The California Rules against Restraints on Alienation, Suspension of the Absolute Power of Alienation, and Perpetuities

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Chapter 1463 of California Statutes 1951, made important changes in the rules which are designed to defeat attempts to make property inalienable. The chapter repealed several sections of the Civil Code, amended other sections, and added new sections.

The most important additions to and amendments of the Civil Code made by Chapter 1463, Statutes 1951, are:

1. By section 715.2, the common-law Rule Against Perpetuities (remoteness of vesting) which had been held in the case of Estate of Sahlender¹ to be law in California, is incorporated into the Civil Code in terms that accord with the rule at common law;

2. By section 715.1, the period during which the absolute power of alienation may be suspended by limitation or condition is changed from lives in being or 25 years, to lives in being and 21 years. The period during which the absolute power of alienation may be suspended is thus made the same as the period during which the vesting of a future interest may be postponed by section 715.2;

3. The last sentence of section 716 makes a common-law rule, stated in the Restatement of the Law of Property, section 373, as applicable to the Rule Against Perpetuities, applicable to both the Rule Against Perpetuities and the Rule Against Suspension of the Absolute Power of Alienation.

These changes improve the law so far as they go. Unfortunately, they do not eliminate one of the worst defects in the law dealt with by the chapter. Several writers have pointed out that the Rule Against Suspension of the Absolute Power of Alienation (former sections 715, 716) as applied by the courts has caused the failure of trusts which were unobjectionable from the public point of view. The extension made in the period of suspension permissible (from lives in being or 25 years to lives in being and 21 years) may reduce the number of failures (although that is not certain because of the reduction in the number of years) but it will not eliminate all unnecessary failures. With the Rule Against Perpetuities in force, the Rule Against Suspension has no function except in respect to trusts. It destroys trusts that

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might by the terms of their creation continue beyond the period of suspension allowed. This is an unnecessary and undesirable result and the rule should be eliminated entirely.

California now has three rules designed to keep property alienable. They are (1) The Rule Against Restraints on Alienation; (2) The Rule Against Suspension of the Absolute Power of Alienation; and (3) The Rule Against Perpetuities.

It is not intended here to make an exhaustive exposition of this area of the law. The purpose is to help students to understand the nature of these rules, their relation to each other, and to suggest the repeal of such rules as serve no useful purpose. The sections of the Civil Code as amended by chapter 1463, Statutes 1951, which are important for the purpose of this discussion, are given here for convenient reference:

Section 711. Conditions restraining alienation, when repugnant to the interest created, are void. (Enacted 1872.)

Section 715.1. The absolute power of alienation cannot be suspended, by any limitation or condition whatever, for a period longer than 21 years after some life in being at the creation of the interest and any period of gestation involved in the situation to which the limitation applies. The lives selected to govern the time of suspension must not be so numerous or so situated that evidence of their deaths is likely to be unreasonably difficult to obtain.

Section 715.2. No interest in real or personal property shall be good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest and any period of gestation involved in the situation to which the limitation applies. The lives selected to govern the time of vesting must not be so numerous or so situated that evidence of their deaths is likely to be unreasonably difficult to obtain. It is intended by the enactment of this section to make effective in this state the American common law rule against perpetuities. (Enacted 1951.)

Section 716. Every future interest is void in its creation, which by any possibility, may suspend the absolute power of alienation for a longer period than is prescribed in this chapter. Such power of alienation is suspended when there are no persons in being by whom an absolute interest in possession can be conveyed. The period of time during which an interest is destructible pursuant to the uncontrolled volition and for the exclusive benefit of the person having such a power of destruction is not to be included in determining the existence of a suspension of the absolute power of alienation or the permissible period for the vesting of an interest within the Rule.

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2 Enacted 1951; but the section has the same function as and is a substitute for section 715 enacted 1872 with period lives in being; amended 1917 to make period lives in being or 25 years; and repealed 1951 when section 715.1 was enacted with period lives in being and 21 years.
CALIFORNIA RULES AGAINST RESTRAINTS ON ALIENATION

Section 771. The suspension of all power to alienate the subject of a trust, other than a power to exchange it for other property to be held in the same trust, or to sell it and reinvest the proceeds to be held upon the same trust, is a suspension of the power of alienation, within the meaning of section 715.1. (Enacted 1872; amended 1951 so as to refer to new section 715.1 instead of old section 715 which is repealed.)

