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The Suspension Rule and Other Statutory Restrictions on Trusts and Future Interests in California

By Lowell Turrentine

Statement of the Problem

The common law reflects a long struggle to prevent the tying up of property. One aspect of this struggle was the development, beginning with the Duke of Norfolk's Case¹ in 1682, of a rule against the creation of remote unvested future interests—the rule which today we refer to as the rule against perpetuities.

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

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

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

¹ This is a revision of a study made at the direction of the California Law Revision Commission entitled “A Study to Determine Whether the Sections of the Civil Code Prohibiting Suspension of the Absolute Power of Alienation Should Be Repealed”. However, the opinions, conclusions and recommendations made herein are entirely those of the author and do not necessarily represent or reflect those of the California Law Revision Commission or any of its members.

² Professor of Law, Stanford University Law School. A.B. 1917, Princeton University; LL.B. 1922, S.J.D. 1929, Harvard University. Admitted to practice in Ohio, New York and California.

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

² Cal. Const. art. XX, § 9.
In 1951 two changes of major importance were made in this area of our law. First, the common law rule against perpetuities was enacted as Civil Code Section 715.2. Second, the suspension rule, although retained, was made to conform to the common law period of lives in being and 21 years embodied in the perpetuities rule (using the term “perpetuities rule” for convenience to refer to Civil Code Section 715.2). In the light of these two changes it now is pertinent to inquire whether there is any longer any need for the suspension rule. Learned writers, cited hereinafter, have contended that the suspension rule, in the only area in which it now has independent effectiveness, namely, in regard to trusts, produces undesirable results, and that in other respects it is superfluous.

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

**The Rule Against Perpetuities**

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

§ 715.2. No interest in real or personal property shall be good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest, and any period of gestation involved in the situation to which the limitation applies. . . .

Certain statutory qualifications of this rule will be noted later.

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

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

Second: Any interest given to a person not certain to be ascertained
within the stated period is struck down by the rule. In 1938 a case arose in
which a testator had left a gift “to the four chair officers of San Diego
Lodge No. 168 Benevolent and Protective Order of Elks, being the four
chair officers in office at the time of distribution of my
estate.”4 It was un-
certain, the court reasoned, whether the estate would reach the time for
distribution within 21 years after the testator’s death, and the will had not
restricted the vesting of the gift to any life or lives in being at the testator’s
death. Therefore the gift failed under the rule.

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

Here, in contrast to the first and second examples above, there is no
difficulty about the alienability of the interests in the property. Under Cali-
ifornia law, A and B can at once convey their rights to an intending pur-
chaser of the property and thereby clothe him with the full, unrestricted
title. In other words, nothing in this third example “suspends the absolute
power of alienation.” Nevertheless, B’s interest is void under the rule be-
because the test under Civil Code Section 715.2 is remoteness in vesting, not
alienability. The justification for a test other than alienability is that, al-
though contingent interests such as B’s are transferable, they cannot be

3 Leach and Tudor, The Common Law Rule Against Perpetuities in 6 AMERICAN LAW OF
PROPERTY § 24.22 (1952).
4 Estate of Campbell, 28 Cal. App. 2d 102, 82 P.2d 22 (1938). For a critique of cases of
this type see Leach and Tudor, supra note 3, § 24.23.
satisfactorily valued and thus no market exists for them. They therefore are likely to run on as actual, even if not theoretical, barriers to the normal marketability of the property.

It is not important here to go further into the operation of the perpetuities rule. But two provisions, applicable both to that rule and to the suspension rule discussed below, may be mentioned. The first is restrictive in nature. The statute provides that the lives used to measure the allowed period must not be so numerous or so situated that evidence of their deaths is likely to be unreasonably difficult to obtain.4 The second provision, found in Civil Code Section 716, operates, where it applies, to enlarge the permissible period. In simple terms, it means that if the creator of the interest in question has reserved for himself an absolute right of revocation, or has given to some person in being an absolute power to appoint the entire property to himself at any time, the period of the two rules begins to run only at the death of the person having the right of revocation or the power of appointment. This is reasonable, for as long as the right of revocation or the power of appointment exists, the property is not actually tied up.

I

The Rule Against Suspension of the Absolute Power of Alienation

Definition of "Suspension of the Absolute Power of Alienation"

Civil Code Section 716 says that the absolute power of alienation is suspended when there are no persons in being who can convey an absolute interest in possession.5 This means that the complete title, free and clear of any trust or restriction, must be capable of being transferred to someone; otherwise the absolute power of alienation is suspended.6 The test is met if several persons, by conveyances, releases or surrenders of their several interests, can lodge a fee title in real property or an absolute interest in personal property in someone. Examples of cases where this could not be done and where, therefore, there is a suspension, are given below. First, a brief word as to the period of allowable suspension.


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

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

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

In 1917 Civil Code Section 715 was amended to allow a gross period of 25 years (not 21 years as at common law) from the beginning of the interest as an alternative to lives in being, but not to be tacked onto lives in being.9 The constitutionality of this amendment was upheld in the leading case of Estate of McCray10 in 1928 where for the first time our Supreme Court clearly defined the difference between suspension of the absolute power of alienation, which is a statutory concept, and remoteness in vesting, which is the concept involved in the common law rule against perpetuities. From 1917 down to 1951 the permissible period of suspension differed from the period for vesting under the common law rule against perpetuities in two ways. First, the suspension rule allowed a gross period of 25 years from the creation of the interests; second, this gross period could not be tacked onto any lives in being. Certain results of these differences are mentioned below.

