Perpetuities in California Since 1951

By Lewis M. Simes*

Throughout the history of California as a state, its law concerning perpetuities has undergone periodic changes. An excellent article by Professor Everett Fraser and Professor (now Dean) Arthur M. Sammis, on "The California Rules Against Restraints on Alienation, Suspension of the Absolute Power of Alienation, and Perpetuities," published in 1953, traced this development to that date, and summarized the then existing state of the California law. The writer is here dealing with important developments in the law which have taken place since that time. Indeed, this article may be regarded as a sequel to the Fraser-Sammis article. 1951 has been selected as a cutoff date because of the important legislative changes in California rules which came into being at that time, and which were expounded in the Fraser-Sammis article.

Before proceeding further, various terms should be explained and distinguished. The term perpetuity, in its broadest sense, has been used to refer to any device which tends to tie up property or to fetter its alienability. In this article, the term is not used so broadly. Three terms, however, are used, which should be precisely differentiated. They are the common law rule against perpetuities, the rules against suspension of the power of alienation and the rules against direct restraints on alienation. The common law rule against perpetuities, as it eventually came to be recognized, is a rule against remoteness of vesting, and is directed against contingent future interests (that is, interests limited on conditions precedent) which may vest at too remote a time. It is now codified in section 715.2 of the California Civil Code, which reads in part as follows: "No interest in real or personal property shall be good unless it must vest, if at all, no later than 21 years...

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18 Hastings L.J. 101.

2 Doubtless in the earlier history of the rule against perpetuities, it was not entirely clear whether it was a rule against suspension of the power of alienation, or against remoteness of vesting. That it was a rule against remoteness of vesting was settled in England by the case of In re Hargreaves, 43 Ch. D. 401 (1890). Gray's treatise on the Rule Against Perpetuities, the first edition of which was published in 1886, made it clear that the American common law rule is a rule against remoteness of vesting. However, it would seem that the New York Revisers who prepared the legislation of 1830 must have regarded suspension of the power of alienation as a large ingredient in the rule, although they also included some statutes prohibiting remoteness of vesting.

[247]
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."

Rules against suspension of the power of alienation were introduced into the California code in 1872, and were borrowed from New York legislation of 1830. Sections 715, 716 and 772 of the California Civil Code, as originally enacted, laid down rules as to the suspension of the power of alienation and were as follows:

§ 715. The absolute power of alienation cannot be suspended, by any limitation or condition whatever, for a longer period than during the continuance of the lives of persons in being at the creation of the limitation or condition, except in the single case mentioned in Section 772.

§ 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.

§ 772. A contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited die under the age of twenty-one years, or upon any other contingency by which the estate of such persons may be determined before they attain majority.

From these sections it is clear that the power of alienation is suspended by the limitations of a future interest in favor of an unborn or an unascertained person; for in that case there is no person or group of persons who can convey in fee simple absolute. At an early period it was also determined by the California courts that the beneficial interest in a trust could suspend the power of alienation, whether the interest be contingent or vested, and even though it be a present interest. This result was reached by reason of certain other statutes which were regarded as making the equitable interest in the trust inalienable.

A third type of rule, which existed at common law, and which has

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3 In general, as to the New York legislation on the suspension of the power of alienation, see SIMES, Future Interests 259, 298-303 (2d ed. 1966).
4 Estate of Walkerly, 108 Cal. 627, 41 Pac. 772 (1895); Estate of Maltman, 195 Cal. 643, 234 Pac. 898 (1925).
6 See SIMES, op. cit. supra note 3, at ch. 22.
long been recognized in the California Civil Code, is that prohibiting direct restraints on alienation. Such restraints can arise because of an express provision in the language of the instrument creating the interest, either prohibiting alienation or providing for termination or forfeiture of the interest on alienation. The restraint may be in the form of a disabling restraint. Thus A may convey land to B in fee simple and expressly provide in the instrument that B shall never alienate it. Or the restraint may be in the form of a forfeiture restraint. A may convey land to B in fee simple "on the express condition that B shall not alienate it, and upon such alienation the grantor may enter and forfeit B's estate." Or A may convey land to B in fee simple "so long as B does not alienate it." Both the disabling restraint and the forfeiture restraint, when applied to a legal fee simple, are void; but the conveyance of the fee simple is good. That is to say, in each of the three illustrations given, B has a fee simple absolute, freed from the restriction, condition or limitation.

California courts have often used the term "restraint on alienation" when they are really talking about a suspension of the power of alienation. But in the case of the direct restraint on alienation, the rule is directed against the language of restraint, the direction, condition, or limitation, which is thereby held void. In the case of the suspension of the power of alienation, the rule is directed against a contingent future interest, or a beneficial interest in a trust, and the interest itself is void if it violates the rule.

Summary of the Period Through 1951

Before considering in detail the California perpetuities law since 1951, two things will be noted, namely, (a) the important stages in this law prior to that date, and (b) the state of the California law of Perpetuities on that date.