Section 863. Except as hereinafter otherwise provided, every express trust in real property, valid as such in its creation, vests the whole estate in the trustees, subject only to the execution of the trust. The beneficiaries take no estate or interest in the property, but may enforce the performance of the trust. (Enacted 1872.)

Section 870. Where a trust in relation to real property is expressed in the instrument creating the estate every transfer or other act of the trustees, in contravention of the trust, is absolutely void. (Enacted 1872.)

I. The Rule Against Restraints on Alienation

The Rule Against Restraints on Alienation is expressed in Civil Code, section 711. It is briefly discussed here for the purpose of distinguishing it from the Rule Against Perpetuities and the Rule Against Suspension of the Absolute Power of Alienation with each of which it is not infrequently confused. It is important to distinguish the difference between the type of provision which calls for the application of the Rule Against Restraints on Alienation and the type of provision which calls for the application of either of the other two rules. Finally, it is important to note the difference between the result of applying the Rule Against Restraints and the result of applying either of the other two rules.

(A) Types of Provisions to Which the Rule Against Restraints Is Applicable

The Rule Against Restraints on Alienation is a rule against restraints expressly imposed by a conveyor upon the estate which he conveys for the purpose of preventing alienation of that estate. Thus if A convey to B an estate in fee and provide that the estate shall never be conveyed or taken by creditors, this provision is an attempted restraint and it is void by the Rule Against Restraints on Alienation.

The attempted restraint may be any one of several forms:

1. It may be a mere declaration that the estate conveyed shall not be
aliened as in the example given above. Such a restraint is called in the Restatement of the Law of Property, section 404, as disabling restraint. Such a restraint on either a legal or an equitable estate, other than those imposed on equitable interests under a trust (spendthrift trusts) are invalid.\(^3\) Subject to the exception stated a conveyor cannot by a mere declaration on his part destroy the power which the law gives to the conveyee to transfer the interest conveyed.

2. The attempted restraint may be in the form of a covenant by the conveyee that the estate conveyed to him will not be conveyed by him. Such a provision is called a promissory restraint.

3. The attempted restraint may be (a) in the form of a special limitation, as to B and his heirs so long as B or his heirs continue to own the estate conveyed, but when it ceases to be so owned the land shall revert to the conveyor or his heirs; or (b) in the form of a condition subsequent, as to B and his heirs upon the condition that the estate shall not be aliened, and for breach of this condition the conveyor or his heirs may enter and terminate the estate conveyed; or (c) in the form of a conditional limitation as to B and his heirs, but if B or his heirs cease to own the land it shall go to C and his heirs. These three forms are called forfeiture restraints.\(^4\)

The Rule Against Restraints on Alienation treats promissory and forfeiture restraints alike.

The purpose of this discussion is to distinguish the Rule Against Restraints from the Rule Against Suspension and the Rule Against Perpetuities, and this does not call for a statement of all the attempted restraints which are invalid and of all those which are valid. In general it may be said that promissory or forfeiture restraints on the alienation of a fee simple in land or ownership of other things, which are unlimited as to the time the restraints shall last and as to the persons to whom alienation is forbidden, are void. Thus the attempted restraints in the above examples are void. Likewise by the great weight of authority restraints on a fee simple in land or on ownership of other things, limited in respect to time only, as to the duration of a life or for ten years, but unlimited in respect to the persons to whom alienation is forbidden for this time are also void. It is said the promissory or forfeiture restraints on a fee simple or ownership which are reasonable are valid.\(^5\) The factors which make for reasonableness or unreasonableness are stated in the Restatement of the Law of Property, section 406, comment (i). This statement, which is a generalization of the decisions in all the states considered together, is of doubtful validity in respect to a particular state. The fact is that the courts in some states apply the Rule Against

\(^3\)Restatement, Property, § 405.
\(^4\)Id., § 405.
\(^5\)Id., § 406.
Restraints strictly and make few specific exceptions, while the courts in other states apply the rule less strictly and make more specific exceptions.