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

Comparison of the Suspension Rule With the Rule Against Perpetuities

An Interest to an Unborn Person. We have noted that any future interest given to an unborn person who might not come into being within the

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10 204 Cal. 399, 268 Pac. 647 (1928).
12 Cal. Stat. 1951, c. 1463, §§ 1, 7, pp. 3442, 3443. Civil Code Section 715.1 now provides: "The absolute power of alienation cannot be suspended, by any limitation or condition whatever, for a period longer than 21 years after some life in being at the creation of the interest and any period of gestation involved in the situation to which the limitation applies. The lives selected to govern the time of suspension must not be so numerous or so situated that evidence of their deaths is likely to be unreasonably difficult to obtain."
period for vesting—lives in being and 21 years—is made void by the rule against perpetuities.\textsuperscript{1} An interest given to an unborn person will also suspend the absolute power of alienation, and since the allowable period for suspension is now the same as that for vesting, there will be a violation of both rules in such a case. Putting the matter in another way, the suspension rule is unnecessary with regard to interests given to unborn persons, for any such interests which would suspend alienation too long would also violate the perpetuities rule.\textsuperscript{5}

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

Two things may be remarked as to the foregoing types of interests. First, prior to 1951 an interest given an unborn or unascertained person might offend one rule and not the other since the allowable periods for vesting and suspension differed. A bequest to the first descendant of A who enters Stanford University within 21 years after A’s death would have been good under the perpetuities rule but bad under the suspension rule for the latter, prior to 1951, did not admit of any period added to lives in being. On the other hand, a bequest to the first descendant of the testator who enters Stanford University within 25 years after the testator’s death would have been bad under the perpetuities rule but good under the suspension rule prior to 1951. No longer do these discrepancies exist.

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

\textbf{An Interest to an Ascertained Person Upon a Contingency.} The third sort of interest discussed above in connection with the rule against perpetuities is

\textsuperscript{14} See discussion at p. 263 \textit{supra}.
\textsuperscript{15} It may be argued at this point that the suspension rule would not be complied with merely because the person taking the interest is born within the permissible period of suspension (as the perpetuities rule would) since the taker would be disabled to convey until he became of age. Any impediment to conveyance because of the minority of the taker is caused by the general law, not by the instrument, Estate of Campbell, 149 Cal. 712, 87 Pac. 573 (1906) and is immaterial from the standpoint of the suspension rule, unless, indeed, there is a trust provision for holding up the taker's interest during minority. Otto v. Union Nat. Bank, 38 Cal.2d 233, 238 P.2d 961 (1951). See note 46 \textit{infra}.
\textsuperscript{16} SIMES, \textit{FUTURE INTERESTS} 377 (Hornbook Series 1951).
tuitities\textsuperscript{18} is one given to an ascertained person, but upon a contingency which may not occur within lives in being and 21 years. Such an interest may not vest in time and therefore is bad under the perpetuities rule, but it is nevertheless a transferable interest and does not of itself create a suspension. Here, too, the suspension rule turns out to be superfluous.

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

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

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

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

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

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

During the medieval period and long before there was any rule against perpetuities, the common law developed a doctrine that provisions directly restraining the transfer of property interests are invalid. The doctrine

\textsuperscript{18} See discussion at p. 264 supra.

\textsuperscript{19} CAL. CIV. CODE §§ 699, 1044, 1046.

\textsuperscript{20} Leach and Tudor, supra note 3, § 24.62.

\textsuperscript{21} Id. §§ 24.56, 24.57.
would apply, for example, to a condition inserted in a transfer of a fee interest that the transferee is never to alienate the property. Such conditions are said to be "repugnant to the interest created,"[22] but the true basis of the doctrine is the public policy against the freezing of property interests. The doctrine applies not only to conditions that purport to make the interest in question inalienable—the so-called "disabling restraints"—but also to conditions directly penalizing alienation by providing, for example, that upon attempted alienation the title should pass to some other person. The latter are called "forfeiture restraints." The doctrine is codified in our law as Civil Code Section 711, which provides: "Conditions restraining alienation, when repugnant to the interest created, are void." It is subject to certain well-known exceptions, of which the commonest is the recognition of the validity of "spendthrift trust" clauses and of conditions against assignment in the case of leases.

Our inquiry now is whether the suspension rule serves any useful purpose in view of Civil Code Section 711 which strikes directly at "conditions restraining alienation." As to legal interests subject to such conditions the suspension rule is superfluous. This rule would of course be violated by some such conditions, namely the disabling restraints, which purport to make the interest in question inalienable ipso facto. If such a restraint were held good, no one during the period of the restraint could convey an absolute estate in possession. But disabling restraints (with the sole exception of spendthrift clauses as to equitable life interests) are emphatically within the prohibition of Section 711.[23] Therefore, with respect to such restraints, there is no need for the suspension rule.

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

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

II
The Effect of the Suspension Rule Upon the Duration of Trusts

Charitable Trusts

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

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

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

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

26 CAL. CONST. art. XX, § 9.
27 Estate of Hinckley, 58 Cal. 457, 471-74, 482 (1881); Estate of Sutro, 155 Cal. 727, 733, 102 Pac. 920, 922 (1909).
or if a provision of the trust would literally prevent him from winding up the trust within that period. The result is that the trust, or at least those trust interests which exceed the permissible period of suspension, fail. No good would be served by a rule in this State which would put our law as to perpetual private trusts at variance with the general law already outlined. The possibility that our suspension rule might do so is one count against that rule.

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

Here we encounter an application of the suspension rule which puts California out of harmony with the trust law of most American jurisdictions and which has given rise to a challenging demand for repeal of the suspension rule. We may take as a typical example of the trust now under consideration the facts of a leading California case, *Estate of Maltman.*

This was a testamentary trust to pay income to the testator’s son A for A’s life, then to A’s children—born and to be born—for their lives, and finally, to distribute the principal to B and C, persons in being at testator’s death. Examining these limitations, we note that the interest of A and of the ultimate remaindermen, B and C, vest at once and that the interests of A’s children must vest not later than A’s death. All interests therefore vest within the perpetuities rule. The only criticism to be made of the trust is that if A has children born after the testator’s death, the trust by its terms may last throughout the lives of such after-born children, which may be a period more than 21 years longer than the life of any of the persons, (A, B, C and existing children of A) alive at the testator’s death. If this trust suspends the absolute power of alienation throughout this possible period, the suspension is too long and the suspension rule will come into play. There are two possible points of view as to whether there is a suspension after A’s death during the lives of his children.

