discarded suspension rule; the only definition of "vested" that makes sense in connection with the perpetuities rule (not "contingent") was expressly repealed.

The New Concept of Vesting

The change made in 1963 by enactment of Section 715.8 and repeal of former Sections 693, 694, and 695 has been described as "thoroughly unique and completely revolutionary"³⁴ and as "drastic and sweeping."³⁵ To understand this emphasis, it is necessary to recall that the Rule Against Perpetuities (as continued in effect by Section 715.2) is a rule forbidding the creation of "contingent" interests that may "vest" too remotely. It is not a rule against the creation of interests which may last too long nor against the imposition of direct restraints on alienation. More pertinently, it is not a rule against suspension of the power of alienation through the creation of interests in unborn or unascertained persons. Remotely contingent interests questionable under the rule may be, and usually are, freely alienable at all times.³⁶

Applying the rule has always involved the initial constructional problem of determining whether an interest is vested, vested subject to divestment, or contingent. This problem of construction is especially acute in dealing with inexpertly drawn wills and conveyances and with such interests as leases,³⁷ options,³⁸ and oil and gas interests.³⁹ Nevertheless, for centuries, the term "vested" has basically meant "not subject to a condition precedent," and "contingent" has meant "sub-

³⁴ Simes, *supra* note 6, at 256.

³⁵ Dukeminier, *supra* note 6, at 678.

³⁶ See J. MORRIS & W. LEACH, *THE RULE AGAINST PERPETUITIES*, Ch. 1 (2d ed. 1962); Simes, *supra* note 6, at 256.

³⁷ See, e.g., Fisher v. Parsons, 213 Cal. App.2d 829, 29 Cal. Rptr. 210 (1963).

³⁸ See Berg, *Long-Term Options and the Rule Against Perpetuities*, 37 CAL. L. REV. 1, 235 (1949).

³⁹ See Jones, *The Rule Against Perpetuities As It Affects California Oil and Gas Interests*, 7 U.C.L.A. L. REV. 261 (1960).

ject to a condition precedent." In general, an interest is "vested" for the purposes of the rule when the recipient is ascertained, any condition precedent is satisfied, and—in the case of class gifts—the members and their amounts or fractions have been determined.⁴⁰ These concepts were reflected in former Civil Code Sections 693, 694, and 695, but those sections were repealed in the legislation of 1963.⁴¹ Hence, "it would appear that, under the guise of a new definition of vested and contingent future interests, the new section has in fact eliminated any rule against remoteness of vesting, and has provided a test of suspension of the power of alienation in determining the validity of future interests."⁴² In terms of California's experience with perpetuities legislation, as Professor Simes notes, "This is a step backward."⁴³

The principal change made by Section 715.8 appears to be this: Future interests are valid—however remotely contingent they may be—if there are ascertainable persons who collectively can "convey a fee simple title." Examples given of this novel operation of the section have included the following:

- (1) "A conveys land to B in fee simple, but if the land is ever used for business purposes, then to C in fee simple."⁴⁴
- (2) "T to A in fee simple until Puerto Rico becomes an American state, then to B until Canada becomes a part of the United States, and then to C, but if the events happen in the opposite sequence, then to D."⁴⁵

The historical irony of this result is that Section 715.8 restores the common law position after so-called executory interests were recognized as indestructible but before the Rule Against Perpetuities had its beginning in the Duke of Norfolk's case (1682).⁴⁶ The policy objection to this result is that a technical "conveyability" of fragmented interests does not prevent the practical "fettering" of specific property

⁴⁰ See J. MORRIS & W. LEACH, *supra* note 36, at 38. The following examples are given in 6 AMERICAN LAW OF PROPERTY § 24.3 (1952):

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

* * * * *

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

⁴¹ Cal. Stats. 1963, Ch. 1455, p. 3009, §§ 1-3. Those repealed sections provided:

693. KINDS OF FUTURE INTERESTS. A future interest is either:

1. Vested; or,
2. Contingent.

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

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

⁴² Simes, *supra* note 6, at 257.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ Comment, *The Quest for the Best Vest*, *supra* note 6, at 288.