The California constitution of 1849 contained the following provision, which was incorporated into the constitution of 1879:

"No perpetuities shall be allowed except for eleemosynary purposes."

At a much later time this language was held by the California courts to enact the common law rule against perpetuities. The permissible period for the suspension of the power of alienation stated in the statutes of 1872 was lives in being plus, in certain cases, an actual minor-

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7 Section 711.
8 Cal. Const. art. XI, § 16 (1849); Cal. Const. art. XX, § 9 (1879).
9 See cases cited note 12 infra and accompanying text.
In 1917 the permissible period for the suspension of the power of alienation was changed by the addition of an alternative period of 25 years. Thus the permissible period became lives in being, plus the restricted minority, or in the alternative a period of twenty-five years. It was during the period between 1917 and 1951 that the courts came to recognize the constitutional provision already referred to as enacting the common law rule against perpetuities.

In 1951 the permissible period in the statute on the suspension of the power of alienation was changed to lives in being and twenty-one years; and at the same time the statute declaring the common law rule against perpetuities, with its period of lives in being and twenty-one years, was enacted. At this point it may be asked: Were both these statutes necessary? That is to say, since the period of time was now the same, if an interest were void under one of these statutes, would it ever be valid under the other; and vice-versa? In so far as contingent future interests are concerned, any interest which would be void under one of these statutes, would it ever be valid under the other; and vice-versa? In so far as contingent future interests are concerned, any interest which would be void under the suspension of the power of alienation statute, would also be void under the common law rule. But some contingent future interests which do not suspend the power of alienation would also be void under the common law rule. However, certain vested, beneficial interests in trusts, which would be void under the suspension of the power of alienation statute, would be valid under the common law rule against perpetuities. Thus, as the Fraser-Samms article shows, the suspension of the power of alienation statute added nothing to the common law rule against perpetuities except in the case of the application of the statute to vested, beneficial interests in certain trusts.

Scope of Treatment of Post-1951 Law

The discussion of California perpetuities law since 1951 which follows will deal with the following topics: (a) the legislation of 1959; (b) the legislation of 1963; and (c) important judicial decisions. No attempt will be made to consider statutory exceptions to the common law rule against perpetuities.

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12 Estate of McCray, 204 Cal. 399, 268 Pac. 647 (1928); Estate of Sablender, 89 Cal. App. 2d 329, 201 P.2d 69 (1949); Dallapi v. Campbell, 45 Cal. App. 2d 541, 114 P.2d 646 (1941); Estate of Harrison, 22 Cal. App. 2d 28, 70 P.2d 522 (1937). Sometimes the cases also suggest that the common law rule against perpetuities is in force because of a statute making the common law, except in certain cases, the rule of decision in this state.
14 See Fraser & Samms, supra note 5.
law rule, such as those concerned with profit sharing and retirement trusts, nor are rules restricting accumulations or direct restraints on alienation included.

Legislation of 1959

In 1959, pursuant to the recommendations of the California Law Revision Commission, based on a study by Professor Lowell Turrentine, all statutes relating to the suspension of the power of alienation were repealed. This was also in accordance with the recommendations of the Fraser-Sammis article. The reason for this was that the invalidating of a trust because of the suspension of the power of alienation was felt to be unduly harsh; and because it was realized that, in most states, private trusts which might last longer than the period of the rule against perpetuities were not thereby rendered invalid.

The elimination of statutes restricting the suspension of the power of alienation, however, would then leave the state with no statutory rule restricting the duration of private trusts, as such. Hence, it was felt that new legislation on this subject should be enacted. It is true, there was authority in other states, in the absence of statute, to the effect that a private trust which does not violate the common law rule against perpetuities, but which may last longer than the period of the common law rule, can be terminated on the concurrence of all the beneficiaries. In other words, such a trust was said to be subject to internal attack, though not subject to external attack. If, for example, such a trust were set up in a will, the heirs could not attack it, nor secure a holding of its invalidity. But, even though all the purposes of the trust had not been accomplished, all the beneficiaries, being sui juris, could secure a termination of the trust and a transfer of the trust corpus to them. As is pointed out in the report of the Law Revision Commission, since there was no judicial authority on this subject in California, a repeal of the suspension of the power of alienation rule as applied to the duration of private trusts should be superseded by legislation as to the duration of such trusts. Hence, California Civil Code, section 771, was

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15 As to these trusts, see Cal. Civ. Code § 715.3.
18 Fraser & Sammis, supra note 5, at 116.
enacted as a part of the 1959 reform. That section, which is still in force, reads as follows:

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.

If a trust is not limited in duration to the time within which future interests in property must vest under this title, a provision, express or implied, in the instrument creating the trust that the trust may not be terminated is ineffective insofar as it purports to be applicable beyond such time. A provision, express or implied, in an instrument creating an inter vivos trust that the trust may not be terminated shall not prevent termination by the joint action of all the creators of the trust and all of the beneficiaries thereunder if all concerned are competent and if the beneficiaries are all of the age of majority.