The text writers, supported by New York cases, and now by two

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29 See note 27 supra and articles cited in Leach and Tudor, supra note 3, § 24.67, n.1
31 195 Cal. 643, 234 Pac. 898 (1925).
justices of our Supreme Court\textsuperscript{34} argue that if, as here, the beneficial interests all vest in time and are all alienable, the entire beneficial interest may be assigned to an intending purchaser of the property and the trustee then may convey to such purchaser, thus ending the trust and giving the purchaser an absolute title. In cooperating to terminate the trust under these circumstances the trustee is not committing a breach of trust, it is contended, for the assignments by the beneficiaries have rendered impossible the original purpose of administering the property for their benefit. This reasoning leads to the conclusion that the trust is terminable, or as is often said, “destructible,” at the death of A at the latest, and thus cannot suspend alienability too long.

The conclusion just stated, however, does not clearly represent the California law. A series of Supreme Court cases in this State, originating in \textit{In re Walkerly}\textsuperscript{35} in 1895, and exemplified by the \textit{Maltman case}\textsuperscript{36} discussed above, assumes that in spite of the alienability of the beneficial interests there is a suspension throughout the duration of the trust. The result, of course, is that where the trust by its terms is to continue for the lives of the unborn children of A, the suspension is too long, both under the older period of Civil Code Section 715 and the new period of Civil Code Section 715.1.

The \textit{Maltman} case does not explain why a trust for the lives of A’s children suspends alienation during their lives, after A’s death. It relies upon the \textit{Walkerly} case, which tells us that “Trusts such as these under consideration in their very nature operate to suspend the power of alienation. That power must be suspended . . . while the trustee is distributing the rents and profits . . . .”\textsuperscript{37} The \textit{Walkerly} case thus takes the somewhat extraordinary position that if the trust is an active trust the trustee cannot rightfully do anything but pay income to the designated income beneficiaries, and therefore he cannot rightfully cooperate with the income and residuary beneficiaries by conveying the trust property either to them or to their assignee. Without saying so explicitly, the court construes the suspension rule (specifically Civil Code Section 716) as meaning that in the case of a trust the absolute power of alienation is suspended unless the trustee has an authorization under the instrument to terminate the trust.

\textsuperscript{35} 108 Cal. 627, 41 Pac. 772 (1895).
\textsuperscript{36} Estate of Maltman, 195 Cal. 643, 234 Pac. 898 (1925).
\textsuperscript{37} \textit{In re Walkerly}, 108 Cal. 627, 650, 41 Pac. 772, 777 (1895). Three years after the \textit{Walkerly} case the court in Toland v. Toland, 123 Cal. 140, 144, 55 Pac. 681, 682 (1898), correctly pointed out that “...the creation of a trust does not of itself suspend the power of alienation unless a trust term in the property is created within which a sale or other alienation by the trustee would be in contravention of the trust.” But no attention was paid to this precept in the later opinion in the \textit{Maltman} case.
It is not enough, apparently, that because the material purposes of the trust are accomplished, no one would have standing to object or call the trustee to account if he were to cooperate in terminating the trust.

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

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

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

In the *Maltman* case there was a spendthrift clause, prohibiting the alienation of the beneficial interests. This, under the *Walkerly* doctrine, would have made invalid any trust interest which might extend beyond the

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

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

40 Four cases since *Walkerly* involve trusts where the beneficial interests were not certain to vest within the permissible period. Estate of Troy, 214 Cal. 53, 3 P.2d 930 (1931); Estate of Van Wyck, 185 Cal. 49, 196 Pac. 50 (1921); Estate of Whitney, 176 Cal. 12, 167 Pac. 399 (1917); Estate of Cavarly, 119 Cal. 406, 51 Pac. 629 (1897). In Sheean v. Michel, 6 Cal.2d 324, 57 P.2d 127 (1936), as in the *Maltman* case, the life interests both of living and unborn beneficiaries were subject to a spendthrift clause.
permissible period of suspension. But the court paid no attention to the spendthrift clause in its opinion, and it is obvious that the decision against the trust would have been the same if there had been no restraint on the alienation of the beneficial interests.

Certain language in the recent case of Otto v. Union National Bank41 affords some basis for hope that the rationale of the Walkerly and Maltman cases, viz., that any trust to pay income suspends alienation as long as the active duties of the trustee continue, is not the view of the present court. The Otto case concerned an inter vivos trust for the life of the settlor A with a testamentary power of appointment in A and a gift in default to A's issue per stirpes, the share of any minor child of A to continue to be held in trust until such child should attain 21, income payable to him in the meantime. These remainders might go to children not in being at the creation of the trust. If such a child was a minor at the death of A, that child's share might have to be held in trust for as long as twenty-one years after A's death. In other words, the trust by its terms might continue longer than the then permissible period under Civil Code Section 715 as it stood before 1951. The interests of the remaindermen, whether minors or not, were all vested at the end of the settlor's life and nothing in the instrument restrained transfer of such interests at the death of the settlor unless it was the fact that the remaindermen or some of them might be minors and therefore could only convey by guardian with court approval.42 The court reasons that during such a possible period of minority after the death of the settlor the remaindermen could not convey "their present rights to income and compel the trustee to convey the corpus as directed by them."43 The provision for a continuance of the trust for the period of minority after the settlor's life was therefore held to create an illegal suspension.44 The suspension thus created would, of course, have been within the permissible period under the present form of Civil Code Section 715.1.