⁴⁶ See J. MORRIS & W. LEACH, *supra* note 36, at 3-13.

and this, in addition to restricting "dead hand control," was the reason the courts created the common law rule.⁴⁷

The second paragraph of Section 715.8 provides, in effect, that an interest is not invalid because of its duration, and, therefore, merely states a well-settled precept in applying the common law rule. That rule is satisfied if an interest must "vest" within the perpetuity period; it is not concerned with the duration of the interest and it does not require that the interest come to an end within the period.⁴⁸ If the law were otherwise, of course, all "fee simple" interests would fail as would lesser, long-term interests such as leases, profits, easements, restrictive covenants, and the like.⁴⁹

Application of Section 715.8 to Trusts and Powers of Appointment

The most serious practical objection that has been raised to Section 715.8 is the possibility that it may permit the creation of private trusts that can continue indefinitely and avoid estate and gift taxes throughout the existence of the trust.⁵⁰ If the section has this effect, the result is anomalous because the old rule against suspension of the power of alienation (seemingly resurrected by Section 715.8) operated *more stringently* in its application to trusts than does the common law rule and Civil Code Section 771 (private trust duration). Indeed, that operation of the suspension rule was the principal reason for its being repealed.⁵¹ It is possible that, in view of the origin of Section 715.8 and notwithstanding its literal import, the courts will construe it only as exempting certain "commercial transactions" and as having no operation in the field of "trusts and estates."⁵²

Nevertheless, if applied to trusts, it has been convincingly shown that Section 715.8 logically can be construed in only one of three ways: (1) it may be satisfied if the trustee has a power of sale; (2) it may be satisfied if one or more persons has the power to "convey" a fee simple *without consideration*—a power on the part of the trustee to convey the trust assets to the trust beneficiaries would satisfy this requirement;

⁴⁷ See note 6, *supra*, and J. MORRIS & W. LEACH, *supra* note 36, at 13 (2d ed. 1962).

See also L. SIMES & A. SMITH, *FUTURE INTERESTS* §§ 1411-1439 (2d ed. 1956).

⁴⁸ See J. MORRIS & W. LEACH, *supra* note 36, at 95 (2d ed. 1962).

⁴⁹ It may be that the paragraph was intended to validate such commercial transactions as very long-term options. It will not have this effect, however, because the perpetuities objection to a temporally unlimited option is not to the timelessness of the power to demand the property. Rather, the objection is that a contingent, equitable interest in the property will "vest" only upon the possibly remote exercise of the option. It seems more likely that the paragraph was intended to overcome a few appellate decisions in which the courts have *construed* certain instruments as creating contingent interests that arise only in the future, rather than as being present interests subject to divestment or uncertain duration. See, e.g., *Victory Oil Co. v. Hancock Oil Co.*, 125 Cal. App.2d 222, 270 P.2d 604 (1954); *Epstein v. Zahloute*, 99 Cal. App.2d 738, 222 P.2d 318 (1950). Compare *Brown v. Terra Bella Irrigation Dist.*, 51 Cal. 2d 33, 330 P.2d 775 (1958); *Fisher v. Parsons*, 213 Cal. App.2d 829, 29 Cal. Rptr. 210 (1963). It seems certain, however, that merely restating the settled common law principle will not have the intended effect. Moreover, the dubious decisions arose under the old suspension of the power of alienation rule, and by seemingly resurrecting that rule, Section 715.8 may do more to revive such decisions than to avoid the occurrence of such decisions in the future.

⁵⁰ See, in particular, *Dukeminier*, *supra* note 6.

⁵¹ See *Turrentine*, *supra* note 15; *Fraser & Sammis*, *supra* note 10.

⁵² See *Wong v. Di Grazia*, 60 Cal.2d 525, 386 P.2d 817, 35 Cal. Rptr. 241 (1963); *Prime v. Hyne*, 260 Cal. App.2d 397, 67 Cal. Rptr. 170 (1968).

or (3) it may be satisfied only if one or more persons has the power to convey a fee simple title to anyone without consideration to anyone. It has been suggested that the most restrictive construction of the section would still permit the following trust: ⁵³

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

These powers of the "issue" and the Regents technically may permit the "conveyance" of a "fee simple," but it seems obvious that with such trusts there is no longer "a fair balance between the desires of members of the present generation, and similar desires of succeeding generations, to do what they wish with the property which they enjoy." ⁵⁴

Although the power of these income beneficiaries would satisfy Section 715.8, it would not be a taxable "general power of appointment" under the Internal Revenue Code since it can be exercised only with the consent of the Regents who have a substantial adverse interest. ⁵⁵ It has been urged that this tax avoidance possibility may lead to restrictive tax legislation (analogous to Internal Revenue Code Section 2041(a)(3) which was designed to deal with "Delaware Trusts") that will more than overcome any benefit afforded by Section 715.8. ⁵⁶

With respect to powers of appointment generally, *one* person who holds a general power is treated, both for tax and perpetuities purposes, as an absolute owner. This principle has wide and fairly clear application in the fields of powers and taxation as well as perpetuities. Section 715.8 seemingly makes the precept applicable, whatever number of persons hold the power and however adverse their interests may be. Thus, Section 715.8 conflicts with such related provisions as recently-enacted Civil Code Section 1391.1, which governs the application of the

⁵³ See Dukeminier, *supra* note 6, at 683 (footnote omitted).

