Suggestions for Revision of Provisions of the California Civil Code Regarding Future Interests*

The unsatisfactory state of California property law, particularly as regards future interests, has been remarked upon by distinguished scholars. Professor Hohfeld, in 1913, wrote:

"There are those who believe that the California Civil Code provisions relating to legal and equitable interests in property,—considered as a whole,—fall far short of constituting an unambiguous and reasonable system adapted to the ordinary needs and desires of an advanced society; and the present writer must confess that he shares in this view. The hope may therefore be indulged that some day in the future a comprehensive and liberalizing—yet cautious—revision may be made, after prolonged study, by competent members of the profession."1

In 1921, Dean McMurray said:

"The law upon the entire subject of future interests, including the doctrine of powers, is in a most unsettled condition in California, but possibly that very situation is a desirable one, for lawyers will usually advise their clients in view of the law's uncertainty against the feasibility of intricate settlements of property, which is exactly in harmony with the general spirit of our people."2

It is comforting to discover, with Dean McMurray, that the prevailing uncertainty possibly has a redeeming feature. Unfortunately, instruments involving future interest questions are often drawn by persons, not always laymen, unaware of the besetting difficulties and therefore not subject to the deterring influence commended by Dean McMurray. This appears plainly enough in much of the reported litigation on future interests. How large a proportion of such litigation3 might

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1 Hohfeld, The Need of Remedial Legislation in the California Law of Trusts and Perpetuities (1913) 1 Calif. L. Rev. 305.
3 For interesting comment on the public and private burden of unnecessary litigation, see Hohfeld, op. cit. supra note 1, at 332. Careless legislation, leaving
have been avoided had the Civil Code contained a more complete and comprehensible scheme is of course impossible to estimate. Unquestionably the present confusion as to what future interests may be created and when they must vest in order to be valid is an extraordinary handicap in the drafting of wills, trusts and property settlements of all sorts.

While we undoubtedly need a general revision of the law with respect to legal and equitable property interests, there is no immediate prospect of obtaining it. The task will be a difficult one. As Professor Hohfeld said, it must be done slowly, painstakingly, and by the best talent available. Meanwhile, there is no reason why specific defects, if obvious and remediable, should not be corrected. This paper is an attempt to point out a few such defects in the law of future interests, and incidentally to illustrate the need for more general revision.

A logical arrangement has not been attempted; rather, the numerical order of the code sections, with one exception, is followed. To the discussion of specific code sections, four suggestions for revision involving the addition of entirely new matter to the Civil Code are appended.

I. CIVIL CODE SECTIONS 694 AND 695

The Code has taken definitions perhaps adequate to describe vested California at one time in a situation where trusts were limited to certain specific purposes, which did not include a trust to convey, and where powers in trust were abolished, led to the failure of the trust provisions in the famous Fair will and the expensive litigation thereunder. Estate of Fair (1901) 132 Cal. 523, 64 Pac. 1000; see Hohfeld, op. cit. supra note 1, at 306.

4 One must not forget, of course, the disadvantage inherent in every code that "the cast-iron classification and definitions of a former generation" come to be "felt to be imperfect and inadequate." See Gray, THE NATURE AND SOURCES OF THE LAW (2d ed. 1921) 4. Nor is it necessary to dwell upon the familiar caution that no statute however full and definite will be clear in its application to all cases that arise. The task of construction must remain an important and often difficult one.

5 For a recent example of such a thorough-going revision, with revolutionary changes in many respects, note the six property acts of 1925 in England. See Johnson, The Reform of Real Property Law in England (1925) 25 Col. L. Rev. 609. Evidently there is agitation for a considerable change in New York, at least with respect to perpetuities. See Russell, Proposed Changes in the New York Rule Against Perpetuities (1932) 6 St. John's L. Rev. 50 (not available to the writer); Note (1927) 27 Col. L. Rev. 959, 968.

6 See Hohfeld, op. cit. supra note 1, at 331. The unfortunate results of hasty or improvidently drafted legislation are as apparent in the law of future interests as in other fields of law. The New York statutory provisions on future interests and the resulting mass of litigation, much of it eventuating in ways which the draftsmen of the statutes neither foresew nor desired, are a conspicuous instance. See Rundell, The Suspension of the Absolute Power of Alienation (1921) 19 Mich. L. Rev. 235, 251.