The significant thing about the reasoning of the court in the Otto case is the tacit assumption—if such it be45—that what created the suspension

41 38 Cal. 2d 233, 236, 237, 238 P.2d 961, 963 (1951). Case is noted in 4 Stan. L. Rev. 598 (1952) and 41 Calif. L. Rev. 549 (1953).
43 38 Cal. 2d 233, 237, 238 P.2d 961, 963 (1951).
44 The provision for a trust of the interests of minor remaindermen was considered merely a modifying clause, so that it might be disregarded and the remainders upheld as outright gifts. The court therefore affirmed the decision below, viz., a denial of the demand of the settlor to terminate the trust, there being outstanding interests in remaindermen not before the court. Why was not the trust revocable pursuant to Civil Code 2280? No mention of any clause making the trust irrevocable appears in the opinions of the District Court of Appeal or the Supreme Court, or in the Petition for Hearing or the briefs of counsel in the Supreme Court.
45 The doubt here arises from the court's statement, affirming "the principles of the Walkerly case," 38 Cal. 2d 233, 237, 238 P. 961, 963. The Walkerly case as it was understood in the Maltman case, construed a trust as suspending alienation so long as the trustee, by the terms
was not the mere fact that the trust was to continue after a life in being, but rather that such continuation was for the benefit of a minor. Seemingly it was a minor's disability to convey, or directly to compel termination of the trust, which caused the suspension. If this is true the wholesale condemnation of trusts which outlast lives in being and 21 years is gone: a trust to last for A's life, and then for the life of A's unborn child, remainder to B and his heirs, is perhaps valid. If there is a suspension during the possible minority of A's child, the suspension is permissible under Civil Code Section 715.1.

Suppose, instead of the foregoing, it were a trust for A's life, then to pay income to A's first child (unborn) until 30, and at 30 to pay the principal to such child, the interest of the child to be vested and transmissible. Here, even on our supposition as to the rationale of the Otto case, it is not clear that the trust would be upheld. The interest of A's first child is certain to become alienable in time, but the court may reason that neither that child nor any transferee from him can compel termination until the instrument, was to collect and pay over income; but if the Otto court had meant to affirm this "principle" the court would not have needed to base its conclusion on the minority of the remaindermen. The mere fact that the trust was to last after lives-in-being would have condemned it. However, the able discussion of the Otto case in 41 Cal. L. Rev. 549 at 550 and 551 understands the majority by dictum to stand on proposition that any trust suspends the power of alienation.

If suspension in this case results solely from the possible minority of the remaindermen, the case sub silentio overrules Estate of Campbell, 149 Cal. 712, 87 Pac. 573 (1906), where in dealing with a gift of a legal interest not actually distributable until the donee should reach 21, the court held that any lack of alienability during the period of minority resulted from the law-created disability of a minor, not from what Civil Code § 715 was aimed at, namely, a restraint created by the instrument. The same principle had been stated in Estate of Pfarr, 144 Cal. 121, 127, 77 Pac. 825, 827 (1904). There has always been a doubt as to the correctness of the Campbell case where a period of minority is expressly provided for. If, however, a trust is to last, e.g. until a person arrives at 30, or, a fortiori, if to last during the life of a child-to-be-born, the fact that the beneficiary may be a minor during part of the income period ought not to be held to create suspension under the statute.

In Sheean v. Michel, 6 Cal. 2d 324, 327, 57 P.2d 127, 128 (1936), the court says that an inter vivos trust such as there involved, designed to continue during the minority of unborn children, would create an unlawful suspension under Civil Code § 715. But the trust interests in that case were subject to a spendthrift clause preventing assignment. The court overlooked the fact that the trust was revocable throughout the life of the settlor, the parent of the minors, and therefore that no real suspension could begin until his death, at which time all the beneficiaries would be lives in being. In Estate of Troy, 214 Cal. 53. 3 P.2d 930 (1931), the court struck down trust interests which might last during the minority of unborn persons. Although it does not appear that these interests were subject to an express prohibition of alienation, they were in effect inalienable because the gift to the unborn persons was in the form of a direction to the trustees to expend so much of the income as they should see fit for the support and education of these minor beneficiaries.

Neither of the two cases just mentioned are precedents for the Otto holding, since in Otto there was nothing, apart from the legal disability of a minor, which would have prevented termination of the trust within the allowable period.
child reaches 30—which may be more than 21 years after A's death and so too late.\(^{47}\)

There are other situations where the suspension rule, in spite of the amelioration in construction suggested by the Otto opinion, will still do us harm in striking down trust interests which would be valid by the general modern common law. For instance, in either of the preceding examples, \(i.e.,\), a life interest to an unborn person or a deferment in payment of principal until an unborn person reaches 30, if the interest of the beneficiary in the income of the trust is made inalienable by a spendthrift clause, the suspension rule will strike down not just the restraining clause but the trust interest as well. The same drastic result would follow if the trustee were forbidden to alienate the trust property until expiration of the trust. Nothing in the Otto case alters this established construction of the suspension rule. Indeed the majority in the Otto case affirm and purport to apply "the principles stated in the Walkerly case,"\(^{48}\) one of which as already noted, was the invalidity of a trust by reason of a direct restraint on the alienation of the trust property for too long a period.

