1-1-1916

Modern Phases of the Rule Against Perpetuities and Restraints Upon Alienation Applied to Entrusted Properties in the State of California

Adolph Canelo
Santa Clara University Law School

Follow this and additional works at: http://digitalcommons.law.scu.edu/stutheses

Part of the Estates and Trusts Commons

Automated Citation
THESE PHASES OF THE RULE AGAINST PERPETUITIES FOR ALLOCATION AND RESTRAINTS UPON PROPERTIES IN THE STATE OF CALIFORNIA.
There is perhaps no legal subject more interesting nor important in the sphere of trust activity than the so-called "Rule against Perpetuities". This rule is colorful in its historical antecedents, and in its present form, as part and parcel of the common law, is the creature of necessity evolved to prevent property owners from placing their property perpetually beyond the reach of their descendants, or other beneficiaries. The doctrine compromises the conflict between those on the one hand who have amassed property, and who desire that the succeeding generations might enjoy the use and benefit thereof without possibility of the corpus being squandered or otherwise impaired, and those, on the other hand, who recognize the need of a rule embodying the principle of public policy, that the first purpose of property is its complete and unrestricted enjoyment, and that under no circumstance should it be dedicated to or diverted toward a purpose foreign thereto.

To better understand the subject of perpetuities and the rule governing the same, we might refer to Chief Baron Gilbert's definition — "A perpetuity is the settlement of an interest descendable from heir to heir, so that it should not be in the power of him in whom it is vested, to dispose of it or turn it out of the channel". Lord Nottingham, in the Duke of Norfolk's case, the case recognized
by Mr. Gray, an authority on the subject of perpetuities, as laying the foundation for the modern rule against perpetuities, said: "A perpetuity is the settlement of an estate or interest in tail with such remainders expectant upon it, as are in no sort in the power of the tenant in tail in possession, to dock by recovery or assignment, but such remainders must continue as perpetual clogs upon the estate".

Blackstone in Book II, in discussing the merits of perpetuities sets out that "courts of justice will not indulge even wills so as to create a perpetuity, which the law abhors: because by perpetuities (or the settlement of an interest, which shall go in the succession prescribed, without any power of alienation) estates are made incapable of answering those ends, of social commerce, and providing for the sudden contingencies of private life, for which property was at first established".

The rule against perpetuities has been gradually established by judicial decisions, and affords a most notable instance of the nice adaptation of the principles of the common law to the decision of a question which requires at once a due regard for the rights of persons and property, and a careful consideration of these larger problems of public policy so essential to the welfare of communities and states, for public policy is opposed to the perpetual settlement of property in families in such manner that it is forever inalienable, or inalienable so long as there may be a person to take in answering the designation of some testator who died generations before.
Briefly summarizing the evil practices of the common law preceding and responsible for the rule against perpetuities, we find (1) the creation of indestructible estates tail, (2) the imposition of conditions against the alienation of present interests, and (3) the creation of estates that would not vest until some remote time, in futuro. These common law practices were respectively countered (1) by a rule making estates tail destructible, (2) by a rule against restraints on alienation, making void, all unreasonable restraints or conditions against alienation of a present interest, and (3) by the rule against perpetuities sometimes referred to as the rule against remoteness, which voided all interests or estates which might vest beyond the prescribed period. All of these practices were motivated by the desire to continue exercising an influence on the affairs of the world after death, and all of the rules counteracting these practices were predicated upon the principle that property should be diverted to its proper channel without unreasonable delay.

Without further reviewing the historical phases, we shall consider the rules against perpetuities and against restraints upon alienation insofar as they apply to present day trusts, both living and testamentary, created and administered in this state. To simplify this treatise we shall consider a hypothetical case, in the light of the law, both legislative and judicial, of the State of California.
FACTS

Let us assume a set of facts where the Trustor, a widower, creates a private or living trust by formal written Declaration of Trust by and with a corporate Trustee.

The trust provides that the Trustor might revoke the same during his lifetime, but that in the event of his death without such revocation the corpus shall be divided among certain named beneficiaries, children and grandchildren of the Trustor, and among the issue of certain of the said beneficiaries, by right of representation, should said named beneficiaries be deceased or die before having attained majority. It further provides that should any of the said issue, taking by right of representation, not yet have attained the age of majority, then the trust shall continue as to such issue until such issue shall severally attain majority. The trust further provides,—

"In the event that any of the children of the said Trustor hereinbefore named as beneficiaries hereunder, should predecease the said Trustor, then and in that event, upon the death of the said Trustor, the said Trustee shall pay, transfer and convey the portion or portions of said trust estate to which such deceased child or deceased children would have been entitled had he, she or they been living at the time of the death of the said Trustor, equally, share and share alike, to the issue of such deceased child or deceased children living at the time of the death of the said Trustor.

"In the event that any of such surviving issue of any deceased child, or deceased children of said Trustor, shall not have attained the age of majority at the time of the death of the said Trustor, then and in that event, the said Trustee shall continue to hold in the manner and according to the terms and conditions
of this Declaration of Trust, the portion or portions of said trust estate to which such surviving issue under the age of majority are entitled, and as each of such surviving issue severally attains the age of majority, the said Trustee shall pay, transfer and convey to him or to her, his or her proportionate share of said trust estate."