7 The references to the Civil Code are to the Deering 1931 edition unless otherwise noted.
and contingent remainders at common law and applied them to all future interests, both in realty and in personalty. This raises at least one serious question common to both kinds of property. Suppose, first, a devise in this form: "Blackacre to A and his heirs 50 years after my death." At common law this is an executory devise, vesting only at the expiration of the period named and therefore objectionable under the common-law rule against perpetuities. This rule, according to the dictum of Estate of McCray, is law in California by reason of the constitutional prohibition of perpetuities. But under sections 694 and 695 of the Civil Code, the devise in question would seem to answer the test for a vested interest. We are therefore faced with this query: Can the legislature, by defining as vested a future interest which would be executory at common law, remove the objection of remoteness in vesting which, apart from the legislative definition, would arise under the rule against perpetuities?

Suppose, in the second place, a bequest of $1000 "to A, his executors, administrators and assigns, fifty years after my death." The inclusion of the phrase, "executors, administrators and assigns," would incline a court, on common-law reasoning, to hold the bequest vested in the sense in which that term is generally used with respect to personal property, that is, transmissible, so that it would be payable to A's personal representative even if A did not survive to the time fixed. There obviously is some objection to so remote a gift from the standpoints of the administration of the testator's estate and the general policy against tying up property. If the period to elapse before payment is longer than

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8 Cf. Nicol v. Morton (1928) 332 Ill. 533, 539, 164 N. E. 5, 8. For a discussion of the common-law distinctions with regard to vested and contingent remainders, see the controversy between Professor Kales and Professor Bingham as published in (1906) 22 L. Q. Rev. 250, 383; (1907) 5 Mich. L. Rev. 497; (1908) 24 L. Q. Rev. 301.
9 See Gray, The Rule Against Perpetuities (3d ed. 1915) §114.
10 Ibid. §317.
11 (1928) 204 Cal. 399, 406, 268 Pac. 647, 649.
12 Cal. Const. (1879) art. XX, §9. This matter is discussed later, in treating sections 715, 716 and 771 of the Civil Code.
13 As an original question, the devise to A, 50 years hence, being alienable under section 699 of the Civil Code, though not so at common law (Challis, Real Property (3d ed. 1911) 176) is perhaps not so serious a clog on the alienability of the property as to require it to be held void under the policy of the rule against perpetuities. But a line would have to be drawn somewhere. No court would tolerate a devise, e.g., 500 years hence. The mere difficulty of ascertaining the individuals then entitled would be sufficient reason against allowing it. For the common-law rule as to the descent of executory devises and contingent remainders, see 2 Farnes, Remainders (4th ed. 1795) 529-536.
14 Cf. Saunders v. Vautier (1841) 1 Craig & P. 240.
15 See Simes, Future Interests in Chattels Personal (1930) 39 Yale L. J. 771, 799; Gray, op. cit. supra note 9, §118.
in the case put, the objection becomes more pronounced. Gray points out that merely because a bequest is vested in the sense of being transmissible, it should not be held on that account to be exempt from the application of the rule against perpetuities. Courts uncontrolled by statutes such as sections 694 and 695 of our Civil Code, and mindful of Gray's admonition, would be free to invalidate the fifty-year bequest, even though it is transmissible, by treating it as executory on the common-law analogy of executory devises and therefore within the rule against perpetuities. In California, however, the definition of section 694 would, by its terms, apply and would make this bequest vested for all purposes. The same question of constitutionality is thus raised as in the case of the executory devise first given.

Sections 694 and 695 have been criticized by Dean McMurray as adding confusion to an already confused topic. Although a revision of them is desirable if they are retained at all, it is just as well to face the fact that no code definition is likely in all cases to enable one to predict what decision the supreme court will make on the issue of vesting.

II. CIVIL CODE SECTION 703

No future interest in property, says section 703, is recognized by the law except such as is defined in division II of the Code.

10 Ibid.
17 As a matter of fact, courts in two jurisdictions have not followed the realty analogy. Having found the bequest at a future time to be vested in the sense of descendible, they have treated it as not within the rule against perpetuities. Shepard v. Union & New Haven Trust Co. (1927) 106 Conn. 627, 138 Atl. 809; Nicol v. Morton, supra note 8; see Simes, op. cit. supra note 15, at 801.
18 Loc. cit. supra note 2.
19 Cf. Gray v. Union Trust Co. (1915) 171 Cal. 637, 642, 154 Pac. 306, 309, where the court declared that a remainder to the heirs of a certain living person was a vested remainder. In Miller v. Oliver (1921) 54 Cal. App. 495, 502, 202 Pac. 168, 171, the Gray case in this respect is criticized, and of course properly, in view of section 695 of the Civil Code as well as the common law.

Cf. Estate of Campbell (1906) 149 Cal. 712, 87 Pac. 573, where the will devised realty to be sold, and directed certain legacies to be paid out of the first $600,000 of proceeds, and other legacies out of the next $200,000 etc. It might well be argued here that the second group of legacies were contingent upon the sale value being in excess of $600,000, an uncertain event within the meaning of section 695 of the Civil Code, but the court held all the interests to be vested from the start.