Whenever a trust has existed longer than the time within which future interests in property must vest under this title

(1) It shall be terminated upon the request of a majority of the beneficiaries.

(2) It may be terminated by a court of competent jurisdiction upon the petition of the Attorney General or of any person who would be affected thereby if the court finds that such termination would be in the public interest or in the best interest of a majority of the persons who would be affected thereby.

While it deviates somewhat from the rule which has been referred to, this legislation appears to be a satisfactory solution of the problem.

Legislation of 1963

The perpetuities legislation of 1963 appears to be a manifestation of a statutory reform movement, observable in a number of other states as well as in the British commonwealth, to mitigate the harshness of the common law rule.\(^2\) In California it also may have been inspired by a desire to eliminate the harshness of the doctrine laid down in *Haggerty v. City of Oakland*,\(^2\) which is discussed at a later point in this paper.\(^2\)

This legislation includes four separate provisions, each of which is apparently designed to accomplish a somewhat different purpose. These four will be considered separately, on the assumption that they are all constitutional. Then, since a question of validity under the Cali-

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\(^2\) See *Simms*, *op. cit. supra* note 3, at §§ 124-26.


\(^2\) See authorities cited note 55 *infra*. 
Perpetuities in California may be raised, at least as to two of them, that question will be considered in conclusion.

(a) Reformation Cy Pres

One of the principal criticisms of the common law rule against perpetuities which has been made in recent years, is that the consequences of a violation are unduly harsh. Thus, it has been commonly held that, if a contingent interest violates the rule, it is totally void; whereas it is argued that it should be possible to give effect to the settlor's intent as nearly as possible (cy pres), by reforming the instrument to conform to the rule, in such a manner as the settlor would have preferred had he known of the violation. The subsection designed to effectuate this reform is as follows:25

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

This is similar to legislation enacted in a few other states.26 Indeed, it has been contended that the same result can be accomplished by judicial decision.27 At least one recent case actually does this.28

Much can be said for this piece of legislation. After all, to strike down completely the provision of the settlor's instrument is difficult to justify, where it is possible to give effect to a similar limitation which the court can be reasonably sure the settlor would have preferred to total invalidity. About the only thing which can be said against such a reformation by judicial decree is that it permits a judge with little knowledge of the law of estates and future interests to rewrite the will. But with the assistance of competent counsel, the court should not go far wrong. And, in any event, what the court does will probably be preferred to total invalidity.
(b) Sixty-Year Period in Gross

Another section of the legislation of 1963 reads as follows:29 "No interest in real or personal property which must vest, if at all, not later than 60 years after the creation of the interest violates Section 715.2 of this code." This provision was doubtless suggested by the 1956 Report of the English Law Reform Committee on the Rule Against Perpetuities.30 This recommendation of the English Law Reform Committee has since been enacted into law in England,31 Western Australia,32 and New Zealand.33 The text of the English provision, as enacted by Parliament, is in part as follows:34 "... where the instrument by which any disposition is made so provides, the perpetuity period applicable to the disposition under the rule against perpetuities, instead of being of any other duration, shall be of a duration equal to such number of years not exceeding eighty as is specified in that behalf in the instrument." According to the report of the English Committee, this was recommended to take the place of the so-called "royal lives" clause, which was then frequently used by legal draftsmen. Such a clause expressly limited the duration of a trust, or the time of vesting of a future interest, to the time when the last survivor of all the descendants of some designated recent English monarch, who were alive at the time the will or trust instrument in question took effect, should die, and a period of twenty-one years thereafter. Royal lives were, of course, used, because accurate records were generally available as to who they were and when each died. However, this was not always the case.35 And, as the English Report states,36 "Even if all the designated royal lives can be ascertained, it may well be difficult and expensive to discover the date on which the last of them dropped." The enactment of the eighty year provision was thought to woo the bar away from the use of the "royal lives" clause, and thus to avoid its difficulties.

It should be noted that, according to the English statute, the eighty year period can only be applied if the instrument specifies it, and then it is to be used to the exclusion of the common law period of lives in being and twenty-one years. But in the California statute there is no

30 Law Reform Committee, Fourth Report, Cmd. No. 18, at 6-7 (1956).
32 Law Reform (Property, Perpetuities, and Succession), 1962, 11 Eliz. 2, No. 83 (W Austl.).
34 Perpetuities and Accumulations Act, 1964, 13 Eliz. 2, c. 55, § 1.
35 See In re Villar, [1929] 1 Ch. 243.
36 Law Reform Committee, op. cit. supra note 30, at 6.
such restriction. Not only is the period sixty years instead of eighty, but there is no requirement that the instrumment specify that this period is being used, nor that it must be used to the exclusion of the common law period. It seems clear, indeed, that the sixty year period of the California statute is merely an alternative period, and that its effect is to validate the instrumment if contingent limitations will vest either within the sixty year period or within lives in being and twenty-one years; and this is true whether the draftsman indicated that he was using that period or not. Thus, on an average, there will be more cases held valid under the rule than there were before.