By the wording of the paragraphs just quoted, the Trustor obviously intends that the share or shares of issue of any deceased child of the Trustor should continue in trust until the respective majorities of such issue, irrespective of whether such issue be born before or after the date of creation of the said trust.

**QUERY**

Is such a trust void under the laws of the State of California, by virtue of its provision that the share of certain issue, whether born before or after the date of execution of the living trust, should continue in trust for such issue until majority. In other words, can a Trustor validly create a living trust to endure beyond the lifetime of a person or persons in being, at the date of the creation of the trust?

**SOLUTION**

The solution of this problem involves the consideration of the following quotations on perpetuities and restraint upon alienation found in the Constitution and Civil Code of the State of California, viz:
The Constitution, Art. XX, Sec. IX, provides: "No perpetuities shall be allowed except for eleemosynary purposes".

Pertinent sections from the Civil Code provide as follows:

C. C. 715. Restraints upon Alienation.
"Except in the single case mentioned in Section Seven Hundred Seventy-Two, the absolute power of alienation cannot be suspended, by any limitation or condition whatever, for a longer period than as follows:

1. During the continuance of the lives of persons in being at the creation of the limitation or conditions; or
2. For a period not to exceed twenty-five (25) years from the time of the creation of the suspension."

C. C. 772. Contingent Remainder in Fee.
"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."

C. C. 716. Future Interests void, which suspend Power of Alienation.
"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."

C. C. 771. Suspension by Trust.
"The suspension of all power to alienate the subject of a trust other than a power to exchange it for other property to be held upon the same trust, or to sell it and reinvest the proceeds to be held upon the same trust, is a suspension of the power of alienation within the meaning of Section Seven Hundred and Fifteen."

"The delivery of the grant, where a limi-
tation, condition or future interest is created by grant, and the death of the Testator, where it is created by will, is to be deemed the time of the creation of the limitation, condition or interest within the meaning of this part of the code." 

**TIME OF COMMENCEMENT OF SUSPENSION.**

That the time of commencement of the suspension of the power of alienation is the time of the execution of the Declaration of Trust, is clearly the meaning of C. C. 749, and is a conclusion supported by the decisions of the highest courts of this State. In the instant case there is a possibility of birth of issue to one or more of the children of the Trustor, which children might in turn predecease the Trustor, in which event the trust would be continued until the majority of beneficiaries not in being at the date of execution of the Declaration of Trust.

As to the time of commencement of the suspension of the power of alienation in a living or private trust, the Estate of Willey, 128 Cal. 1, is authority for the rule that the deed of trust vests the fee in the Trustee, subject only to the declared trusts and the execution thereof, and that the deed of trust declaring the trust in favor of the grantor for life, and reserving to him the power of revocation and modification of its provisions, and a direction to sell and convey any part of the property, and providing that after his death the residue and remainder of the property should be held in trust to receive the income and distribute it to certain named beneficiaries, leaves only the equivalent of a life estate in the grantor and not a fee simple.
At page 9 of the last mentioned case the Court says: "The deed vested the fee in the Trustees subject only to the declared trust. The reserved right to revoke was a mere privilege and as it was never exercised it had no effect upon the estate granted. 'Except as hereinafter provided, every express trust in real property, valid as such in its creation, vests the whole estate in the Trustees, subject only to the execution of the trust'. (C.C. 865.)

"Section 2280 expressly provides that a trust may be revoked if the Declaration of Trust reserves the power of revocation, and to hold that the power of revocation prevents the vesting of an estate in the Trustee, would be to throw statutory provisions on the subject into utter confusion. There was at farthest nothing more left in the grantor than the equivalent of a life estate."

In the case of Tenant vs. John Tennant Memorial Home, 167 Cal. 570, in considering the effect upon the conveyance where the deed reserves unto the grantee the right to revoke, the Court held:

"The effect of the reservation of the life estate is that the deed conveys a future interest, only, to the grantee. In respect to the time of enjoyment, an interest in realty is either present or future (C.C. 688.). A future interest entitles the owner to the possession of the property only at a future period (C.C. 690.). A future interest is a vested interest when there is a person in being who will have a right, defeasible or indefeasible, to the immediate possession of the property when the intermediate estate or interest ceases (C.C. 694.). This deed therefore purports to pass to the grantee at once a vested future interest in the land, said interest being the entire fee, following the termination of the reserved life estate."

Continuing further, the Court holds:

"So, also, the fact that in this case there
is also reserved a power to revoke the deed and to sell the remainder, is of no consequence in the argument upon the question whether it is or is not testamentary. The power of revocation being valid, its exercise would at once vest the title in the grantor and she would then have absolute power to dispose of it by deed or otherwise. The power of sale reserved is therefore of no consequence, since it was necessarily included in the power to revoke. The reservation of the power to revoke did not operate to destroy, or in anywise restrict the effect of the deed as a present conveyance of a future vested interest. It merely afforded the means whereby such vested future estate could be defeated and divested before it ripened into an estate in possession. (See Nichols vs. Emery 109 Cal. 522.)