What would be the California law as to the permissible duration of private trusts if the suspension rule were abolished? The evil effect of the suspension rule in striking down a trust of the Maltman type, which would be good by the general law, has been explained above. If the suspension rule were abolished, it is believed that private trusts would be sufficiently controlled by (1) the constitutional prohibition of perpetuities,\(^ {49}\) (2) the rule against perpetuities,\(^ {50}\) and (3) the common law of trusts. The situation may be outlined as follows:

Under modern trust law, if the beneficial interests all vest within the

\(^{47}\) In a trust to pay income to A until 30 and then to deliver the principal to A, where there is no question of the trust enduring too long because A is in being at the inception of the trust, A cannot demand termination upon attaining 21. Estate of Yates, 170 Cal. 254, 149 Pac. 555 (1915). Although, in the absence of a spendthrift clause, A's interest is transferable, the transferee, by the general rule, cannot require termination of the trust until A reaches 30. De Ladson v. Crawford, 93 Conn. 402, 106 Atl. 326 (1919); Scott, Trusts § 337.3 (2d ed. 1956); Restatement, Trusts § 337, comment k (1935). Although there is no California case on this last point, we may assume that California would follow the general rule. In other jurisdictions, if the trust were to endure until an unborn person reaches 30, the courts would be likely not to apply the rule of the Yates case, supra (the so-called doctrine of Claflin v. Claflin, 149 Mass. 19, 20 N.E. 454 (1889)). Instead, the beneficiary would be free to demand termination upon coming of age. Thus the possibility of the trust remaining indestructible beyond the perpetuities period would be avoided. But in California, the Yates rule would probably be assumed to apply here also (see the Otto case, 38 Cal. 2d 233, 237, 238 P.2d 961, 963 (1951)) with the result that the beneficial interest given to the unborn child would be held void and perhaps the entire trust.

\(^{48}\) See note 45 supra.

\(^{49}\) Cal. Const. art. XX, § 9.

\(^{50}\) Cal. Civ. Code § 715.2.
period of perpetuities, these interests are good. The trust is sometimes said not to be subject to "external" attack, i.e., attack by persons who would be entitled to the property if the trust were invalid. As stated in connection with private trusts of perpetual duration, the mere fact that a trust, with all the interests vested so as to avoid the perpetuities rule, may last longer than the period of the rule against perpetuities, does not make the trust invalid. This possibility of prolonged duration may, however, lead a court to disregard any clause which would prevent the beneficiaries, as soon as all the interests vest, from terminating the trust. In other words, such a long lasting trust may be subject to "internal" attack. Two cases, one at either end of the scale, are clear. First, if by its terms the trust is to be of indefinite or perpetual duration, there is no doubt that the beneficiaries, if all are of age, can require its termination. This is the typical "internal" attack. This result under the general law would be reinforced by our constitutional prohibition of perpetuities. Second, a Claflin-type trust, where the entire beneficial interest is vested in A, a person in being, but the trustee is directed to convey the corpus to him only when he attains a stated age, is not only a good trust under the general law, but the restriction which makes the trust unbarrable by A before he attains the stated age, is also good.

The foregoing two cases represent solid ground at either end of the scale of trust duration. Between them lies an area embracing, for example, trusts of the Maitman type for the lives of the unborn children of a living person, where, although the validity of the trust is clear in most jurisdictions, the vulnerability of the trust to internal attack is not established by a clear course of judicial decision. Leading text writers argue that if the trust by its terms may last longer than lives in being and 21 years—the perpetuities period—public policy requires that the trust be subject to internal attack and that any clause against termination in the instrument or any restriction, such as a spendthrift clause, which would prevent termination by disabling a beneficiary from assigning or surrendering his interest, is to be disregarded. The rule thus contended for is not an application of

51 1A BOGERT, TRUSTS AND TRUSTEES § 218 (2d ed. 1951); 1 SCOTT, TRUSTS § 62.10 (1939); Simes, Future Interests 401-402 (Hornbook Series 1951); 4 RESTATEMENT, PROPERTY §§ 378, 381 (1944); Leach and Tudor, The Common Law Rule Against Perpetuities in 6 American Law of Property § 24.68 (1952); Morray, The Rule Against Prolonged Indestructibility of Private Trusts, 44 Ill. L. Rev. 467, 470 (1949).

52 See note 47 supra.

53 1 SCOTT, TRUSTS § 62.10 (1939); Simes, op. cit. supra note 51, at 405; Leach and Tudor, supra note 51, § 24.66; Fraser and Sammis, supra note 30, at 113. But GRISWOLD, SPENDTHRIFT TRUSTS §§ 290-93 (2d ed. 1947) argues that a spendthrift clause as to the life interest of an unborn person should be valid. The Restatement takes no position, 4 RESTATEMENT, PROPERTY § 381, caveat.
the rule against perpetuities itself, for we have assumed that all the trust interests vest in time. But, as Professor Simes points out,\textsuperscript{54} the rule against perpetuities is a manifestation of the public policy against the tying up of property for too long a time, and the same policy should invalidate any restriction which would tie up a trust corpus for longer than the perpetuities period.

It is a reasonably safe guess that, although case authority is slight,\textsuperscript{55} our Supreme Court would follow the views of the text writers if the suspension rule were abolished. In so doing it would find support in our constitutional prohibition of perpetuities,\textsuperscript{56} though the bearing of that provision in this situation is less clear than in the case of a private trust made perpetual by its terms. If this prediction is correct, we would, by the abolition of the suspension rule, be freed from the sadistic doctrine of Walkerly and Maltman which strikes down a trust—that is, subjects it to external attack—merely because its duration might exceed the perpetuities period. At the same time we would run no risk of the undue tying up of property by such trusts because any barrier to their termination by the parties in interest would be disregarded.\textsuperscript{57}

**Private Trusts for Indefinite Purposes and "Honorary" Trusts**

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

The first is a trust in the general form of the classic case of *Morice v. Bishop of Durham*.\textsuperscript{58} Here property was left to the Bishop of Durham upon trust to dispose of it "to such objects of benevolence and liberality as the Bishop of Durham in his own discretion shall most approve of."\textsuperscript{59} The Court of Chancery analyzed the gift as not limited to charitable objects and finding, therefore, that no one had a standing to enforce performance of the trust because of its indefiniteness, held the trust to fail and declared the Bishop of Durham to hold on a resulting trust for the next of kin. Such

\textsuperscript{54} Simes, op. cit. supra note 51, at 401.

\textsuperscript{55} The best treatment of the cases is Cleary, *Indestructible Testamentary Trusts*, 43 Yale L.J. 393 (1934) and Note, 34 Mich. L. Rev. 553 (1936).