In Estate of Blake (1910) 157 Cal. 448, 108 Pac. 287, the residue of an estate was left in trust to pay the income equally to A, B and C, until they should respectively attain 30 and then to distribute one-third of said residue to each. If any of them should die under 30 and without issue, her share was to go to the survivors. In view of the intermediate gift of income, and the nature of the gift-over, which was only to take effect in the event of death without issue, the interests in the corpus might properly have been held vested, subject to defeasance. The court, however, construed them as contingent.

The writer cannot agree with Dean McMurray in his criticism of the holding as to vesting in the Estate of Phelps (1920) 182 Cal. 752, 190 Pac. 17. See McMurray, op. cit. supra note 2, at 457.
CALIFORNIA CIVIL CODE: FUTURE INTERESTS

This sweeping prohibition of all future interests other than those defined in the Civil Code would be unfortunate if it were given effect by the courts. Of course it is not. Where, for instance, does the Civil Code "define" future interests in personal property such as have long been recognized by our courts? Although the Code does provide for a system of estates and interests in real property, it is not improbable that at least one other such interest, not mentioned in the Code, will come to be recognized in this state, namely, a possibility of reverter after a fee simple determinable. The courts at any rate should be free to pass upon the question without the embarrassment of section 703. It should be repealed.

Legislation is needed with respect to possibilities of reverter, just mentioned, and two other interests which may conveniently be taken up in the same connection, namely, rights of entry reserved in grants in fee and a donor's right of reverter in realty upon dissolution of a charitable corporation. These matters will be discussed in order.

A. Possibilities of Reverter After Determinable Fees. Suppose A grants land to B and his heirs, so long as business of a certain, specified type is permitted by law. If business of the type named becomes illegal, does B's fee automatically divest by reason of the special limitation incorporated into the language creating it, and is the transferor, A, thereupon revested with title in fee? In other words, does A have a possibility of reverter after his conveyance to B? In some eighteen states the answer is yes, although Gray, the most eminent American authority on such matters, contended that at common law the possibility of reverter depended upon a relationship of tenure between the feoffor and the feoffee, and therefore was done away with by the statute, Quia Emptores. California, so far as the writer is aware, has not passed upon the question, and perhaps will not soon be required to do so, for most instruments which would raise the question contain also words, for example, with respect to the right of the grantor or his heirs to enter and revest themselves, etc., which permit a court to construe the limitation as a fee simple, subject to a condition subsequent, with a reserved right of reentry.

Gray's reasoning leads one to suppose that the question of the existence of determinable fees and possibilities of reverter would involve an inquiry as to whether tenure in the common-law sense exists in this state or whether land here is allodial, another unsettled point. But

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20 This matter is considered in a later section of this paper.
21 See Powell, Determinable Fees (1923) 23 Col. L. Rev. 207, 231.
22 GRAY, op. cit. supra note 9, §36.
23 As tending in this direction, see Thompson v. Doaksum (1886) 68 Cal. 593, 596, 10 Pac. 199, 201; CAL. POL. CODE §§ 40, 41.
24 To this effect, see Title Guarantee & Trust Co. v. Garrott (1919) 42 Cal.
scholars inform us, on the basis of decisions elsewhere, that this distinc-
tion has lost significance in modern law.\textsuperscript{20}

Legislation is desirable to remove the existing uncertainty as to
determinable fees and possibilities of reverter. If these interests are
allowed, the statute should settle three matters with respect to them.

1. \textit{Alienability and Devisability.} It would seem likely, from dicta\textsuperscript{26}
of the supreme court, that if the court should recognize possibilities of
reverter as part of our common law, it would hold them inalienable and
undevisable, a result not consistent with the broad policy in favor of
the transferability of future interests generally embodied in section 699
of the Civil Code, and also inconsistent with certain of the more recent
decisions in other states.\textsuperscript{27}

2. \textit{Mode of Descent.} At common law, contingent and executory
interests did not technically descend, that is, did not pass from the
named purchaser, if he died before the interest vested, to his heir and
so on to the heir of such heir. However, those persons who were heirs of
the named purchaser at the time that the interest vested might claim
it as his representatives.\textsuperscript{28} This rule has been applied to possibilities of
reverter in this country although under some succession statutes such
possibilities have been held to descend like vested interests.\textsuperscript{29} If a
statute is enacted in California allowing possibilities of reverter and
making them transferable and devisable, they logically also should be
made descendible. But unless these interests are limited in remoteness
of vesting by the rule against perpetuities, as discussed below, the
common-law rule of representation instead of a rule of descent may be
preferable as tending to confine within more reasonable limits the class
who take if the person originally entitled dies intestate.