In California there are only a few reported cases involving the kind of express restraints considered here. (The California courts generally use the term “restraints on alienation” not only for the express restraints under discussion here to which Civil Code section 711 is applicable, but also for suspensions of the absolute power of alienation to which Civil Code sections 715.1 and 716 are applicable.) The leading case is *Title Guarantee & Trust Co. v. Garrett.* The case was, A conveyed a fee simple to B by a deed containing a covenant that the land conveyed would not within a period of 14 years be sold or leased to a person of African, Chinese or Japanese descent, and a condition that for breach of this covenant A might terminate the estate conveyed. Within the specified period the land was sold to C, a person of African descent. A brought an action against C to recover the possession. On demurrer to the complaint the trial court gave judgment for C which was affirmed by the appellate court in an elaborate opinion by Presiding Judge Finlayson. A petition for hearing in the Supreme Court was denied. Both the covenant and the condition subsequent were declared to be void by force of Civil Code section 711, which the Court said is declaratory of the common law. The restraint was limited both in respect to time and persons but the Court held that such limited restraints on a fee simple are void under the rule. It should be noted that this decision was based wholly on the Rule Against Restraints on Alienation, having been made long before the U. S. Supreme Court held that the enforcement of such racial restraints by the courts of a state would be a denial of the equal protection of the law forbidden by the Fourteenth Amendment.

(B) The Result of Applying the Rule Against Restraints on Alienation

The restraints which are avoided by the Rule Against Restraints on Alienation are those which are expressly imposed for the purpose of preventing alienation. They are generally attempted on possessory estates and rarely on nonpossessory estates, and even in the latter case the attempted restraint is expressly imposed and is other than the restraint, which arises from the creation of an interest which is inalienable by its own nature. If, for example, in 1952, A devised Blackacre “to the person who will be Governor of California in 1980” a good title (fee simple absolute) in Blackacre could not be conveyed until 1980, not because A has expressly said it could not but because he has created an interest in Blackacre which is inalienable for lack of an ascertained owner of it. This type of restraint is regulated by the Rule

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Against Suspension and also by the Rule Against Perpetuities and not by the Rule Against Restraints.

The Rule Against Restraints avoids the attempted restraint; it does not destroy the estate, the alienation of which is restrained. This it can do because the expressly created restraint is extrinsic to the estate to which it relates and not inherent in it. The rule does destroy any interest which is a part of the attempted restraint itself, as when the restraint is in the form of a condition subsequent with a right of entry in the conveyor or with a conditional limitation over to a third party. But the primary purpose of the conveyor is to create the estate the alienation of which is restrained and the destruction of those interests which are designed to prevent the alienation of it do not defeat this primary purpose. When, however, the inalienability arises out of the nature of the interest created, as in the devise “to the person who will be Governor of California in 1980,” the inalienability can only be ended by holding the interest itself invalid and thus defeating the primary purpose of the conveyor. This is the effect of both the Rule Against Suspension and the Rule Against Perpetuities.

It will be shown hereafter that express restraints are not affected by the Rule Against Suspension, or by the Rule Against Perpetuities, except in some cases where the restraint is in the form of a conditional limitation over to a third person.

II.
The Rule Against Suspension of the Absolute Power of Alienation and the Rule Against Perpetuities

(A) As Applied to Future Interests Which Are Not in Trust

The creation of future interests in property, real or personal, legal or equitable, is now restricted by both the Rule Against Suspension of the Absolute Power of Alienation and the Rule Against Perpetuities. The former fixes the period during which the absolute power of alienation may be suspended by creation of future interests; the latter fixes the period during which the vesting of future interests may be postponed. The period allowed is the same for both rules—the life of the last survivor of a not unreasonably large number of persons in being when the future interest is created and 21 years after the death of such survivor. The effect of both rules is the same, a future interest which by the terms of its limitation might either suspend the absolute power of alienation, or continue to exist as an unvested interest beyond the period allowed is void.

It is first necessary to determine the difference between the requirement

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6Id., § 715.2.
that the absolute power of alienation shall not be suspended by a future interest beyond a certain period, and the requirement that the vesting of a future interest shall not be postponed beyond the same period.

The absolute power of alienation is suspended when there are no persons in being by whom an absolute interest in possession can be conveyed. An absolute interest is an interest that is indefeasible, not liable to be defeated on a contingency. The absolute power of alienation is necessarily suspended when interests are limited to persons who are not in being or not ascertained. If all those in being and ascertained who have interests united to convey a fee it would be subject to the limitation to those not in being or not ascertained. Those executory interests are indestructible by the persons in being. They cannot be released because the persons to whom they are limited are not in being or are unknown.