PERIOD OF SUSPENSION ALLOWED BY LAW.

In the instant case Section 715 of the Civil Code is applicable only as to subdivision 1, measuring the duration of the period of suspension by "lives of persons in being". In dismissing subdivision 2, however, which was added to the said section in 1917, and which purports to permit a suspension for a definite period not to exceed twenty-five (25) years from the time of the creation of the suspension, a passing reference should be made to Estate of McCrery, decided by the District Court of Appeal of California on October 25, 1927, and reported in 54 Cal. App. Dec. 625 and 160 Pac. 940. This case held as unconstitutional the 1917 amendment on the ground that our Constitution incorporated the common law "Rule against Perpetuities" limiting the duration of trusts to the length of "lives in being", and that a trust for a fixed term of years might exceed the said common law limit of duration. Although
the District Court of Appeal on November 25, 1927, denied a
rehearing of this case, a petition for rehearing was granted
by the Supreme Court of California on December 22, 1927, and
the final decision thereon is awaited with interest.

In interpreting subdivision 1 of Section 715 of the
Civil Code, the decisions in this State are unanimous, with the
possible exception of Goldtree vs. Thompson (79 Cal. 613), which
may be distinguished, in holding void any trusts which by any
possibility may suspend the absolute power of alienation for a
period longer than that of lives in being at the date of the
creation of the trust.

In Berry vs. Lebus, 56 Cal. App. 378, the Court con-
siders the validity of a trust deed wherein the Trustor has
provided that upon his death, certain property should go to
certain designated beneficiaries, and in the event of the death
of one of the said beneficiaries, then to such beneficiary's
issue as they respectively attain the ages of twenty-five, thirty
and thirty-five years. The trust deed was attacked as void on the
ground that it might possibly extend beyond lives in being at the
date of its creation, inasmuch as the said issue of a beneficiary
predeceasing the Trustor might be born after the date of the
creation of the trust.

The court in sustaining the trust justifies its pos-
tion by quoting a saving paragraph in the trust deed, reading as
follows, to-wit:

-10-
"It is distinctly understood that it is not the intent hereof to create a trust extending beyond lives in being; therefore, in any event, upon the death of the last survivor of persons herein mentioned now in being, this trust shall cease and determine and distribution of the principal of the entire net trust estate then held hereunder shall thereupon be made by said Trustee to the persons or person then entitled thereto under the terms hereof."

In the Estate of Whitney reported in 176 Cal. 12, at page 15, considering the validity of a testamentary trust whereby the testator divided his estate in trust among his three children, each to take his share upon arriving at the age of thirty-five years, and providing further that should one of the sons die before the said age, the share of such deceased son was to continue in trust until the youngest child of such deceased son should become of age, the Court in discussing the period during which the power of alienation may be suspended, declares as follows:

"The time of the death of the testator is deemed to be the time of the 'creation of the limitation, condition, or future interest' declared to be void by the code sections above mentioned (C.C. 749). Section 716 declares that 'every future interest is void in its creation which, by any possibility', may suspend the power of alienation longer than the code permits. This possibility is to be determined by the conditions existing 'at the time of the creation' of the limitation or future interests, - that is, at the time of the death of the testator. 'The statute does not permit us to wait and see whether events may not so transpire that in fact no perpetuity results, but if under the terms of the deed or will creating the trust, when properly construed, the instrument 'by any possibility may suspend' the absolute power of alienation beyond the continuance of lives in being, the instrument,
whether a deed or will, is void, and no trust is created nor any estate vested in the trustees.' (Est. Steele 124 Cal. 537; Gray on Perpetuities, Sec. 231);

After a further discussion of the case, the Court continuing at page 18, states:

"If the effect of these provisions in the possible event that a child shall die leaving a minor child or children, is that the title to the share is to be held by the trustees thereafter until the youngest child is of age and shall at that time, and not before, become vested in those of the issue that may then be living and the children, if any, of any deceased child, then it would constitute a gift to a class of persons, not in being at the death of the testator, and neither the number of the class nor the persons who are to compose the class could be known or ascertained until the youngest surviving child became of age. (See 1357 C.C.) Such remainder would be a future contingent interest which could not be aliened until the child became of age. (C.C. 693-695) Then, for the first time, the persons who are to own it would become known. That event must occur after the termination of the life of the child of the testator. From the death of such child, until the youngest of such issue became of age the power of alienation would be suspended, contrary to Section 715, aforesaid. (Est. of Cavarly 119 Cal. 409.) Under Section 716, such limitation would be void in its creation."