3. \textit{Applicability of the Rule Against Perpetuities.} The technical and
by no means conclusive reasoning upon which possibilities of reverter
have been held not subject to the rule against perpetuities in every
American jurisdiction which has passed upon the question\textsuperscript{30} will be

\textsuperscript{20}\textsuperscript{20} See Victoria Hospital Ass'n v. All Persons (1915) 169 Cal. 455, 465, 147
Pac. 124, 128; Johnston v. City of Los Angeles (1917) 176 Cal. 479, 485, 168 Pac.
1047, 1049.

\textsuperscript{27}\textsuperscript{27} See Powell, \textit{op. cit. supra} note 21, at 232-233; Note (1930) 28 Mich. L.
Rev. 1015, 1018-1021.
likely to prevail with our supreme court. The legislature, however, must weigh the interests involved, and here the problem is not easy. Land held upon a fee which is liable to drop at some unpredictable and possibly remote time is obviously not fully and freely marketable, and the special limitation upon the fee may be such as in practice prevents the land from being used most advantageously. On the other hand, as Professor Powell points out, the device of creating a determinable fee is a convenient one for donors who desire to convey land to a public or charitable corporation and to assure the automatic cessation of the grantee's title if the specified purpose is discontinued. In such cases, the use of a determinable fee will be less popular if the possibility of reverter must be confined to the period of the rule against perpetuities.

Even if the creation of determinable fees, unrestricted by the rule against perpetuities, is consistent with public policy in respect to donations for charitable purposes, the same can hardly be said of the creation of such fees in ordinary conveyancing, where a vendor finds it possible to make the purchaser take a title of this sort in order, for instance, to assure the vendor of the observance of some use restriction. Possibly a satisfactory statute might be framed which would give effect to the policy contended for by Professor Powell in the donation cases, yet which would also place a reasonable time limit upon possibilities of reverter in conveyancing generally.

B. Rights of Entry Reserved in Fee Grants. Whatever doubt may exist as to the propriety of applying the rule against perpetuities to possibilities of reverter, there is no doubt as to the desirability of applying the rule, or some similar restriction in time, to rights of entry where grants in fee are made defeasible upon conditions subsequent. Limitations of this sort are very common, by contrast with possibilities of reverter, and are frequently given perpetual duration. Such conditions and rights of entry are serious restraints upon alienability and sometimes upon economic use as well. They are within the policy of the rule against perpetuities and also, in the view of eminent authorities, within its letter.

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32 For discussion of determinable fees generally, see Challis, Determinable Fees (1887) 3 L. Q. Rev. 403; Gray, Determinable Fees (1887) 3 ibid. 399; Powell, loc. cit. supra note 21; Vance, Rights of Reverter and the Statute Quia Emptores (1927) 36 YALE L. J. 593; Zane, Determinable Fees in American Jurisdictions (1904) 17 HARV. L. REV. 297; Note (1926) 21 ILL. L. REV. 387. For particular discussion of the applicability of the rule against perpetuities, see 1 TIFFANY, op. cit. supra note 28, §183; Note (1930) 28 Mich. L. Rev. 1015.

33 GRAY, op. cit. supra note 9, §303, n. 5.
guished logically from conditional limitations in favor of some third party, a typical situation for the application of the rule, now that rights of entry in California are alienable and devisable even before breach of the condition. 34 The arguments for applying the rule to rights of entry reserved in grants in fee have been marshalled convincingly by Dean McMurray, 35 and there is little dissent among modern commentators. 36 English cases do make this application, 37 but California 38 and other American authorities 39 are contra. The matter calls for legislative correction.

Before drafting a statute, the common uses of rights of entry in various types of instruments should be studied. We ought not to assume without investigation that a single blanket limitation in time is desirable. Distinctions may have to be made between, for example, use restrictions in ordinary conveyancing, defeasance provisions in instruments of hypothecation, and provisions for forfeiture of property granted or devised for public and charitable purposes.

It may be noted further that a district court of appeal 40 has lately added a new check upon the operation of perpetual rights of entry for breach of condition subsequent; it has refused to enforce such a right of entry by forfeiture of the title where, through change in the character of the neighborhood, the purpose of the condition is no longer attainable. Thus the law has taken over a doctrine well settled in equity when injunctive enforcement of a condition is sought under similar circumstances. 41 However, the case is opposed in spirit, at least, to a previous holding 42 that the title of an owner in fee would not be quieted as against a perpetual condition and right of entry even if, by reason of a change in the neighborhood, equity would refuse enforcement of the condition. The recent decision has much to recommend it from the practical point of view, particularly if perpetual conditions are not to be