The writer believes that, on the whole, thiis new legislation is undesirable. The period of lives in being and twenty-one years permits a sufficiently extensive tying up of property, without extending the period by a new alternative. It is true, the use of the sixty year period may sometimes be easier to handle than a period of lives in being and twenty-one years. And it may be said that, after all, a period of of average lives plus twenty-one years is no longer than a period of sixty years. It is also true that some types of provisions are not likely to involve any lives in being, and then the common law period is merely twenty-one years. It is arguable that, in such a situation a longer period in gross, such as sixty years, should be permissible. But is there any situation where a period as long as sixty years is needed, there being no lives in being involved? It may be said that an option contract in a case in point. But is there any real need for options to purchase land which may last longer than twenty-one years? The writer believes that the answer is no.37

Nor would it seem desirable to qualify the use of the longer period in gross as the English have done, requiring that the instrumment specify that the period is used and that no alternative period can then be used. If this were done, American draftsmen would be likely to be unaware of these restrictions on the use of the sixty year period, and would often fail to bring the terms of an instrumment within them when they intended to do so. In England the drafting of such instruments as are here considered is largely in the hands of a highly skilled group of specialists who doubtless would be aware of the precise scope of the restrictions on the use of the eighty year period. But, since this is not the case in the United States, the English restrictions on the use of the period would probably give rise to difficulties.

37 The English Act does not apply the eighty year period provision to an option to purchase land. In that case the period is only twenty-one years. Perpetuities and Accumulations Act, 1964, 13 Eliz. 2, c. 55, § 9.
Another clause of the 1963 act involves what Professor Leach has felicitously described as the "unborn widow" case.\textsuperscript{38} The language of the clause is as follows:\textsuperscript{39} "In determining the validity of a future interest in real or personal property pursuant to Section 715.2 of this code, an individual described as the spouse of a person in being at the commencement of a perpetuities period shall be deemed a 'life in being' at such time whether or not the individual so described was then in being." The following case illustrates the sort of situation which this clause was designed to remedy.

A devises land on trust for his son $B$ for life, and then for such widow as $B$ shall leave surviving him, for her life, and then to distribute to the children of $B$ who are living at the death of such widow: Cases have commonly held that the contingent limitation to the children of $B$ violates the common law rule against perpetuities. For $B$ might marry a woman who was not in being at the testator's death, and she might live more than twenty-one years after the death of $B$. Thus the remainder to the children of $B$ would not vest until more than twenty-one years after $B$'s death, the only available life in being. If $B$'s wife had been in being at the testator's death, and had been referred to as such, then the limitation to the children, which would vest on her death, would be valid. The new statutory provision says that $B$'s widow is deemed to be a life in being even if she is not a life in being. This may seem anomalous; but it is believed to be good sense. Such a limitation is the kind of slip draftsmen not infrequently make. If we view the validity of the limitation at its inception, we must then say that it is possible that $B$ might marry a woman who was unborn at the time of testator's death. But as a practical matter, this is very unlikely to happen. The new statute validates the numerous cases where the widow turns out to be a life in being, as well as those extremely rare cases where she was not a life in being.

\textit{New Concept of Vesting}

Probably the most thoroughly unique and completely revolutionary provision in the legislation of 1963 is Section 715.8, which reads in part as follows:\textsuperscript{40} "An interest in real or personal property, legal or equitable, is vested if and when there is a person in being who could convey or

\textsuperscript{38} See Leach, \textit{Perpetuities in a Nutshell}, 51 Harv. L. Rev. 638, 644 (1938).
\textsuperscript{39} \textsc{Cal. Civ. Code} § 715.7 (enacted by Cal. Stat. 1963, ch. 1455, § 6, at 3009).
\textsuperscript{40} \textsc{Cal. Civ. Code} § 715.8 (enacted by Cal. Stat. 1963, ch. 1455, § 7, at 3010).
there are persons in being, irrespective of the nature of their respective interests, who together could convey a fee simple title thereto."

As a part of the legislative act in which this provision was included there was a clause repealing Sections 693-95 of the California Civil Code, which, since 1872, had constituted the definitions of vested and contingent future interests. The repealed sections are as follows:

§ 693. Kinds of Future Interests. A future interest is either:
1. Vested; or
2. Contingent.

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

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

It would appear that, under the guise of a new definition of vested and contingent future interests, the new section has in fact eliminated any rule against remoteness of vesting, and has provided a test of suspension of the power of alienation in determining the validity of future interests. This is a step backward. As has been seen, suspension of the power of alienation was entirely eliminated from our code in 1959 because it was thought to be undesirable. It is true, a major objection to it at that time was that rules restricting the suspension of the power of alienation unduly restricted the duration of trusts; and clearly the new section establishes a rule of suspension of the power of alienation only with respect to contingent future interests, but does not concern itself with the duration of equitable vested interests in trusts. Nevertheless, a rule dealing solely with suspension of the power of alienation, without any restriction on those contingent future interests which do not suspend the power of alienation, is undesirable.