If A devise land to B, a bachelor, for life, remainder to B’s first child, there is a suspension of the absolute power of alienation of the fee. A conveyance made by the persons in being, B and A’s heirs (to whom the reversion would descend until the remainder vest) would be subject to the interest of B’s unborn child. There is a suspension of the absolute power of alienation which will continue until the child is born. It can continue at the longest only during B’s life, which is a permitted period. But if the devise were to B, a bachelor, for life, remainder to B’s first grandchild, there is a suspension which might continue not only for B’s life, but also for the lives of all B’s children, persons not in being when the gift is made, and the remainder would be void.

Likewise if A, in 1952, devise land “to the person who will be Governor of California in 1980” that person may be in existence but he will not be ascertained until 1980 so there is a suspension which must continue for 28 years and the gift is void.

The Rule Against Perpetuities requires that every future interest be so limited that by the terms of its limitation it must either vest or cease to exist within the period allowed. If by the terms of its limitation it might continue to exist as an unvested interest after the period allowed it is void in its creation.

In the above examples, the interest to B’s first grandchild is contingent on the birth of a grandchild. The interest might continue as a contingent interest for the life of B, a person in being, and also for the lives of B’s children, that is for the lives of persons not in being when the gift was made, and the interest is void by the Rule Against Perpetuities. Likewise the limitation “to the person who will be Governor of California in 1980” creates an interest to an unascertained person which is contingent and must

\[\text{Id., § 716.}\]
continue contingent for 28 years, and is therefore void by the Rule Against Perpetuities.

When, and so long as "there are no persons in being by whom an absolute interest in possession can be conveyed" there can be no persons in being in whom the future interest can vest, and the interest would be void under either rule.

It is in the implied negative of the definition of suspension of the absolute power of alienation that the difference between the two rules appears. The implied negative is that the absolute power of alienation is not suspended when there are persons in being by whom an absolute interest in possession can be conveyed. The courts have implied this negative and have held that when there are persons in being who by joint action can convey an absolute interest in possession the absolute power of alienation is not suspended at all.

If A devise land to B in fee and further provides that if C, or his heirs, should within 50 years pay to B or his heirs $1,000 the land shall go to C and his heirs, the devise creates in B a fee subject to a conditional limitation to C in fee. Each interest may by the terms of its limitation last for 50 years. Each interest is descendible, devisable and alienable by B and C, respectively, and on the death of each by his heirs. B and C are persons in being and they can by joint action at any time convey an absolute fee in possession. There is consequently no suspension of the absolute power of alienation as defined by Civil Code section 716, and the interest of C would not be invalid under the Rule Against Suspension, Civil Code section 716. But the interest of C is contingent and by the terms of its limitation might continue to exist as a contingent interest for 50 years and it is therefore void under the Rule Against Perpetuities, Civil Code section 715.2.

If the A Corporation give to the B Corporation an option for 50 years to buy a certain tract of land, there is no suspension as defined by Civil Code section 716 because A and B could by joint action at any time convey an absolute fee in possession. So the option would not be invalid under the Rule Against Suspension. But the option gives B a power to acquire an estate which by the terms of the option might continue unvested for 50 years, and this power is void by the Rule Against Perpetuities.

The Rule Against Suspension does not require that the person or persons who will ultimately be entitled to the future interest be individually ascertained within the period allowed. The rule is satisfied if by the terms of the limitation all persons who can possibly take by the limitation must be in being and ascertained as a group within the period allowed and the group is not "so numerous or so situated that evidence of their deaths is likely to

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10 Ibid.
be unreasonably difficult to obtain." Each member of the group can release his possibility and all who have interests in the subject matter together can convey an absolute fee.

If A devise land to B, a bachelor, for life, remainder to that child of B who first attains 25 in fee, the remainder is contingent. It is subject to the conditions precedent that a child be born and reach 25. Each of the children born to B before any one of them reaches 25 is a possible taker. There is a suspension of the absolute power of alienation. B could convey his life estate, and A's heirs (to whom the reversion would descend subject to the contingent remainder) could convey the reversion in fee, but this conveyance would be subject to the contingent remainder to the child of B, and the conveyee would not have an absolute interest. The suspension may continue so long as B lives. Suppose B dies leaving five children all under 25. Does the suspension continue? It does not because the five children who are the only possible takers could join with the heirs of A and together convey an absolute fee. Thus the absolute power of alienation is suspended only during B's life, which is a permitted period, and the gift is valid.