\textsuperscript{56} Cal. Const. art. XX, § 9.

\textsuperscript{57} See the statute as to private trusts, enduring beyond the period of perpetuities, proposed by the California Law Revision Commission, quoted in the Addendum, infra.


\textsuperscript{59} Ibid.
a trust as just described, if valid in other respects, would seemingly suspend the absolute power of alienation, since there would be no beneficiary capable of conveying the equitable interest. This was recognized as the law in California in *Estate of Peabody*, involving a gift to "an institution for old people... Mr. J. Haskell is to make the choice of the institution." The court also rested its decision against the gift upon the failure of the testator to indicate the beneficiary (the gift not being limited to charities) with reasonable certainty. Other California cases have invalidated non-charitable gifts in trust where the beneficiaries were indefinite or uncertain, relying on the doctrine of *Morice v. Bishop of Durham* or on the constitutional prohibition of perpetuities, and with no reference at all to the suspension rule. We must therefore conclude that the abolition of the suspension rule would not change the law in this area.

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

But the "power" analysis is not accepted by some of the cases nor by Professor Simes. There are "trust" characteristics in this situation, at

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61 Estate of Ralston, 1 Cal.2d 724, 37 P.2d 76 (1934); Estate of Sutro, 155 Cal. 727, 102 Pac. 920 (1909); Estate of Kline, 138 Cal. App. 514, 32 P.2d 677 (1934).
63 See Leach and Tudor, *supra* note 51, § 24.67.
64 1 *RESTATEMENT, TRUSTS* § 124, comment b (1935); 2 *id.*, § 418, comment b.
65 Clark v. Campbell, 82 N.H. 281, 133 Atl. 166 (1926) and the California cases cited below.
66 *SIMES, op. cit. supra* note 51, at 408.
least if, as Professor Simes assumes, another trustee might be appointed if the one named by the settlor were to die. The Restatement of Trusts and Professor Scott say the permissive power is invalid if exercisable after the period of perpetuities. But if it is only a power given to a named person (not a corporation) it could not be exercisable beyond that period.

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

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

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67 Id. at 409.
68 1 Restatement, Trusts § 124, comment f (1935).
69 1 Scott, Trusts § 124.1 (1939).
70 Clark v. Campbell, 82 N.H. 281, 133 Atl. 166 (1926).
71 Simes, op. cit. supra note 51, at 409.
72 Id. at 407; 1 Scott, Trusts § 124.1 (1939); 1 Restatement, Trusts § 124 (1935); Leach and Tudor, supra note 51, § 24.67. For a recent case see Alexander v. House, 133 Conn. 725, 54 A.2d 510, 46 Mich. L. Rev. 707 (1948).
73 See, e.g., Hartson v. Elden, 50 N.J. Eq. 522, 526, 26 Atl. 561, 562 (1893) on the “permissive power” theory.
74 1 Scott, Trusts § 124.1 (1939); Smith, Honorary Trusts and the Rule Against Perpetuities, 30 Colum. L. Rev. 60 (1934).
75 1 Restatement, Trusts § 124 (1935).
76 2 Simes, Law of Future Interests § 555 (1936); see also Kales, Estates and Future Interests § 658 (2d ed. 1920).
mination of the trust, whereas in the case of the overlong honorary trust the trust itself is invalid. Simes sums up the nature of the honorary trust and the rule that limits it as follows:

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

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

In another case a gift to keep a grave in repair for at least 25 years was held invalid, without mentioning suspension, on the ground that the gift was “entirely too indefinite ever to be enforced.” California’s Health and Safety Code makes provision for private endowment-care cemeteries accepting gifts for general endowment care and gifts or trusts for special endowment care, that is, for the improvement of the whole cemetery or of a particular plot or plots. The code exempts such gifts and trusts from “any law against perpetuities or the suspension of the power of alienation.

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

78 Simes, Future Interests 409 (Hornbook Series 1951).

79 Gifts for saying masses, however, are now seemingly upheld, either as outright gifts if to a priest, or as charitable trusts, if to a high ecclesiastic. See RESTATEMENT, TRUSTS, CALIF. ANNOT. § 371, comment g (1940).

80 138 Cal. 552, 71 Pac. 707 (1903).

81 Id. at 553, 71 Pac. at 708.

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

83 CAL. H. & S. CODE § 8735.

84 Id. § 8775.
of title to property," and further declares authorized gifts and bequests
to the fund to be charitable and eleemosynary and not invalid by reason of
any indefiniteness or uncertainty of the persons designated as benefici-
caries. But if a gift is made to some trustee for the perpetual care of a plot
in a public cemetery not operated under the above-mentioned provisions of
the Health and Safety Code, such a gift fails as a violation of Article XX,
Section 9 of the Constitution.

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

**Trusts for Unincorporated Associations**

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

Suppose, however, it is found to have been the settlor’s intent that the
trust continue indefinitely or beyond lives in being and 21 years for the
benefit of the association with no power in the trustees or the members to
terminate the trust and divide the property within the permissible period
of suspension. Clearly such a trust violates the suspension rule. But that

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85 Id. § 8737.
86 Id. § 8776.
88 Estate of McDole, 215 Cal. 328, 10 P.2d 75 (1932).
89 This was probably the assumption of the court in Ruddick v. Albertson, 154 Cal. 640,
98 Pac. 1045 (1908).
rule is unnecessary for the trust would fail anyway under the general law of trusts. As Professor Scott says:

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

Business Trusts and Trusts for Security

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

Business or "Massachusetts" Trusts. The distinguishing features of the business trust are two: (1) it is created for the management of an enterprise by trustees who function like the directors of a corporation; and (2) the beneficial interests are represented by transferable certificates or shares. Such trusts generally contain a provision either for termination after some specified period such as lives of specific persons, or more commonly for termination upon the concurrence of a majority or a stated percentage of the certificate holders. Even if no time or other provision for termination is stated in the trust such a trust has been said to be terminable by action of all the certificate holders and for this reason not to create any suspension of alienation. Sears, Wrightington, Simes, and Castle take the view that, if there is no prohibition against termination in the trust instrument, business trusts with transferable shares create no suspension of the absolute power of alienation.