Two examples will show how this is so. A conveys land "to B in fee simple, but if the land is ever used for business purposes, then to C in fee simple." If the executory interest limited to C is valid, it may tie up the property and prevent a clear title for an indefinitely long period of time. It is true, B and C could unite in conveying in fee simple absolute; hence there is no suspension of the power of alienation. Moreover, C's interest is valid as a "vested" interest under the new statutory provision. But clearly it does tie up property For while B

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42 Simms, Future Interests 268 (2d ed. 1966).
and C could unite in conveying in fee simple absolute, they are not likely to do so, since they will have difficulty in evaluating their respective interests.42 Or suppose A, owning land in fee simple absolute, executes for valuable consideration, an instrument, covenantee on behalf of himself, his heirs and assigns, that B, his heirs, and assigns, shall have an option for 1,000 years to buy the land for $10,000. Under the common law rule against perpetuities, the option would be regarded as invalid,43 since A is trying to give B a contingent, equitable interest in the land, which may not vest for 1,000 years. Yet the option does not suspend the power of alienation, and, under the new statutory provision, it would apparently be good. Indeed, the new statutory provision results in this: If the only contingent, future interests found in a deed or will are limited to definite ascertained persons, the rule against perpetuities is not violated. The contingent future interests are saved by the use of a fiction in accordance with which they are deemed vested.

That a rule solely against the suspension of the power of alienation is inadequate to prevent the tying up of property for an unreasonably long time, has been recognized by the courts of this state and of other states. Thus, as has been seen, before the common law rule against perpetuities was declared in this state in statutory form, the courts concluded that the common law rule against perpetuities, as a rule of remoteness of vesting, was in force by virtue of a provision of the California constitution. And in New York and some other states, where statutory rules as to the suspension of the power of alienation have been in force, courts have seemed ready to find, on one ground or another, that there is also a rule against remoteness of vesting.44

But even if we were to concede that the only rule restricting the tying up of property by future interests should be a rule as suspension of the power of alienation, it is most unsatisfactory to state it in the form of a new definition of vesting. From time immemorial the term "contingent," when applied to future interests, has meant "subject to a condition precedent." It is hard to see how such an interest can truly be said to be vested merely because of the new clause in the statute.45

42 The leading English case to this effect is London & S.W Ry. v. Gomm, 20 Ch. D. 562 (1882). To the same effect is 4 Restatement, Property §§ 393-94 (1944).
44 It is believed that the California Supreme Court, which has recognized that a rule against remoteness of vesting is declared by the California constitution, is not going to conclude that we still have a rule against remoteness of vesting enacted in the civil code, just because the legislature has re-defined vesting in terms of suspension of the power of alienation.
Constitutionality of the 1963 Legislation

Subsequent to the enactment of the 1963 legislation, a question has been raised as to the constitutionality of some of its provisions. This applies particularly to the provision embodying a new definition of vesting, and may apply to the sixty year provision. As has been seen, it has been held that the California constitution of 1879, with its provision to the effect that “no perpetuities shall be allowed except for eleemosynary purposes,” means that the common law rule against perpetuities, as a rule restricting the vesting of a contingent future interest to a period of lives in being and twenty-one years, is in force.

Just what is the precise scope of this doctrine, as declared by the California courts, is none too clear. Certainly a number of California cases have declared that the common law rule against perpetuities, as a rule against remoteness of vesting, is in force by reason of our constitution, and at least two cases have so held. These is no square decision on this point by the Supreme Court of California. But in Estate of McCray, the Supreme Court said: “The rule against restraints on alienation [obviously referring to the statutory rule against suspension of the power of alienation] has been, in some cases, confused with the rule against perpetuities; but the two rules, while having the same end in view, viz., that of preventing undue interference with the freedom of transfer of property, are of entirely different origin and application. The rule against perpetuities, engrafted upon our system by the constitution, relates only to future interests in property, the vesting of which is to be postponed beyond the allotted time. The rule relating to restraints on alienation, on the other hand, is statutory in origin, and has reference to an undue prevention of the transfer of estates already vested.”

Does the view of the California courts on the effect of the constitutional provision mean (a) that the common law rule against remote-

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46 38 CAL. S.B.J. 641 (1963); Comment, The Quest for the Best Vest, 37 So. Cal. L. Rev. 283, 292 (1964) (contending that the constitutional provision is merely a statement of policy).