In the Estate of Lux, 149 Cal. 200, the testator created a testamentary trust to continue "during the life of my son, Charles H. Lux, and of all of his children who are living at the time of my (the testator's) death. With the death of the survivor of them the said trust is to terminate". The Court in sustaining the validity of the will against the objection that the ultimate beneficiaries might not be in being at the time of the creation of the trust, at
page 205, decides:

"The devise to the Trustees became effectual only at the death of the deceased. The limitation or condition which had the effect of suspending the absolute power of alienation was created when the devise became effectual. Under the provisions of the will, the trust cannot continue beyond the continuance of lives of persons in being at that time."

In the *Estate of Caverly*, 119 Cal. 406, decided in 1897, and before the amendment of 715 C. C. permitting the suspension of the power of alienation for a twenty-five year period, the Court has under consideration a testamentary trust whose terms provide that it shall continue "until my said younger son, Frank Bolles Caverly, shall, or would if living, reach the age of thirty years".

The Court declares such trust to be void as suspending the power of alienation for a time certain and not dependent upon any life or lives in being. The proponents of the document argued that if the postponement were too remote the postponement would be void as against public policy and as repugnant to the estate granted, and that the postponement being void, the estate would vest in possession within the period allowed, citing *Saunders vs. Vautier*, 4 Beav. 115; *Gray on Restraints on Alienation*, Sec. 105; *Gray on Perpetuities*, Sec. 120; and 1 *Jarman on Wills* 232.

The Court in answering this argument at page 409, states:

"We are not disposed to dispute these propositions laid down by the learned counsel of the appellant. Our statute is not, properly speaking, against perpetuities. It simply prohibits restraints upon alienation. The
declaration that a future estate is void in its creation, which thus suspends the power of alienation, is to the same end. It is void if by any possibility it may suspend the absolute power of alienation beyond the prescribed period. Upon this point Chaplin, in his work on Suspension of Alienation, Section 1, remarks - speaking of the New York statute, from which ours was copied - that it affects all estates of every character which are capable of interfering with the power of alienation, and, secondly, that it does not insist upon the vesting of estates, but only their alienability. The doctrine of remoteness, therefore, has no materiality, except as it affects alienability."

In Toland vs. Toland 123 Cal. 140, in considering a will which provided for the sale of lands "as soon as the leases of rented lands are cancelled", the Court met contestant's objection that such suspension violated Sections 715 and 716 of the Civil Code, by stating that the tenants could at any time cancel their leases by agreement with the Executor to unite with him in the conveyance of the fee and possession of the land. At page 145 we find:

"The statute does not prohibit all limitations of estates by which the power of alienation is suspended, but permits a suspension of such power with the restriction that the suspension shall not continue beyond the period of lives in being at the creation of the limitation, and in Section 716 defines this restriction as follows: 'Such power of alienation is suspended when there are no persons in being by whom an absolute interest in possession can be conveyed'. Consequently, whenever there are persons in being by whom an absolute interest in possession in the land can be conveyed, the power of alienation is
not suspended."

In the Estate of Steele 124 Cal. 553, there is before the Court a testamentary trust to continue during the lifetime of the widow of the testator, and to terminate as to three named minor children when they respectively attain the age of twenty-five years. Contestants argued that since no provision was made for the remainder over, in the event of the death of all of the said children under the age of twenty-five years, the trust must continue for a definite time, to-wit, until the youngest child would have attained the age of twenty-five years, and was therefore void.

The Court in sustaining the validity of the document calls attention at page 540, to the distinction between trusts void at the time of their creation and resulting trusts arising from failure of beneficiaries.

"A distinction should be taken between trusts which fail for want of beneficiaries, and trusts attempted to be created by will, but which are void under the statute against perpetuities, or other statutes, and therefore vest no estate in the alleged trustee; while if the trust is valid when created, and afterward fails for the want of a beneficiary, a trust results in favor of the heirs of the testator; but as the heirs and trustee may at any time convey an absolute estate, the resulting trust is not within the statute against perpetuities."

The Estate of Van Wyck 185 Cal. 49, is particularly in point in considering the instant case. Henry Van Wyck created a testamentary trust to endure during the lifetimes of his son and daughter, and provided that upon the death of the survivor of them,
"their or its descendants shall take the corpus" of the estate, provided, however, that the property should continue in trust "until the youngest grandchild shall become twenty-one years of age, and then to divide among and deliver absolutely to my grandchildren then surviving, and the lawful issue of any deceased grandchild by right of representation, all of my (testator's) estate then remaining in the hands of my trustee". The Court held that a trust created by a will which provides that it shall continue until the youngest grandchild of the testator shall have become of the age of twenty-one years, is void as suspending the power of alienation for a longer period than that of the life of a person or persons in being at the time of the testator's death, since the youngest grandchild would include a grandchild born after such death.