The Rule Against Perpetuities requires that the person who will ultimately be entitled to the future interest be individually ascertained within the period allowed. This is so because the rule invalidates any interest which by the terms of its limitation might continue to exist as an unvested interest beyond the period, and an interest can only vest in a definitely ascertained person. The rule is satisfied if, and only if, by the terms of the limitation all persons who can possibly take by the limitation must be in being and individually ascertained within the period allowed.

But the gift to that child of B who first attains 25 viewed, as it must be, from the time it is made might by the terms of its limitation continue to exist as an unvested interest beyond the period allowed, and so the gift is void by the Rule Against Perpetuities.

The Rule Against Perpetuities requires that a future interest be so limited that it will either become vested or cease to exist within the period allowed. All vested interests which are not in trust are alienable. It follows that every future interest which is not in trust and which satisfies the requirements of the Rule Against Perpetuities will also satisfy the requirements of the Rule Against Suspension of the Absolute Power of Alienation, since the period allowed is the same for both rules. Consequently, the Rule Against Suspension—the first sentence of Civil Code section 716, "Every future interest is void in its creation, which by any possibility, may suspend the absolute power of alienation for a longer period than is prescribed in this chapter"—is unnecessary with respect to future interests which are not in trust.

1Id., § 715.1.
The Rule Against Suspension requires that a future interest be so limited that it will either become alienable or cease to exist within the period allowed. Contingent interests to ascertained persons are alienable and so satisfy that rule even though they may continue contingent beyond the period allowed for suspension. But they do not satisfy the requirements of the Rule Against Perpetuities and they are invalid under that rule.

Thus, briefly stated, every future interest which is not in trust, which is valid under the Rule Against Perpetuities, is also valid under the Rule Against Suspension of the Absolute Power of Alienation but not every future interest which is valid under the Rule Against Suspension is valid under the Rule Against Perpetuities.

With respect to future interests not in trust, with the Rule Against Perpetuities in force, the Rule Against Suspension is only a cause of confusion. It will hereafter be shown that this rule has unfortunate results in respect to beneficial interests in trusts.

(B) As Applied to Express Restraints on Alienation

It was said in Part I of this article that express restraints on alienation are not affected by the Rule Against Suspension of the Absolute Power of Alienation or by the Rule Against Perpetuities except in some cases where the restraint is in the form of a conditional limitation over to a third person. The reasons for this statement and the nature of the exception can now be more easily understood. The exposition of these matters will further serve to illustrate the differences in the functions of the several rules.

In each of the following instances A is conveying land to B in fee and attempts to restrain the alienation of it.

1. If the attempted restraint be in the form of a mere declaration by A in the deed that the land shall not be conveyed by B such a provision does not create any limitation or condition or future interest to which the Rule Against Suspension or the Rule Against Perpetuities is applicable:

2. If the attempted restraint be in the form of a covenant by B that the land shall not be conveyed, the restraint is not affected by the Rule Against Suspension for the reason that there are always persons in being who can together convey an absolute fee. The restraint is not affected by the Rule Against Perpetuities because contracts are not subject to this rule unless they create contingent interests in the land and the promise not to alien does not create such an interest.

3. If the attempted restraint be in the form of a special limitation, as to B so long as B or his heirs continue to own the land, but when it ceases to be so owned it shall revert to A and his heirs, the restraint is not affected by the Rule Against Suspension because there are always persons in being
who can together convey an absolute fee. The restraint is not affected by
the Rule Against Perpetuities because the possibility of reverter in A is not
subject to this rule.

4. If the attempted restraint be in the form of a condition subsequent,
as to B and his heirs upon condition that the land shall not be conveyed
and for breach of this condition A and his heirs may enter and terminate
the estate conveyed, the restraint is not affected by the Rule Against Suspen-
sion because there are always persons in being who can together convey
an absolute fee. The restraint is not affected by the Rule Against Perpetuities
because the right of entry in A is not subject to this rule.

5. If the attempted restraint be in the form of a conditional limitation
to an ascertained third party, as to B and his heirs, but if B or his heirs ever
alien the land it shall go to C and his heirs, the restraint is not affected by
the Rule Against Suspension because there are always persons in being who
can together convey an absolute fee. The restraint is void by the Rule Against
Perpetuities because conditional limitations are subject to this rule. The
conditional limitation to C is contingent and might by the terms of its creation
continue to exist as an unvested interest beyond the period allowed.