48 204 Cal. 399, 406, 268 Pac. 647, 650 (1928). But see Estate of Micheletti, 24 Cal. 2d 904, 908, 151 P.2d 833, 835 (1944) where the court, by way of dictum, indicates some doubt. However, it has been noted that a hearing before the Supreme Court was thereafter denied in Estate of Sahlender, 89 Cal. App. 2d 329, 201 P.2d 69 (1948) which was a square decision in accord with the view that the constitution enacts the common law rule.
ness of vesting is thereby enacted in all its details, or (b) does it merely announce a general policy against permitting the tying up of property for an unreasonable time, or (c) does it mean that the common law rule is enacted only in substance, but that this does not prevent the legislature from modifying it in some particulars, so long as it can still be said to be the common law rule against perpetuities? The second interpretation cannot be taken without a square departure from the doctrine as laid down in a number of cases. It would seem that the third interpretation is the acceptable one in the light of these cases. If we were to say that the constitution enacts the common law rule against perpetuities, with all its details, exactly as it existed in 1849 or in 1879, then all the minor statutory amendments, such as those concerning pension and profit sharing trusts and trusts to maintain a cemetery lot, would seem to be void. Yet these statutes merely supplement the rule. They still leave us with the common law rule against remoteness of vesting. Indeed, it is unthinkable that our courts would hold that the common law rule against perpetuities, as it existed when the constitution was enacted, cannot be changed in the minutest detail without a constitutional amendment. Thus, judged by the third test suggested, the 1963 legislation involving the reformation of an

49 This seems to have been the view of the court of appeal in the case of Estate of McCray, referred to in the preceding note. The opinion in the court of appeal is reported in 260 Pac. 940 (1927). The case involved a will in which the testator sought to set up a trust for a period of ten years. At that time the statute was in force permitting a suspension of the power of alienation for twenty-five years, or in the alternative, for lives in being and a possible minority in certain cases. The period of lives in being and a restricted minority had been a part of the statute since 1872. The twenty-five year alternative had only been added by amendment in 1917. This court held the trust void on the following line of reasoning. The constitution enacted the Rule Against Perpetuities, with its period of lives in being and twenty-one years. The legislature could further restrict the period, but it could not lengthen the period. Hence, the amendment permitting a period in gross not to exceed twenty-five years was unconstitutional. And the only rule was the prior statute — without any period in gross unconnected with an actual minority. It is true that Supreme Court reversed, pointing out that the court of appeal had confused the statutes as to suspension of the power of alienation, and the constitutional provision which was said to concern remoteness of vesting, and that therefore the 1917 legislation was constitutional, and the trust was valid. But the fact remains that the Supreme Court did not deny that the twenty-one year period was a part of the rule of remoteness of vesting, impliedly enacted by the constitution.

50 This is the view favored in the following: Burby, The Meaning of the Constitutional Provision Prohibiting Perpetuities, 1 So. Cal. L. Rev. 107 (1928); Gerdes, "Perpetuities" and the California Rule Against Suspension of the Absolute Power of Alienation, 16 Calif. L. Rev. 81 (1928); Comment, 37 So. Cal. L. Rev. 283 (1964).

51 As to such amendments, see Cal. Civ. Code § 715.3 (profit-sharing or retirement trusts); Cal. Civ. Code § 715.4 (insurance trusts); Cal. Health & Safety Code § 8776 (maintenance of cemetery lot).
otherwise void limitation, and that dealing with the “unborn widow” case, are constitutional. For we still have the common law rule against perpetuities after their enactment.

The provision stating a new concept of vesting is believed to be different. As has been seen, the effect of this is to substitute the concept of suspension of the power of alienation for that of remoteness of vesting. If we are to rely on declarations of our courts that the constitution enacts a rule against remoteness of vesting, then the change in the concept of vesting so as to make it mean suspension of the power of alienation would seem to mean that we no longer have a rule against perpetuities.

What about the alternative sixty year provision? It is doubtful whether its existence means that we no longer have the rule against perpetuities. What we have is the common law rule plus an alternative period, which would not, on an average, be longer than the common law period of lives in being and twenty-one years. On the other hand, it may be said that the only period in gross recognized as a part of the common law rule is twenty-one years. And it may be pointed out that, in the McCray case, the opinion in the Court of Appeal did regard the twenty-one year period as an essential part of the rule.52

**Important Decisions Since 1951**

Five important decisions of the California courts on perpetuities questions, decided since 1951, have been selected for discussion. Two of these concern the question of liberal or strict construction of a limitation for purposes of determining whether the interest will necessarily vest with the period of the rule. Two of them involve oil and gas leases. The other concerns the validity of an appointment under a testamentary power.

An important part of the common law rule against perpetuities is the doctrine that the validity of a limitation is to be determined as of the time of inception of the instrument, on the basis of what might possibly happen, not what probably would happen. Indeed, earlier cases usually applied this doctrine with great severity Gray declared that “every provision in a will or settlement is to be construed as if the Rule did not exist, and then to the provision so construed the Rule is to be remorselessly applied.”53 But, by the time the American Law Institute published its Restatement concerning the rule against perpetuities, the law was declared therein to favor a legally more effec-

52 See note 49, supra.

tive construction of an ambiguous limitation, for purposes of deter-
mining its validity under the rule. In a number of jurisdictions, how-
ever, the old doctrine, as stated by Gray, continued to be followed. This was true in California.