In demonstrating the possibility of this trust extending beyond lives in being, the Court argues that since it is possible that a great-grandson might be born after the death of the testator's son and daughter, it is evident that upon their deaths, all persons necessary for the complete alienation may not be in being and the power of alienation will still be suspended; and continuing at page 59,-

"It follows that if, after the death of the testator's son and daughter but before the youngest grandchild had reached twenty-one, all of the beneficiaries under the will should unite in an alienation, the alienation would not be complete, since there would still be outstanding the possible interest of any child born thereafter to a grandchild then living and joining in the alienation but who should die before the
arrival of the time provided by the will for division. Under the will then, it is possible that, upon the death of the testator's son and daughter, the trust must continue with the power of alienation suspended until the youngest grandchild reaches twenty-one, since it may not be possible to determine sooner who is entitled to receive the corpus of the estate; that such, in fact, will be the situation if more than one grandchild survives the son and daughter. The possible period, therefore, during which the power of alienation may be suspended extends to the time when the youngest grandchild reaches twenty-one, and since such grandchild may be one born after the death of the testator, such period is other than one for the lives of persons in being at the time of the creation of the trust, and the trust comes within the prohibition of the statute."

In answer to proponent's argument that the will created a case of alternative limitations, where if one be bad and the other valid, the invalidity of one would not affect the other, at page 61, the Court replies that

"There is but one limitation, namely, that the trust shall remain intact with a consequent suspension of the power of alienation until the youngest grandchild reaches twenty-one. This event may or may not happen within the lives of persons in being at the testator's death, and therefore the period fixed is a period not measured by the lives of such persons and is not permitted by the statute."

One of the most recent decisions on the subject under consideration is the Estate of Maltman, reported in 195 Cal. 643. Mr. Maltman attempted a testamentary trust by will, providing that one-half of his estate should be held in trust during the lifetimes of his daughter, Teresa, her husband and their daughter, and the other half to be held in trust during the lifetimes of his son John,
John's wife and their children "so long as they or either of them shall live", and when "his (John's) wife and all of his children shall have died said trust shall cease and terminate".

After quoting Sections 715 and 716 of our Civil Code, the Court continues at page 649, as follows:

"It is not necessary to again indulge in an elaborate review of the history or proper interpretation of these two sections of the Civil Code. That was done at much length and with great learning in the leading case of Estate of Walkerly, 108 Cal. 627, from the reasoning of which there has been no material departure since its decision thirty years ago. Two particular clauses found in these sections of the Civil Code have been given more exact definitions in later cases. One of these is the clause found in both of these sections referring to the 'creation' of the limitation, condition, estate or interest affected by the inhibition of these code provisions.

"In Estate of Whitney, 176 Cal. 12, it was held that the time of the death of the testator whose will contained provisions for the creation of such condition, limitation, estate or interest was the date fixed by these code sections for the purpose of determining their validity (C.C. 749.). The court in that case quoted approvingly from Estate of Steele, 124 Cal. 555. The language of the Court in that case to the effect that 'The statute does not permit us to wait and see whether events may not so transpire that in fact no perpetuity results, but if under the terms of the deed or will creating the trust, when properly construed, the instrument "by any possibility may suspend" the absolute power of alienation beyond the continuance of lives in being, the instrument, whether a deed or will, is void, and no trust is created nor any estate vested in the trustee'."

The leading case in this State on the present subject is in re Walkerly, 108 Cal. 327. The Court in an exhaustive and well reasoned opinion sets out the law concerning the suspension
of the power of alienation. This case was decided in 1895 and before the amendment of Section 715 C.C., permitting trusts to continue for a definite period of time. The reasoning, however, of this case and the law therein set out, are none the less relevant and applicable to the instant case. The testamentary trust attempted, provided that the property of the decedent should remain in trust for a period of twenty-five years, or should his wife be then still living, it should continue in trust during her lifetime.

The Court in applying the restrictions upon alienation to trusts as well as other conveyances, after citing Civil Code Sections 715, 716, 771 and 749, exhaustively reviews the law on this subject, declaring at page 647 et seq:

"A perpetuity is any limitation or condition which may (not which will or must) take away or suspend the absolute power of alienation for a period beyond the continuance of lives in being. The absolute power of alienation is equivalent to the power of conveying an absolute fee (Chaplin on Suspension of Alienation, Section 64). The law against the suspension of the power of alienation applies to every kind of conveyance and devise. It applies to all trusts whether created by will or deed, whether providing for remainders or executory devises, or, as here, merely restraining the power of alienation for a fixed period of years, and then providing for sale with gift over. In short, it 'covers the entire field of estates, interests, rights and possibilities' (Chaplin Suspension of Alienation, Section 2.). Says Perry: 'A perpetuity will no more be tolerated when it is covered by a trust than when it displays itself undisguised in the settlement of a legal estate' (Perry on Trusts, Section 382), and Section 771 of the Civil Code is but
an enactment of this rule.

"Every express trust, valid in its creation, vests the whole estate in the trustees. The beneficiaries take no estate or interest in the property, but may enforce the performance of the trust. (C. C. 863.) If this trust be not valid in its creation, the trustees would take no estate, but neither would the beneficiaries, whose rights are dependent upon the validity of the trust. ***

The beneficiaries herein then take no estate as such, their interest being the right to the enforcement of the trust.