36 For applying the rule: Gray, op. cit. supra note 9, §303; 1 Tiffany, op. cit. supra note 28, §183; Note (1930) 28 Mich. L. Rev. 1015, 1019-1020. Contra: Kales, Estates, Future Interests and Illegal Conditions and Restraints in Illinois (2d ed. 1920) §662 (merely a statement that the American rule “if not an absolutely necessary view, [is] at least a correct one.”); Mackey, Powers of Entry and Perpetuity (1901) 17 L. Q. Rev. 32, 35-38 (citing earlier text authorities supporting his view, before the evolution of the modern rule against perpetuities).
37 The cases are cited in Note (1930) 28 Mich. L. Rev. 1015, 1020, n. 42.
39 For the cases, see 1 Tiffany, op. cit. supra note 28, at 603, n. 11; Note (1930) 28 Mich. L. Rev. 1015, 1020, n. 44.
41 Hurd v. Albert (1931) 82 Cal. Dec. 467, 3 P. (2d) 545.
42 Strong v. Shatto, supra note 38.
CALIFORNIA CIVIL CODE: FUTURE INTERESTS

brought under the ban of the rule against perpetuities. A statute providing against enforcement of forfeiture and for quieting title, where conditions have become unenforceable within the equity rule, may be desirable.

Sections 715 and 716 of the Civil Code, forbidding suspension of the absolute power of alienation beyond a specified period, are no check upon the creation of possibilities of reverter or rights of entry for breach of condition, however remote. Both of these types of interest are releasable at common law, and, a fortiori, in California. Consequently there are always persons in being who by combining can convey an absolute interest.

C. Donor's Right of Reverter in Realty Upon Dissolution of a Charitable Corporation. Something further may be said of another type of "possibility of reverter," as that phrase is used in judicial opinions in this state, namely, the right of a donor, upon the dissolution of a charitable corporation, to be reinvested with title to realty which he has previously conveyed to the corporation.

At common law, according to Coke and Blackstone, the lands of a corporation, upon its dissolution, did not escheat to the overlord but went back to the grantor. Personal property, with certain exceptions, went to the Crown as bona vacantia. Professor Gray believed that Coke was wrong in supposing that corporate realty was not subject to escheat, and pointed out that the cases upon which Coke relied were of land held in frankalmoign tenure, where the donor-grantor to the corporation was also the overlord and therefore entitled quacumque via. Gray also found a case of Coke's day (1622) in which, upon the death of an abbot and monks, their land was held to escheat and not to go back to the donor. Nevertheless, modern English common law

43 For authorities, see Note (1930) 28 Mich. L. Rev. 1015, 1016, n. 9.
44 See Strong v. Shatto, supra note 38, at 35, 187 Pac. at 162.
45 E.g., Victoria Hospital Ass'n v. All Persons, supra note 26, at 465, 147 Pac. at 128.
46 Co. Lit. *13b.
47 1 BL. Comm. *484, on the theory that the grantor has a reversion after the "life-estate" for the life of the corporation. Coke treated the estate of the corporation as a fee, and the right of the grantor as therefore an exception to the doctrine of escheat. Note (1911) 10 Mich. L. Rev. 121, 123.
50 Gray, op. cit. supra note 9, §§ 44–51a. See also Chaliss, op. cit. supra note 13, appendix VI, p. 467. But see Williston, loc. cit. supra note 49.
seems to have accepted Coke's authority in favor of the reversionary right of the grantor.\textsuperscript{52} An English statute in 1854 authorizing gifts to institutions for the promotion of science, literature and the fine arts, and for the maintenance of libraries, introduced a \textit{cy-près} requirement as to the disposition of assets in the event of dissolution.\textsuperscript{53} The Companies Act of 1929, if here correctly understood, makes a sweeping change in the common-law rule by providing that all property (except property held in trust "for any other person") of a dissolved company (including such charitable corporations as are formed or registered under the Act) shall go as \textit{bona vacantia} to the Crown.\textsuperscript{54}

In the United States, it has long been settled either by statute or in the doctrines of equity that on the dissolution of a business corporation, all its assets are distributable among its stockholders after payment of debts.\textsuperscript{55} The same would be true as to the assets of a non-profit corporation insofar as such assets are not impressed with an express or implied trust.\textsuperscript{56} Where assets are the subject of a private trust, which is terminated at dissolution of the corporate trustee, on general principles there should be a resulting trust for the grantor's benefit.\textsuperscript{57} Similarly a resulting trust for the donor ought also to be decreed where property is held on a trust for some specific charitable purpose which becomes impossible of attainment with the dissolution of the trustee corporation.\textsuperscript{58}

When the corporation's property is impressed with a public or general charitable trust, there is wide diversity of decision as to its disposition.\textsuperscript{59} If the property was conveyed to a corporate trustee with an express declaration of a charitable purpose, equity will of course appoint a successor if the first trustee is dissolved.\textsuperscript{60} If the property was conveyed to a charitable corporation without restrictions, but under


\textsuperscript{53} 17 & 18 Vict. c. 112, especially §30. But see \textit{ibid.} §4.