Thus, in *Haggerty v. City of Oakland*, the validity of a lease for years to arise in the future was involved. The lease by its terms was to begin after the construction of a certain building and not until the first day of the calendar month next succeeding thirty days after notice to the lessee that the building was substantially completed. The court, following the earlier doctrine just stated, held that the lease violated the rule against perpetuities, since it was not certain that the building would be completed within lives in being and twenty-one years. As the court said:

> It is also well settled that, in determining whether or not the rule applies, the courts have no power to consider reasonable probabilities or possibilities, or to consider what has happened after the creation of the interest. If, at the time of the creation of the interest, there exists any possibility at all that the interest involved may not vest within the prescribed period, the rule has been violated, and the grant must fail.

It has been indicated that the 1963 legislation which stated a new definition of vesting was designed to make valid such a limitation as was involved in the *Haggerty* case. If that be true, the legislature might have been saved the devious device which it employed to get around the *Haggerty* case had it anticipated the decision of the Supreme Court of California in the case of *Wong v. DiGrazia*.

The latter case was practically on all fours with the *Haggerty* case. It also involved an agreement for the lease of a building to commence upon completion of the building. The court held that the rule against perpetuities was not violated, and expressly overruled the holding in the *Haggerty* case. As the court said:

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56. 161 Cal. App. 2d at 418, 326 P.2d at 964.
57. See *Comment, The Quest for the Best Vest*, 37 So. Cal. L. Rev. 283, 284 n.8 (1964).
Courts and scholars almost unanimously agree that provisions which made vesting contingent upon performance within a reasonable time, or some equivalent phrase, do not violate the rule "if, in the light of the surrounding circumstances, as a matter of construction 'a reasonable time' is necessarily less than twenty-one years." (3 Simes & Smith, Future Interests (2d ed. 1956) § 1228 at p. 122.)

The two cases involving oil and gas leases should be considered together. In Victory Oil Co. v. Hancock Oil Co., it appeared that Berry conveyed the land in question to Tucker, "excepting therefrom and reserving to the grantors and their successors in interest all oil, gas, and other minerals on or under the said described lands." The deed provided that, if oil, gas or other minerals shall not be found in paying quantities within five years, all rights of the grantors in said land should cease; and if oil, gas or other minerals should be found within the five year period, the rights of the grantors should continue for a period of twenty years and so long thereafter as oil, gas or other minerals shall be produced in paying quantities. Berry executed an oil and gas lease, which came into the ownership of the Hancock Oil Company. This suit involved a determination of the state of the title. Certain defendants, who were successors of Tucker, the original grantee, contended that the title of Berry had ceased in accordance with the limitations of the original deed, some of the oil wells having been abandoned and another located on adjoining land. The court held that the interest of the grantee, Tucker, was void under the rule against perpetuities. The contention was made by counsel that the conveyance to Tucker contained a reservation to the grantor, not an exception, and that therefore the rule was not violated. Apparently the distinction referred to was this. If A conveys to B in fee simple, excepting a possessory interest for so long as oil and gas are found in paying quantities, this would have left a determinable fee in the grantor had it been created in some one other than the conveyor. But no determinable fee can arise in the grantor, and so the grantor had conveyed to the grantee an executory interest in the nature of a springing use, which is subject to the rule against perpetuities. On the other hand, if A has conveyed to B in fee simple, reserving to the grantor an incorporeal interest, known as a profit a prendre, which is to last so long as oil and gas are found in paying quantities, B has a

59 Wong v. DiGrazia, supra note 58, at 536-37, 35 Cal. Rptr. at 249, 386 P.2d at 825.
present, possessory fee simple, which, being vested, cannot be subject to the rule against perpetuities; and the grantor has a determinable interest in a profit.\textsuperscript{62} When the grantor's interest ceases because oil and gas are no longer found in paying quantities, the profit simply terminates, leaving the grantee with a fee simple absolute. Here the court declared that the grantor had attempted to limit an exception to himself,\textsuperscript{63} and that therefore, the granted interest was void under the rule against perpetuities, leaving the grantor with a fee simple absolute subject to the lease he had given. Whether the court fully appreciated the significance of this conclusion may, however, be doubted in view of the incomprehensible observation that "even if this were held to be a reservation the rule of Dallap v. Campbell, 45 Cal. App. 2d 541, 545, would be persuasive, the court there finding a reservation of a profit a prendre to be a violation of the rule against perpetuities, and therefore void and of no effect."\textsuperscript{64}

Four years after the decision in the Victory Oil Company case, the Supreme Court decided the case of Brown v. Terra Bella Irrigation District,\textsuperscript{65} which, though similar to the Victory Oil Company case with respect to the facts involved, was held by the court to be distinguishable. Here, also, a deed conveyed to the defendant a fee simple, reserving oil, gas and other minerals to the grantor for a period of twenty-five years and as long thereafter as oil, gas or petroleum products shall be produced in paying quantities. The deed contained a further provision that, "subject to the reservations and conditions aforesaid," the grantor grants to the grantee all reversion and reversions, remainder and remainders in said property. No minerals were ever found. This was a suit to quiet title and for other relief. Plaintiff was the successor in interest of the grantor, his contention being that the interest of the grantee defendant was void under the rule of the Victory Oil Company case, the provision for the retention of oil and gas rights by the grantor being an exception not a reservation. The court found for the

\textsuperscript{62} See Simms & Smith, op. cit. supra note 61, at § 1248.