"But, if we understand the position of respondents, it is contended that the nephews and nieces take a future estate, which future estate is vested and is alienable, and that therefore it is a valid estate, since only those future interests are void which by possibility may unduly suspend the power of alienation. Following this argument and for this purpose treating the interests of the beneficiaries as a future interest or estate within the contemplating of the code (C.C. 716.), it may be first suggested that all expectant estates, whether vested in interest or contingent with a vested right, or entirely contingent, pass by succession, will and transfer, like present estates and interests. (C.C. 699.) But the fact that such interests may pass does not relieve from the operation of the rule unless there are persons in being who, by combining and conveying all their distinct interests created by the original grant or devise, can pass an absolute interest in possession. Conceding that the future interest of the beneficiaries is vested in the sense in which remainders are spoken of as vesting, and that the interest would thus be alienable, it still is not such an interest as would by transfer carry an absolute interest in possession. As is pointed out by the Court in Vanderpoel vs. Loew, 112 N.Y. 167, the vesting of an estate involves absolute alienability only so far as that particular estate is concerned. The fact that a given remainder is vested renders it absolutely alienable, so far as it is itself concerned, but the absolute fee may at the same time be inalienable. Therefore, to convey this absolute interest
in possession the beneficiaries would be compelled to unite with their conveyance that of the trustees in whom the fee is vested. But the trustees cannot convey until the expiration of twenty-five years. An attempt by them to convey before that time would contravene the trust, and be a void act (C.C. 870), and so even by this method of progression our path leads to that barrier of perpetuity which cannot be surmounted.

"So, even though the beneficiary should be a remainder man under such a trust as this, he still could not alienate the land within the trust period so as to avoid the statute. Such a trust cannot be terminated or destroyed during the period fixed for the existence, even by the consent and joint act of all the trustees and beneficiaries. (Douglas vs. Cruger, 80 N.Y. 15, Penfield vs. Tower 1 N.D. 216.)"

"Hence the question whether the interest of the beneficiaries is contingent or vested is here of no possible moment. The absolute alienability required by Section 715 of the Civil Code does not imply vesting, and it affords no escape from the operation of the rule, because the interests which the beneficiaries take may be relieved from uncertainty as to persons or events. When so relieved the interest may be said to be vested. But it is not such a vesting nor yet such an interest as removes the bar of the statute, since all of the interests and estates, contingent and vested, cannot convey the fee so long as the terms of the trust, from which alone their interests are derived stand in the way. The perpetuity here does not result from too remote limitations or the failure of future estates to vest, but it arises by the direct act of the testator in forbidding his trustees to alienate for a period not tolerated by the law."

TRUSTS IN PERSONAL PROPERTY.

Answering the contention sometimes advanced that the restrictions on the suspension of alienation apply only to real
property, in re Walkerly (supra) may again be cited, this time as authority for the proposition that trusts in personal property come within 715 C.C. At page 656 et seq. we read as follows:

"The essential difference in this state between trusts in real property known as express trusts, and those in personal property are: 1. The former can only be of the kinds permitted by the statute, and no others (Civ. Code, sec. 857), while the latter may be created generally for any purpose for which a contract may be made (Civ. Code sec. 2220); 2. The former must be created and declared by writing (Civ. Code, sec. 852), while the latter may rest upon parol. (Civ. Code, sec. 2222.) But to all trusts, whether of real or personal property, the limitation upon the suspension of the power of alienation expressed in Section 715 of the Civil Code directly applies. The Section is found in Division II, Part 1, Title II, of the Code where the lawmakers are dealing; as expressly declared, with the modifications of ownership and restraints upon alienation of 'property in general'. Again, Section 771 of the Civil Code shows plainly the applicability of the law to personal property. For if it be the suspension of the power to alienate real property which is under the ban, power to sell the realty would relieve the difficulty, and yet it is by that section expressly declared that personal property held after sale under the terms of the original trust operates to suspend the power of alienation, under Section 715 of the Civil Code. And finally, the applicability of Section 715 to trusts in personal property has often been recognized and never questioned. (Estate of Hinckley, supra; Goldtree v. Thompson, 73 Cal. 613; Williams v. Williams, 73 Cal. 99; Whitney v. Dodge, 105 Cal. 192)

"We are not unmindful of the fact that the statutes of the State of New York in express terms put a limitation upon the power to suspend the ownership of personal property. (1 N.Y. Rev. Stats., Sec. 775, Subd. l.) And we have not overlooked the circumstance that the Supreme Courts of Michigan and Wisconsin have uniformly held that their statutes similar in terms to our
Code provisions do not apply to trusts in personal property. But it is to be observed that the Legislature of this State, in adopting Section 715 of the Civil Code, placed it where it must apply, and, therefore, made it apply to 'property in general', while the corresponding Section in the Michigan statutes (Howell's Annotated Statutes of Michigan, Sec. 5551, Subd. 15), and that of the Wisconsin statutes (Wis. Rev. Stats. Sec. 2039), are found in the Chapters of the law relating to estates in real property, and so have been construed by the Courts to be applicable only to trusts in such property (Toms. v. Williams, 41 Mich. 552; Dodge v. Williams, 46 Wis. 70; Palms v. Palms, 68 Mich. 355; De Wolf v. Lawson, supra).