\textsuperscript{54} 19 & 20 Geo. V c. 23, §286; \textit{ibid.} §191 (2). The Act covers such charitable and other non-profit corporations as are formed (\textit{ibid.} §18 (1)) or registered (\textit{ibid.} §321 (1)) under it.

\textsuperscript{55} BALLANTINE, \textit{loc. cit. supra} note 49; (1921) 35 \textit{HARV. L. REV.} 85 and authorities cited.

\textsuperscript{56} See, for instance, the provision of section 605e of the California Civil Code as to disposition of the assets of non-profit corporations. See BALLANTINE, \textit{op. cit. supra} note 49, at 804, n. 106; Female Academy v. Darien (1928) 108 Conn. 136, 141, 142 Atl. 678, 680; Smith v. Dicks (1929) 197 N. C. 355, 148 S. E. 464.

\textsuperscript{57} Coe v. Washington Mills (1889) 149 Mass. 543, 21 N. E. 966; see Note (1928) 41 \textit{HARV. L. REV.} 898, 902, n. 32; (1921) 35 \textit{ibid.} 85.

\textsuperscript{58} Easterbrooks v. Tillinghast (Mass. 1855) 5 Gray 17; Marsh v. Means (1857) 3 Jurist (n.s.) Pt. I, 790.

\textsuperscript{59} For general summary of the authorities, see Note (1911) 10 \textit{MICH. L. REV.} 121; (1921) 35 \textit{HARV. L. REV.} 85; (1929) 28 \textit{MICH. L. REV.} 336.

\textsuperscript{60} 2 \textit{PERRY, TRUSTS AND TRUSTEES} (7th ed. 1929) §731.
circumstances where an intent to devote the property to the general charitable purposes of the corporation may be inferred, some courts, upon the dissolution of the corporation would apply the property cy-prés if possible. Others, in the case of realty, hold that the property "reverts" to the donor or his heirs in accordance with the English common-law rule. If instead of the realty having been received as a gift in specie, it was purchased with donations of money, these jurisdictions would allow the realty to be applied cy-prés or perhaps to escheat to the state. Still other jurisdictions expressly repudiate the common-law rule both as to realty and personalty. In this last class of jurisdictions, a resulting trust will be raised for the donor or his heirs if the property came to the corporation by gift and the cy-prés doctrine is not deemed applicable; if the property consists of contributions from time to time members of the corporation, or is property bought with such contributions, it will be distributed to such persons as are members at dissolution; if the members have no equitable claims against the property, and the property did not come by gift, it may be held to go to the state.

In California we have a dictum of the supreme court in 1869.


62Mott v. Danville Seminary (1889) 129 Ill. 403, 21 N. E. 927; Acklin v. Pashal (1877) 48 Tex. 147. For a considerable body of dicta to this effect, see cases collected in Gray, op. cit. supra note 9, §50, n. 5, and cases cited in notes 68, 69, infra.


64King v. Banks (1929) 220 Ala. 274, 124 So. 871; Carlisle County v. Norris (1923) 200 Ky. 338, 254 S. W. 1044; cf. Cone v. Wold (1902) 85 Minn. 302, 88 N. W. 977. For a case denying the common-law right of the donor, and applying the property cy-prés, see In re Centennial & Memorial Ass'n of Valley Forge, supra note 61.


66See People v. President & Trustees of the College of California (1869) 38 Cal. 166, 174; cf. Wilson v. Leary (1897) 120 N. C. 99, 92-93, 25 S. E. 630, 631-632; McAlhany v. Murray, supra note 64, at 450, 71 S. E. at 1028.

67People v. President & Trustees of the College of California, supra note 67. The court limits the rule of reverter to realty received by the corporation as a gift. Realty purchased by the corporation, says the court, would vest in the state, like personal property, if there were no debts or stockholders.
which, as explained by another dictum in 1915\textsuperscript{60} (the later expressly refuses to approve or disapprove the earlier), is to the effect that the English common-law rule as to realty reverting to the donor prevails here "insofar as charitable corporations are concerned." The later case, however, decides that even if the donor has a "possibility of reverter" at the dissolution of the charitable corporation this right arises only upon such dissolution; prior thereto the donor has no future interest in the property and the title of the corporation may be quieted in fee. The term, "possibility of reverter," as here used, therefore does not have the common-law connotation that the fee of the corporation is a qualified one. The donor's "mere possibility" is not assignable or devisable\textsuperscript{70} and presumably will be cut off by a sale of the land by the corporation.\textsuperscript{71}

Inasmuch as we have only dicta as to the reversionary right of a donor, and as the authority elsewhere is uncertain, we need an amendment to the Civil Code to provide generally with regard to the disposition of property remaining at the dissolution of a charitable corporation.\textsuperscript{72} It is plain that the members of such a corporation, as such, do not have a beneficial interest in its property\textsuperscript{73} and are not entitled to receive any of its property remaining at dissolution.