6. If the attempted restraint be in the form of a conditional limitation
to an unascertained third party, as to B and his heirs but if B or his heirs
ever alien the land it shall go to the person who is Governor of California
when the alienation is made, the restraint is void by the Rule Against Suspen-
sion because there are not persons in being who can together convey an
absolute fee and there may not be such persons within the period allowed.
The restraint is void by the Rule Against Perpetuities because the conditional
limitation to the Governor of California is contingent and may continue to
exist as an unvested interest beyond the period allowed.

In all six cases the express restraint on alienation is subject to the Rule
Against Restraints on Alienation but only No. 6 is subject to the Rule
Against Suspension of the Absolute Power of Alienation and only Nos. 5
and 6 are subject to the Rule Against Perpetuities.

III.

The Effect of the Several Rules on the Duration of Trusts

At common law the rules which restricted the creation and duration
of trusts were the Rule Against Perpetuities and the Rule Against Express
Restraints. The Rule Against Suspension of the Absolute Power of Alienation
had its origin in a statute and differs materially from the common law.

\[15\text{Id.} \, \S 711.\]
\[16\text{Id.} \, \S 715.1, 716.\]
\[17\text{Id.} \, \S 715.2.\]
By the Rule Against Perpetuities a limitation of property, real or personal, legal or equitable, which might continue as a contingent interest for more than 21 years after the termination of lives in being at its creation is void. If by the terms of its creation the interest must either vest or cease to exist as a possibility within that period it is valid. In case one of two or more interests in a trust is void, the whole trust may be void, or the trust may be effective as to the other interests, depending upon whether the void part can be separated from the other parts without defeating the intention of the settlor. If all the several interests are valid the trust is valid. If, for example, A devise property to B and his heirs on trust to collect the income and to pay it to C, a bachelor, for life, and on the death of C to transfer the principal to the child of C who first attains 25, because C might have a child, an infant, at C's death, the limitation to the child might continue as a contingent interest for 25 years after the death of C, and it is consequently void in its creation. But if the ultimate gift be to the child of C who first attains 21, the child will necessarily be ascertained within 21 years after the death of C or else there never can be such a child, and because the gift by its terms must either vest within 21 years after the death of a living person or become impossible, it is valid.

The Rule Against Restraints on Alienation avoids restraints expressly imposed on an interest for the purpose of making it inalienable. The creation of a trust for persons in being does not of itself make any interest in the trust inalienable. Equitable interests are as fully alienable as corresponding legal interests. Restraints expressly imposed on the alienation of equitable interests are void as a general rule, but there are important exceptions. Most states allow "spendthrift" trusts. Such trusts are created by expressly imposing restraints upon the alienation, voluntary or involuntary, of the equitable interest in the trust. In such states express restraints on equitable life estates are valid. In some states express restraints on equitable fees have been sustained if they are sufficiently restricted in duration.

In the absence of a direction to the contrary, the beneficiary of a trust who has a vested and indefeasible equitable ownership can, so soon as he is sui juris, compel the transfer of the possession of the property to himself. A direction that he shall not have it until some more remote time is in some jurisdictions void. In those jurisdictions it is deemed unreasonable and contrary to public policy that a person should be kept out of possession of property to which he has an absolute and indefeasible vested right solely to protect him from himself. But this rule is not now followed in most states. Regarding the right of the creator of the trust to direct when the beneficiary

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15 Restatement, Property, § 402; Restatement, Trusts, § 62, com. k.
16 Restatement, Trusts, § 152.
17 Id., § 337.
shall have the possession, it is held that he cannot compel the trustee to convey it to him until the time specified. This view does not necessarily mean that the beneficiary cannot alien his interest. But so long as he retains it, the trustee may refuse to transfer to him the legal title before the time specified by the creator of the trust.

There are some time restrictions upon those restraints which create spendthrift trusts, and upon those restraints which prevent possession by the beneficiaries. Restraints imposed for the life of any beneficiary in being at the creation of the trust, or for some years of his life are valid. On the other hand, they cannot be made to last forever. As to periods between these extremes, the law is not clearly settled.