\textsuperscript{63} If this was an exception, then the grantor retained a possessory fee simple in the oil and gas in place. If it was a reservation, he only retained a right to take oil and gas, in the nature of a profit a prendre. California authority would indicate that the usual oil and gas lease creates in the lessee a profit a prendre, not a possessory interest in oil and gas in place. See Dabney v. Edwards, 5 Cal. 2d 1, 53 P.2d 962 (1935).

\textsuperscript{64} The court was incorrect in saying that a profit was reserved in Dallap v. Campbell. What the court held in that case was that a power was reserved by the grantor in the nature of a special power of appointment, which might not be exercised within the period of the Rule Against Perpetuities, and therefore was void.

defendant, determining that there was no violation of the rule against perpetuities. In its opinion the court declared that it was unnecessary to decide whether the provision concerning oil and gas was an exception or a reservation. For, said the court, even if it were an exception, making the conveyance to the grantee a void executory interest under the rule of the *Victory Oil Company* case, there would be a possibility of reverter as well as a determinable fee in the grantor; and this possibility of reverter, which was not subject to the rule against perpetuities, was conveyed to the grantee by the later clause of the deed conveying to the grantee all reversions. It is impossible to understand how the grantor could retain both a determinable fee and a possibility of reverter. There can be no determinable fee in the grantor, and even if there were both a determinable fee and a possibility of reverter in the grantor, the possibility of reverter could not be deemed conveyed by a later clause of the deed, since all clauses of the deed operate at the same time. If this was an exception, then the grantee was given an executory interest, which was void under the rule against perpetuities. Of course, the case can be sustained on the ground that there was a reservation of a *profit a prendre*, and that therefore, the granted interest was a present, possessory interest, which was valid under the rule against perpetuities.

One other case deserves brief mention, although it lays down a principle which has long been recognized in other jurisdictions. The case of *In re Bird's Estate* involved a will in which a wife gave her husband a general testamentary power to dispose of her estate. The husband died three months after the death of his wife, leaving a will in which he set up a trust limited to terminate “on the death of the last survivor of my children and grandchildren living at the time of my death, and the entire corpus and undistributed net income shall go and be distributed to the children of my grandchildren per capita.” At the time of the husband's death, the same children, grandchildren and children of grandchildren were living as were alive when his wife died. The court held that the exercise of the power did not violate the rule against perpetuities, since it was to be construed in the light of facts existing when the power was exercised; although, being a power to appoint by will only, the period was to be measured from the creation

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66 It is true, there is one case which holds that a determinable fee can be devised in one clause of a will, leaving a possibility of reverter in the testator's heirs, and that the possibility of reverter can be devised by the residuary clause of the same will. See *Brown v. Independent Baptist Church*, 325 Mass. 645, 91 N.E.2d 922 (1950). But see the writer's comment on that case in 52 Mich. L. Rev. 179 n.4 (1953).

of the power. This is the rule declared by the American Law Institute and by decisions in other states. It has nothing to do with the so-called "wait-and-see" doctrine, which has sometimes been vigorously advocated in recent years. Rather, it merely means that the exercise of the power, being the last step in the transactions designed to get the property to the appointees, should be construed to mean what it meant to the donee of the power at that time. And if, at the exercise of the power, it was certain that the appointees would be determined at the termination of the lives of children and grandchildren who were lives in being when the power was created, then the exercise of the power was good.

Conclusions

By way of conclusion and summary, it may be observed that the legislature took a long step in the right direction in 1959; and that the 1963 legislation reached desirable results in the cy pres provision and in the provision for the "unborn widow" case. As to the sixty year period in gross, it is the writer's opinion that it tends unduly to lengthen an already long permissible period for the rule. If any alternative period in gross is recognized by legislative enactment, a period of thirty years should be sufficient. As to the provision in the 1963 legislation which redefines vesting in terms of suspension of the power of alienation, it should be repealed. It is not only confusing, but also fundamentally unsound from the standpoint of basic policy. The case of Wong v. DiGrazia establishes a wholly desirable doctrine.

In the meantime, and until repeal or amendment, the draftsman and estate planner must live with the 1963 legislation. My advice to him is this: Do not risk drafting an instrument which would be valid only under the provisions of the sixty year clause, or of the clause declaring a new concept of vesting. The new provision as to vesting may be held unconstitutional; and the court might even strike down the sixty year provision on the same ground. Until the Supreme Court of California has spoken, these two deviations from the common law rule against perpetuities should be viewed with suspicion.

68 4 Restatement, Property § 392 (1944).
70 As to this doctrine, see Simes, Future Interests § 129 (2d ed. 1966).
71 See note 58 supra.