Three modes of disposition suggest themselves. Before they are stated, a word may be added in disapproval of any distinction in disposition as between realty and personalty upon dissolution of a charitable corporation. Charitable endowments today, whether in large or small amount, are as likely to be of personalty as of realty, and donors have no greater claim to consideration in one instance than in the other. The only possible justification for such a distinction is the greater difficulty of identifying separate gifts of personalty. This difficulty

\textsuperscript{60} Victoria Hospital Ass'n v. All Persons, \textit{supra} note 26, at 464, 147 Pac. at 128.

\textsuperscript{70} \textit{Ibid.} at 465, 147 Pac. at 128.


\textsuperscript{72} The Civil Code, as amended by chapter 871 of the 1931 statutes, provides in section 605e that upon dissolution of a non-profit corporation, after payment of debts, the assets shall be divided among the members in accordance with their respective rights therein; provided, however, that if the assets are held on any trust, they shall be disposed of by decree of the superior court. Section 605n provides that as to corporations sole, the assets remaining shall be transferred to the governing religious organization, or be disposed of by decree of the superior court. See also \textit{CAL. CIV. CODE} \textsection{605d}; \textit{BALLANTINE, CALIFORNIA CORPORATION LAWS} (1932) \textsection{454}, 455.

\textsuperscript{73} Under section 606 of the Civil Code (added by Cal. Stats. 1931, p. 1855) non-profit corporations for charitable and eleemosynary purposes hold all property, however acquired, upon trust for such purposes, even if no such trust is specified in the conveyance or otherwise. See also Carter v. Balfour's Adm'r (1831) 19 Ala. 814, 823-825; \textit{BALLANTINE, op. cit. supra} note 49, \textsection{267}, p. 804; \textit{Note} (1911) 10 \textit{MICH. L. REV.} 121, 126; \textit{cf.} \textit{Clarke v. Armstrong} (1920) 151 Ga. 105, 106 S. E. 289.
would be material only if such gifts are to be restored to the original donors, contrary to the common law rule as to personality but in accordance with mode (1) below, the least desirable of the suggested modes of disposition. Even here the difficulty might be avoided by a provision that insofar as the original gifts of donors to the corporation cannot be found in specie at its dissolution such donors shall have a pro-rata claim upon all property remaining at dissolution which is not identified as the subject of a specific gift.

The three possibilities to be kept in mind in drafting the recommended statute are as follows:

(1) The property of the dissolved corporation might well be required to be administered under orders of the superior court cy-prés for the general charitable purposes for which the corporation was organized. This jurisdiction, however, should be discretionary, so that if the court finds that no suitable cy-prés disposition can be made, the property may be turned over either to the state or to the donors, depending upon whether mode (2) or mode (3) below is deemed the better policy. Mode (1) has the advantage of avoiding an illogical distinction between property given to the corporation upon an express trust for charitable purposes, where cy-prés would apply on general equitable principles at dissolution of the corporation, and property given to the corporation in absolute terms but obviously intended for the charitable purposes of the corporation, where cy-prés would not apply if the common-law rules are to be given effect.

(2) The property of the dissolved corporation may be required to escheat to the state for the benefit, for instance, of the school fund, thus following the analogy of the Probate Code with respect to the property of a decedent who leaves no heirs. This disposition has the advantage of simplicity. For a precedent one may cite the common-law rule as to personality and the recent English statute to which reference has been made.

(3) The property may be required to "revert" to the donors. There are two principal objections to this provision. First: in many cases the dissolution of the corporation will not occur until long after the death of some, if not all, of the donors. If the heirs of such deceased donors are to be deemed entitled, there will be serious difficulty in determining them.

74 This of course applies only to cases where the terms of the gift do not indicate such a specific charitable intent as has become impossible due to the dissolution of the trustee corporation. See note 58, supra. Mode (1) has the advantage of bringing the dissolution situation into line with the general cy-prés doctrine, as to which, see 2 Perry, op. cit. supra note 60, §§ 723-735; Scott, Education and the Dead Hand (1920) 34 Harv. L. Rev. 1, 5; (1926) 35 Yale L. J. 643.