Sears, Wrightington, Simes, and Castle take the view that, if there is no prohibition against termination in the trust instrument, business trusts with transferable shares create no suspension of the absolute power of alienation. Baker v. Stern, decided under statutes similar to California's, is flatly to this effect. This view is also supported by leading cases in Massachusetts and Illinois where courts...
have said that such trusts do not suspend the power of alienation.\textsuperscript{103} It is true, however, that there is no statute like Civil Code Section 715.1 in either of these jurisdictions and the courts were considering the trusts either under the common law rule against perpetuities or the more general principles applicable where a trust may outlast the perpetuities period.\textsuperscript{104}

None of the California cases involving business trusts discuss the application of the suspension rule or suggest any question of invalidity under this rule. It is a safe assumption, in view of these cases and the general law, that no question of invalidity of a business trust under the suspension rule will arise because it will be held terminable by the beneficiaries unless some provision of the trust will require its continuance beyond lives in being and 21 years.\textsuperscript{105} In a case of the latter type we would be better off with simply the common law approach to nonterminable trusts of long duration than with our suspension rule. As already stated, the common law would strike down whatever provision stands in the way of the beneficiaries’ terminating the trust,\textsuperscript{106} whereas the suspension rule may lead a court to the conclusion that the whole trust is invalid.

**Trusts to Secure Creditors.** Deeds of trust used in place of mortgages are not violations of the rule against suspension because, as earlier held, they are implied exceptions to that rule,\textsuperscript{107} or, as later determined, they create no suspension, because it is always possible for the trustor-debtor, the trustees, and the beneficiary-creditor to join and convey an absolute interest to the purchaser or for the trustor to be reinvested with full title by paying the secured debt.\textsuperscript{108}

### III

**Conclusions and Recommendations**

**Repeal of the Suspension Rule**

It is proposed that the rule against suspension of the absolute power of alienation be repealed. This means outright repeal of Civil Code Sec-


\textsuperscript{104} See SIMES, op. cit. supra note 99, at 406–407; Leach and Tudor, op. cit. supra note 90, § 24.67.

\textsuperscript{105} If, as is true in some cases, the first certificate holders are in effect the settlors of the trust, it may be that they in their dual role as settlors and beneficiaries, and their successors in interest, may wind up a business trust in spite of an express prohibition against termination. See 2 RESTATEMENT, TRUSTS § 338, comment a (1935).

\textsuperscript{106} Leach and Tudor, op. cit. supra note 90, at 24.67, say that a business trust is valid though not restricted to the period of perpetuities.

\textsuperscript{107} Sacramento Bank v. Alcorn, 121 Cal. 379, 53 Pac. 813 (1898).

tions 715.1, 770 and 771. It means that Civil Code Sections 715.3 should be amended by striking out the reference to Section 715.1, and that Civil Code Section 716 should be amended by striking out everything except the provision relating to the perpetuities rule.

The reasons for this recommendation are the following:

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

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

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

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

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

6. The present Supreme Court is divided as to the applicability of the suspension rule in the only area in which it has any longer any significance,

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100 Ind. Acts 1945, c. 216, § 6.
111 Wyo. Laws 1949, c. 92, § 1. See the discussion of all such recent legislation by Munson, Recent Changes in Statutory Rules Against Perpetuities, 38 CORNELL L.Q. 543 (1953).
Repeal of Special Limitations on the Creation of Remainders

Background. Civil Code Sections 774,114 775,115 and 777,116 enacted in 1872 and amended only in 1873,117 were borrowed from the New York Revised Statutes of 1830. The counterpart of these sections is still in the New York Real Property Law as Sections 43 to 47 although there is some difference in wording from the California provisions. Certain consequences of the California sections are clear, namely, that as to legal estates in real property: (1) successive life estates can be given only to persons in being at the creation of the interests; (2) after two such life estates the remainder must be in fee; (3) after a life estate created in a term of years the remainder must be for the whole residue of the term; and (4) if the first limitation is a term of years, a remainder for life after such term must be to a person in being at the creation of the estate. These sections in the New York Revised Statutes were obviously put in for the same general reason as the specific provision limiting the vesting of a fee upon a fee to a period of two lives, namely, that no general rule as to remoteness in vesting (as distinguished from alienability) was discerned in the common law by the Revisers. They therefore set up a series of ad hoc rules limiting the creation of specific sorts of future interests which either involve some degree of remoteness in vesting or which seemed to the Revisers to fragment the title and postpone the time of its integration into a fee too long.

General Policy Favoring Repeal. Since we now have a general statute against remoteness in vesting,118 and since this limits all the types of re-

114 "Successive estates for life cannot be limited, except to persons in being at the creation thereof, and all life estates subsequent to those of persons in being are void; and upon the death of these persons, the remainder, if valid in its creation, takes effect in the same manner as if no other life estate had been created." CAL. CIV. CODE § 774.
115 "No remainder can be created upon successive estates for life, provided for in the preceding section, unless such remainder is in fee; nor can a remainder be created upon such estate in a term for years, unless it is for the whole residue of such term." CAL. CIV. CODE § 775.
116 "Remainder of Estates for Life, No estate for life can be limited as a remainder on a term of years, except to a person in being at the creation of such estate." CAL. CIV. CODE § 777.
118 CAL. CIV. CODE § 715.2.
remainders covered by the provisions of Sections 774, 775 and 777—although not in the same way—no reason for the special limitations in these sections appears.