"In those states it is held that, as to trusts in personal property, the common-law rule still obtains. And it is for the application of this rule that respondents here contend. But even this would not avail to save the trust. The common-law rule against perpetuities does not, as counsel argue, apply only to landed estates. Executory devises, springing and shifting uses, and trusts whether of realty or personality were all within its terms. (1 Jarman on Wills, C. 9; Lewis on Perpetuities, 159; Perry on Trusts, Secs. 577, 594; Lewin on Trusts, c. 7; Gray on Perpetuities, Sec. 202; 4 Kent's Commentaries, 271; Cadell v. Palmer, 1 Clark & F. 372). As Jarman states: 'To the test of the rule settled by Cadell v. Palmer, supra, every gift of real or personal estate, by will or otherwise, must be brought' (1 Jarman on Wills, 217)."

"By the Thelluson Act (39 & 40 Geo. III, c. 93) the maximum period during which the power of alienation could be restrained was lives in being and twenty-one years and nine months. Tested by that act still would this trust be invalid.

"We hold, however, that section 715 of the Civil Code not only applies to trusts in personal property, but also that it shortens the period permitted by the common law to lives in being. Private trusts in personal property which suspend the power of alienation must be limited like private trusts in realty to lives in being, and the trusts here (covering personal property) are consequently destroyed by the same vice which
invalidated those first considered (covering real property)."

SEPARABILITY OF VOID AND VALID PROVISIONS.

As to whether or not the valid provisions of trusts and wills might be sustained while the invalid ones are disregarded as violative of the law, the following citations are offered. In *Nellis vs. Rickard* 135 Cal. 617, sustaining the valid trusts on the theory that they are severable from the invalid ones, the Court quotes Gray in his Rule against Perpetuities, Section 341, at page 621, as follows:

"When the settlor or testator has himself separated the contingencies, there is no difficulty in regarding the gifts separately, and upholding one, although the other fails. And the Courts naturally, and properly, lean to construing the gifts separately, when it can be done."

Remarking that the test should be the possibility of sustaining the valid clause without giving effect to the invalid clause, the Court continues on page 621, et seq:

"If the several trusts are not so interdependent as that neither one can be dealt with without giving effect to the others, the Court will sort out the good from the bad, and give effect to the valid trusts."

In the *Estate of Willey*, (supra) at page 11, in discussing the separability of valid from void provisions, the Court says:

"The principle which should govern courts in determining questions like the one now under review, whether they arise
out of wills or deeds, is expressed by the maxim – *ut res magis valeat quam pereat*; and, under the inspiration of that maxim, courts have firmly established the principle that valid trusts should not be disregarded because in the instrument creating them one particular invalid trust is declared, unless the latter is so inseparably blended with the others that it cannot be eliminated without destroying the main intent of the trustor, or working manifest injustice to other beneficiaries.

Among the various authorities cited by appellant to this point, Darling vs. Rogers, 22 Wend. 483, Vanschuyver vs. Mulford, 59 N.Y. 432, Kennedy vs. Hoy 105 N.Y. 154, and Kane vs. Gott, 24 Wend. 641, 35 Am. Dec. 641, may be mentioned as cases where the subject is fully discussed and the principle aptly stated."

In the Estate of Whitney, 176 Cal. 12, in discussing the same subject and after quoting the above excerpt from the Estate of Willey (supra) the Court continues at page 19:

"If the elimination of the void trust causes no important practical change in the testator's general scheme, if such void trust is not essential thereto, and does not impair the validity of the other dispositions of the will, it may be cut off and the other dispositions allowed to stand. (Manice vs. Manice, 42 N.Y. 381.) If the trust created 'is of such a nature as to make it indivisible, and incapable of being carried out as to that trust which is clearly legal, because of the invalidity of the other trust', the whole trust must be held void. (Nellis vs. Ricket 133 Cal. 620.) 'The question whether the valid clauses can stand depends on whether or not the invalid ones are so interwoven with them that they cannot be eliminated without interfering with and changing the main scheme of the testator. In Darling vs. Rogers 22 Wend. (N.Y.) 495, Senator Verplanck correctly stated the rule as follows: 'When a will is good in part and bad in part, the part otherwise valid is void if it works such a distribution of the estate as, from the whole testament taken together, was evidently never
the design of the testator. Otherwise, when a good part is so far independent that it would have stood had the testator been aware of the invalidity of the rest".1
(Estate of Fair 132 Cal. 540.)

In the Estate of Van Wyck 185 Cal. 49, in stating at page 61 that "the question is one of separability", the Court continues at page 62, et seq:

"The real question presented where a will contains both valid and invalid provisions is whether the two are so parts of a single plan or scheme or otherwise so dependent one upon the other that by avoiding the invalid provisions and allowing the valid to stand there will result a disposition of the estate so different from what the testator contemplated or so unreasonable that it must be presumed that the testator would not have made the valid provisions if he had been aware of the invalidity of the others. The rule in fact is frequently stated more strongly against allowing the valid provisions to stand than we have just stated it."