It is most important to keep in mind the fact that restraints on alienation or on possession by the beneficiaries of a trust, even though they are excessive, do not invalidate the trust or any interest therein. If the restraint is excessive, it is void at least for the excess; the interest is not invalidated, but continues free from the restraint.

To illustrate the operation of these rules, suppose A devise property to B and his heirs on an active trust for C for life, and after on an active trust for D and his heirs. The interests of C and D are at once vested, alienable and liable to claims of creditors. C and D together when each is sui juris can compel B to transfer the legal title to them. If a clause be added providing that C’s life interest shall not be alienable, it is valid in most states. If a clause be added providing that D’s estate shall never be aliened, this restraint is void. If a clause be added that the trustee shall not transfer the property to D until D is 40 years of age, this clause is valid in some jurisdictions at least. But if a clause be added that the trust shall last forever, such a provision is void.

The common law has no rule restricting the actual duration of a trust for definite beneficiaries. The Rule Against Perpetuities requires that all interests in the trust be vested within the period allowed. When the interests are vested they are immune from what the Restatement of Property calls “external attack” which means an attempt to establish the invalidity of the trust for the benefit of those who would be entitled to the subject matter of the trust if the trust were found to be invalid. The Rules Against Restraints on Alienation and Restraints on Possession by the beneficiaries of the trust make the trusts terminable and subject to “internal attack” which means an attempt to terminate the trust for the benefit of the beneficiaries of the trust. These rules make trusts determinable within some limit of time but do not require their termination.

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18 Restatement, Property, § 381.
19 Ibid.
20 Id., §§ 378, 381.
With those rules in force as they are now in California what is the effect of the Rule Against Suspension of the Absolute Power of Alienation on the duration of trusts? Unfortunately, it has an effect and a bad one. The California courts have held that vesting is not enough to establish the validity of a trust as against external attack, that trust interests may be inalienable even when vested and consequently void by the Rule Against Suspension.

The leading case is *Estate of Walkerly.*21 W devised real and personal property to trustees on trust to pay the net income for a period of 25 years to his nephews and nieces, and upon the death of any of them to his or her children by representation. He directed that certain of the real property be held by the trustees for the period of the trust, that at the end of the period it be sold and the proceeds and other property of the trust be distributed equally to his nephews and nieces, or their heirs by representation. On appeal by the heirs of W from the decree of distribution the trust was held void.

The period of permitted suspension of the absolute power of alienation was at that time during lives in being and not for a period of years, but it was argued that the interests of the remaindermen were vested and alienable and that there was consequently no undue suspension of the power of alienation. The Court did not decide whether the interests of the beneficiaries were vested or contingent, stating that the question “is here of no possible moment” because even if these interests were vested a fee simple absolute could not be conveyed.

In respect to the real property which the trustees were forbidden to sell for 25 years, the Court said that this restraint was not void as repugnant to the interest conveyed, thus holding that the restraint was not eliminated by force of Civil Code section 711. The Court further said that by force of Civil Code section 863 the trust if valid vested the whole estate in the trustees and the beneficiaries took no estate or interest in the property; and that by Civil Code section 870 a transfer by the trustees in contravention of the trust would be void. On these bases the Court concluded that a fee simple absolute in possession could not be conveyed, and that thus the trust by its terms caused a suspension of the absolute power of alienation which might continue for a period not allowed.

The Court also held that the trust of the personal property, even assuming all the interests were vested, was void. In respect to this property there was no express restraint on alienation on either the trustees or the beneficiaries, and furthermore the rule of Civil Code section 870 relating to real property only, was inapplicable. But as in case of a sale by the trustees the trust was to continue as to the proceeds, the trust fell within Civil Code section 871 and so was void by force of the then Civil Code section 715, which limited the period of suspension to lives in being. Thus the Court

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21108 Cal. 627, 41 Pac. 772 (1895).
held that a trust, in which all interests were assumed to be vested and the trustees and beneficiaries were under no disability to convey, was void because the settlor directed that it should continue for an unauthorized period. Instead of avoiding the express restraint on possession by the beneficiaries, and sustaining their interests, the Court gave effect to the restraint and avoided the interests. We have seen that the common law has no such rule—that such a trust would be subject to internal attack but not to external attack.22

Notwithstanding criticism from learned writers,23 the principles developed in Estate of Walkerly have been substantially maintained up to the present time.