**Civil Code Section 774.** At modern common law it is possible to limit as many successive life estates as the grantor or devisor desires, whether to persons in being or to unborn persons, subject only to the rule against perpetuities. The effect of the rule is, of course, to require contingent remainders to vest in interest, although not necessarily in possession, within the period of perpetuities. If this is a satisfactory limitation as to the vesting of a contingent remainder in fee and as to the contingency of a fee upon a fee or a springing interest, why is it not also satisfactory as a limitation upon successive remainders for life?

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

**Civil Code Section 777.** A grantor or testator will probably very seldom wish to create a life interest in an unborn person following a term of years, but it could happen. For instance, Mrs. T is unhappy over the fact that her son A has not married and settled down. With this in mind, in her last illness, she devises Blackacre to A for 10 years, remainder to the first child A may have for the life of that child, remainder to Stanford University. Since Blackacre is valuable property, Mrs. T hopes in this way to give A an incentive to have a family and thus keep the benefit of the property for the life of a child. Apart from Civil Code Section 777 there would be no invalidity in the contingent remainder for life given to the unborn child, since Civil Code Section 773 expressly permits a contingent remainder to be created after a term of years. If A should have no child by the end of the ten-year term given to A, the contingent remainder to A's first child would

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110 The so-called "rule of *Whitby v. Mitchell,*" which at English common law forbade a remainder to be created to the child of an unborn person, after a life estate in the unborn person, is here disregarded since it has never been applied in the United States. Leach and Tudor, *op. cit. supra* note 90, § 24.68.
not fail in California but would vest in a child of A born thereafter. It is difficult to see any reasonable objection to the life interest devised to the unborn child. It would certainly be valid so far as the rule against perpetuities is concerned, although the rule against suspension as construed in California would strike it down, at least if it were created by way of trust. Civil Code Section 777 destroys the remainder for life to the unborn child, where created as a legal interest—and wholly without justification.

**Additional Considerations Favoring Repeal.** In addition to the fact that these sections, as above pointed out, serve no useful purpose, there is a practical reason for their repeal: These sections seem to have escaped construction throughout the 83 years of their existence and attorneys, it is believed, have often ignored them in drafting instruments. Several important questions about these sections remain unanswered. For example: (1) These sections occur in a title headed “Estates in Real Property.” Do they have any application to remainders in personal property, and, if not, why should there be a distinction between real and personal property as to them? (2) These sections do not in terms refer to equitable remainders. Are they to be so construed, and again, if not, why should there be a distinction?

In their discussion of the rule against suspension and the rule against perpetuities already mentioned, Professors Fraser and Sammis recommend the repeal of Civil Code Sections 774, 775 and 777, and Professor Orrin B. Evans in 1955 reinforced this recommendation, adding: “§§ 774, 775 and 777, not having been amended when the period of suspendability was increased, are a trap, partially nullifying the amendments to § 715.”

In a review of recent legislation regarding the suspension rule and other restrictions on the creation of future interests derived from the New York Revised Statutes of 1830, it is said of the three sections now under consideration: “No one has been able to offer a cogent explanation for their exist-

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121 Cal. Civ. Code § 774 is referred to, in connection with trust interests, in Estate of Lux, 149 Cal. 200, 205, 85 Pac. 147, 148 (1906) and Estate of Sahlender, 89 Cal. App. 2d 329, 349, 201 P.2d 69, 81 (1948), in the former to remark that the section has no applicability and in the latter to remark that the section is not violated because the succeeding interests are not life estates but estates for years. Neither case considers whether the section would apply to equitable life interests in any event, although in the Sahlender case the court apparently assumes that it might. But in Estate of Maltman, 195 Cal. 643, 234 Pac. 898 (1925) in dealing with successive equitable life interests, the second of which was to unborn persons, the court fails to cite Civil Code § 774.
122 See note 121 supra.
123 Supra note 113, at 116–17.
125 Id. at 115, n.27.
ence. . . . They are anomalous to any scheme restricting perpetuities.”

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

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

Indiana in 1945 repealed a section corresponding to our Civil Code Section 774. It had repealed a section corresponding to our Civil Code Section 777 in 1852. It seems not to have any statute corresponding to our Civil Code Section 775.

ADDENDUM

Subsequent to the submission of the foregoing study (herein revised in minor detail), to the California Law Revision Commission the Commission made a recommendation in general accord with the conclusions in the study and drafted an appropriate bill. This bill was introduced as Assembly Bill 249 at the 1957 session of the California Legislature by Assemblyman Clark L. Bradley of San Jose, the Assembly member of the Commission. The provisions of the bill were in brief: repeal of the suspension rule, Civil Code Section 715.1, and of a related section, Civil Code Section 770 as to suspension of the “absolute ownership of a term of years”; amendment of Civil Code Sections 715.3, 716 and 724 to eliminate reference to suspension of the absolute power of alienation; repeal of Civil Code Sections 774, 775 and 777 which sections were commented upon adversely in the foregoing study; and finally, a new section dealing with trusts which endure beyond the period of perpetuities. This last is of special interest and if the bill had become law, would have constituted pioneer legislation in this field. The wording was as follows:

129 Munson, supra note 126, at 558.
131 Ind. Rev. Stat. c. 23, §§ 37, 40 (1852); see also Munson, supra note 126, at 546.
A trust is not invalid, either in whole or in part, merely because the duration of the trust may exceed the time within which future interests in property must vest under this title, if the interest of all the beneficiaries must vest, if at all, within such time.

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

Upon the recommendation of a special committee consisting of Lawrence L. Otis, General Council, Title Insurance and Trust Co. of Los Angeles, Chairman, Professor William E. Burby of the School of Law, University of Southern California, and William B. Carman, a member of the firm of O'Melveny & Myers of Los Angeles, the Board of Governors of the State Bar of California approved the bill.

The bill passed in the Assembly and received a “do pass” recommendation from the Senate Judiciary Committee but failed to pass in the Senate.