⁵⁴ See L. SIMES, PUBLIC POLICY AND THE DEAD HAND 58 (1955). See also J. MORRIS & W. LEACH, *supra* note 36, at 15, 17:

Whatever may have been the position in past centuries, it is plain that the modern Rule [Against Perpetuities] is primarily directed not against the inalienability of specific land but against the remote vesting of interests in a shifting fund.

* * * * *

It is a natural human desire to provide for one's family in the foreseeable future. The difficulty is that if one generation is allowed to create unlimited future interests in property, succeeding generations will receive the property in a restricted state and thus be unable to indulge the same desire. The dilemma is thus precisely what it has been throughout the history of English law, namely, how to prevent the power of alienation from being used to its own destruction.

⁵⁵ INT. REV. CODE of 1954, § 678 (income tax) (donees not treated as owners for income tax purposes because the power is lodged in more than one person); Treas. Reg. § 20.2041-3(c)(2) (1958) (estate tax); Treas. Reg. § 25.2514-3(b)(2) (1958) (gift tax).

⁵⁶ See Dukeminier, *supra* note 6, at 684 n.15.

Rule Against Perpetuities to the *exercise* of powers,⁵⁷ and the time-honored provision in Civil Code Section 716, which excludes from the perpetuities period any period during which *one* person may totally "destroy" the questioned interest.⁵⁸

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

Conclusion

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

In the light of other legislation and a recent California Supreme Court decision, commercial transactions are adequately protected independently of Section 715.8. In *Wong v. Di Grazia*,⁵⁹ the court abandoned the "fantastic possibilities" test and adopted a rule of reasonable construction. The court stated:⁶⁰

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

Other legislation also prevents the frustration of commercial transactions. Civil Code Section 715.5 confers the power of *cy pres* upon the courts and therefore should avoid most of the harsh results obtained at common law. Section 715.5 requires an interest that violates the rule to be *construed or reformed* to carry out the intent of the parties. In addition, Civil Code Section 715.6 provides an alternative measure of

⁵⁷ See Cal. Stats. 1969, Ch. 155. Note, in particular, the Comment to Section 1391.1 which states, in effect, that the section "overrides" Section 715.8. *Recommendation and a Study Relating to Powers of Appointment*, 9 CAL. L. REVISION COMM'N REPORTS 301, 330 (1969).

⁵⁸ Section 716 provides:

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

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

⁶⁰ *Id.* at 533-534, 386 P.2d at 823, 35 Cal. Rptr. at 247 (footnote omitted).

the validity of an interest. Under that section, an interest which will vest, if at all, within 60 years of the creation of the interest is valid. This alternative measure is applicable even though the instrument does not so specify. In *Wong*, the California Supreme Court made it clear that it would invoke these ameliorative techniques to avoid the harshness characterized by earlier mechanistic applications of the rule to commercial transactions.⁶¹

Section 715.8 is not only unnecessary to achieve its objective, but its application exceeds the purpose for its enactment. Aside from commercial transactions, Section 715.8 incorrectly exempts several other kinds of transactions and arrangements, including private trusts, from the operation of the rule.

The confusion resulting from the enactment of Section 715.8 arises principally from a basic conflict between a literal application of the section and the accepted policy underlying the Rule Against Perpetuities. It seems that some compromise between the two would have to be achieved, but the statute itself furnishes no guidelines towards this end and leaves to the courts the task of resolving the conflict without legislative direction or assistance.

For these reasons, Section 715.8 should be repealed. At least for the foreseeable future, there appears to be no need for substitutional legislation.

⁶¹The indicated application of these ameliorative doctrines can be illustrated by considering several examples of common perpetuities violations. Options to purchase property may not be limited by time and therefore violate the rule. For example, O grants to A, his heirs, and assigns an option to purchase Blackacre for \$50,000. Although this option violates the rule, it does not follow that the transaction will be declared void. Under the *cy pres* power, the court has the power to reform the instrument by limiting the option to 21, or even 60, years if this would carry out the intent of the parties. This reformation technique could also be applied to transfers contingent upon an event not related to any life in being, such as a lease to commence upon completion of a building or the discovery of oil.