In Estate of Maltman24 M devised real and personal property to a trustee upon trust to pay the net income to his son, John, for life, then to pay the income to John's children for their lives, and then to distribute the principal "in accordance with the law of inheritance of the State of California." The trustee was given full power to sell and convey all or any part of the property at any time. In an appeal from a decree of distribution of the Superior Court of Los Angeles County, the Supreme Court held that the trust was void by force of Civil Code sections 715, 716, and 771. The gift to the children of John would include children who might be borne after the death of M, and although the gift to them must vest or fail at the death of John, the terms of the trust required the trust to continue so long as any child lived and thus it might have to continue beyond lives in being. Here again the Court allowed external attack where the common law would allow only internal attack.

In the latest case, Otto v. Union National Bank of Pasadena,25 the Court, while it was able to sustain the trust by the doctrine of "modifying clauses" which happened to be applicable in the case, said that apart from this doctrine the principles stated in the Walkerly case are controlling. Justices Traynor and Carter dissented from this statement, but the fact that the Legislature re-enacted the Rule Against Suspension of the Absolute Power of Alienation in 1951 without any attempt to negative the principles established by the Walkerly and other cases, makes it more unlikely that these decisions will be overruled.

In Part II of this article it was shown that every future interest which is not in trust and which is valid under the Rule Against Perpetuities is also valid under the Rule Against Suspension of the Absolute Power of Alienation.

22Restatement, Property, §§ 378, 381.
24195 Cal. 643, 234 Pac. 898 (1925).
2538 Cal.2d 233, 238 P.2d 961 (1951).
tion, and that in respect to such interests the latter rule serves no purpose and is only a cause of confusion. In this part we see that interests in trusts which are valid under the Rule Against Perpetuities are not subject at common law to any other restrictive rules which would render the interests void (or as is said in Restatement of Property, section 378, would subject them to external attack). Once the interests are vested, as they must be to satisfy the Rule Against Perpetuities, they are subject only to such rules as strike down unreasonable express restraints on alienation of them or unreasonable directions for the continuance of the trust (or as set out in the Restatement of Property, section 381, would subject them to internal attack). These rules nullify the unreasonable restraints and directions but they do not destroy the interests. But the statutory Rule Against Suspension of the Absolute Power of Alienation as applied by the California courts destroys the interests. It cuts off the dog's tail just behind his ears.

IV.

The Rule Against Suspension of the Absolute Power of Alienation and Its Supplementary Rules Should Be Repealed

Now that the common-law Rule Against Perpetuities is law in California, the Rule Against Suspension of the Absolute Power of Alienation should be repealed. Two-thirds of the states have never had this rule and there is no evidence that they have suffered any inconvenience from lack of it. In New York, where the rule originated, and generally in the other states which adopted it, the statutory rules were intended to replace the common-law rules, but now in California they supplement the common-law rules in a way that is generally useless, but sometimes unnecessarily destructive when applied to trusts.

In 1949, the State of Michigan, which had adopted the original New York Statutes, including the Rule Against Suspension of the Absolute Power of Alienation, more than a century before, by statute adopted the common-law Rule Against Perpetuities, and repealed the Rule Against Suspension of the Absolute Power of Alienation. Michigan did not make the mistake of leaving both rules in force as California has done.

In addition to the California Civil Code sections 715.1 and 716 discussed above, there are several other sections in the code which should be repealed. They are sections 770, 771, 774, 775 and 777. These sections had their source in the Revised Statutes of New York, 1830, except section 771, which was added to the other sections in the Field Code. In their origin these sections were supplementary to the general Rule Against Suspension

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of the Absolute Power of Alienation. With the exception of section 771, no one has ever given a good reason for the existence of these rules, and section 771 will have no reason if the Rule Against Suspension of the Absolute Power of Alienation is repealed. They are all restrictive in their nature and so the repeal of them would not hinder the creation of any interest. With the Rule Against Perpetuities in force, they are wholly unnecessary. Michigan repealed its corresponding rules in 1949 when it enacted the Rule Against Perpetuities and repealed its Rule Against Suspension of the Absolute Power of Alienation. Minnesota repealed its corresponding rules in 1947.7 As only repeal is necessary there is no good reason for waiting for a general revision of the law of future interests to get rid of these nuisance rules. They can be repealed at once; no substitutes are needed. The repeal of these sections would be a substantial contribution to the simplicity and clarity of the law of future interests in California.

7Minn. Laws 1947, c. 207.