The Court follows with the citations of Estate of Fair and Darling vs. Rogers, quoting the portions as set forth in the Estate of Whitney (supra); and continuing at page 65 the Court renders its decision as follows:

"In other words, it appears that the valid and invalid portions of the trust which the testator attempted to create are so intimately connected and so dependent one upon the other that the invalid portions cannot be taken away without the whole scheme and plan of the testator falling. The trust must therefore be declared invalid in toto."

In the Estate of Steele (supra) at page 537 the Court after referring to Section 716 of the Civil Code, "which declares

-26-
'void in its creation' every future interest which 'by any possibility may suspend' et cetera", continues,

"The statute does not permit us to wait and see whether events may not so transpire that in fact no perpetuity results, but if under the terms of the deed or will creating the trust, when properly construed, the instrument 'by any possibility may suspend' the absolute power of alienation beyond the continuance of lives in being, the instrument, whether a deed or will, is void, and no trust is created nor any estate vested in the trustee."

In the Estate of Fair, 132 Cal. 525, involving a trust to convey before such trust was permitted by statute, at page 552, the Court declares:

"Of course, if an estate be created subject to several trusts, one of which is void, and the latter is legally separable from the others, the estate vests, unaffected by the void trust; but if the creation of the estate depends upon the execution of the void trust, then it can never come into existence."

And at page 541 after citing an excerpt from Darling vs. Rogers as quoted (supra) in the Estate of Whitney, the Court continues:

"And in the celebrated Tilden will case (Tilden vs. Greene, 150 N.Y. 50) the Courts say: 'The appellants invoke the aid of the principle that where several trusts are created by will which are independent of each other, and each complete in itself, some of which are lawful and others unlawful, and which may be separated from each other, the illegal trust may be cut off and the legal one permitted to stand. This rule is of frequent application in the construction of wills, but it can only be applied in aid and assistance of the manifest intent of the testator and never where it will lead to a result contrary to the
purposes of the will, or work injustice among the beneficiaries, or defeat the testator's scheme for the disposal of his property. We hold that the invalidity of the trust to convey destroys the whole scheme of the will, and carries with it the trust for the lives of the children.

At page 546 in answer to the argument that to destroy the trust would mean intestacy of the testator as to that portion of the estate over which he attempted to create a trust, the Court quotes the Estate of Young, 125 Cal. 543, as follows:

"One of these rules firmly established and never departed from nor even criticized, is, that the expressed intent will not be varied under the guise of correction because the testator misapprehended its legal effect. The testator is presumed to know the law. If the legal effect of his expressed intent is intestacy, it will be presumed that he designed that result. The inquiry will not go to the secret workings of the mind of the testator. It is not, What did he mean? but it is, What do his words mean?"

In the Estate of Maltman (supra) the Court leans upon the above quoted excerpts from the Estate of Van Wyck, Estate of Fair and Darling vs. Rogers, in holding that the valid and void provisions are "so far inseparable that the holding of the one portion thereof void as in violation of the statute against perpetuities, invalidates the entire trust."

In re. Walkerly (already quoted at some length on other points) the Court on pages 651 and 652 in declaring the trust void answers as follows proponents objection that the testator's intention has been violated:
"So it happens that whenever a testator, through temerity or ignorance, violates the plain mandate of the statute, as in this case, and creates a trust by which the absolute power of alienation is sought to be suspended for a term of years, he must pay the penalty of his rashness or folly in the destruction of his cherished design. *** The intestacy of the testator as to the Walkerly block is the harsh result which must follow this void trust, and the property will descend to his heirs. It is true that such was not the testator's intent, but a testator must do more than merely evince an intention to disinherit before the heirs' right of succession can be cut off. He must make a valid disposition of his property. (Harberghan vs. Vincent, 2 Ves. Jr. 204; Halley vs. James 16 Wend. 160; Haynes vs. Sherman, 117 N.Y. 455)."

APPLICATION OF LAW TO FACTS.

Summarizing the foregoing citations, we find that the constitutional and legislative enactments as interpreted by the judicial decisions of this State establish as law, (1) that the suspension of the power of alienation commences in a living trust at the time of its creation, even though the right to revoke be reserved by the Trustor; (2) that the limit of the duration of such suspension is the lifetime of a person or persons in being at the time of such commencement of suspension; (3) that the prohibition against such suspension applies to personal property as well as real property; and (4) that where both valid and invalid provisions are contained in a trust, all constituting a single plan or scheme intimately connected and interwoven, the
trust is void in its entirety. Applying these legal principles to the instant case, we find that the attempted trust suspends the power of alienation for a period longer than lives in being at the date of the execution of the Declaration of Trust and, the Trustor's intentions to the contrary notwithstanding, the purported trust is void in toto and ab initio, no estate has vested in the Trustee, and in the absence of some other conveyance or a testamentary disposition by the Trustor, he must be found to have died intestate as to the property comprising the "corpus" of this attempted invalid trust.

Respectfully submitted to

THE SCHOOL OF LAW, SANTA CLARA UNIVERSITY,
Santa Clara, California, May 8, 1928.