In any case the statute should provide the mode of such determination, that is, whether descent is to be traced from heir to heir or whether those who would be heirs of the decedent if he had died at the dissolution of the corporation are to represent him. Second: In many instances the total value of the remaining property of the corporation after payment of debts will be much less than the total of all contributions. Donors who can identify their contributions as remaining in specie will by this chance come off better than those who cannot. The best that can be done for the latter, as already suggested, will be to give them a pro-rata share of the remaining assets. An inequitable and fortuitous discrimination thus results.

In any event the reversionary right will be a mere windfall to the donor or his heirs. Had the donor so desired, he might have inserted in his gift a clause which would have protected him in the event of the dissolution of the corporation. The practical difficulties inhering in mode (3) make it in the writer's opinion a less desirable solution of the problem than either of the preceding.

III. Civil Code Sections 715, 716 and 771

These sections provide that the absolute power of alienation shall not be suspended longer than lives in being at the creation of the limitations or a period of 25 years from such creation, define suspension of the absolute power of alienation as occurring when there are no persons in being by whom an absolute interest in possession can be conveyed, and declare that the suspension of all power to alienate the subject of a trust, other than to exchange or to sell and reinvest, is a suspension of the power of alienation within section 715.

Uncertainty with regard to the application of these sections to trusts seems to give rise to more litigation in California than any other part of the law of future interests. The history of these sections in the law of New York from which they come has been interestingly told by other authors and need not be repeated here. However, that history is important in any detailed study of the problems of construction presented by the sections. It will be sufficient here to state the most important principles settled by our own supreme court in construing these sections and to point out certain matters of equal importance which are still in doubt.

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76 See Simonton, loc. cit. supra note 31.
77 In (1921) 35 Harv. L. Rev. 85, it is contended that the choice should be between returning the property to the donors, and administering it cy-près, the latter being declared preferable.
78 Upwards of forty cases under these sections may be found in our reports.
It has long been settled that the limitation upon suspension of the power of alienation contained in section 715, unlike the New York statute, applies both to realty and to personalty. Our early cases did not clearly recognize the statutory rule against suspension of the power of alienation as different from the common-law rule against perpetuities, which concerns itself only with remoteness in vesting. It was several times laid down, as in the earlier New York cases, that there was but one rule with regard to perpetuities in this state, namely, that of section 715. In the recent leading case of Estate of McCray, our supreme court distinguishes clearly between suspension and vesting, and holds that the rule of section 715 limiting suspension (as amended in 1917 to include a period in gross longer than the period of the common-law rule against perpetuities) is valid. By dictum, the court says that section 9 of article XX of the California Constitution, prohibiting “perpetuities” except for eleemosynary purposes, applies only to remoteness in vesting, not to suspension of the power of alienation, and, further, that section 9 of article XX “engrafts” upon our system the common-law rule.

This dictum is unfortunate: it takes too narrow a view of the term, “perpetuities,” as used in the constitution, and unnecessarily restricts the legislature should the latter see fit to enact a rule against remoteness in vesting differing somewhat from that of the common law. The provi-

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80 CHAPLIN, op. cit. supra note 79, §32. But section 11 of the New York Personal Property Law is somewhat analogous. See ibid.
81 In re Walkerly (1895) 108 Cal. 627, 41 Pac. 772.
82 For the early New York view, see Note (1927) 27 Col. L. Rev. 959, 960, n. 4.
83 “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.” Henshaw, J., in In re Walkerly, supra note 81, at 647, 41 Pac. at 775. See Blakeman v. Miller (1902) 136 Cal. 138, 68 Pac. 587, 588.
84 (1928) 204 Cal. 399, 268 Pac. 647.
85 Ibid. at 406, 268 Pac. at 650; see Strong v. Shatto, supra note 38.
86 On the point of the validity of section 715, as amended, the decision is not strong authority. The trust in question required the constitutional question to be decided only if construed as suspending alienability during the ten-year term of the trust. The court fails to decide this matter of construction, but says that even if it he assumed that the trust suspends alienability, nevertheless the trust is valid under the amended form of section 715, the amendment being constitutional. The holding that the amendment to section 715 is constitutional is therefore not more than an alternative ground of decision. Furthermore, on sound reasoning the trust did not in fact create any suspension of alienability at all, since all interests, present and future, were vested. See Chaplin, op. cit. supra note 79, §§ 165, 198, 477, and later discussion of section 771. The McCray decision puts to rest the doubt as to the validity of the 1917 amendment to section 715 suggested by Dean McMurray, op. cit. supra note 2, at 457.
87 204 Cal. at 405, 406, 268 Pac. at 649, 650.
sion of section 9 of article XX ought to be held merely to refer to the common-law policy "of preventing undue interference with the freedom of transfer of property," to use the words of the McCray decision itself. This policy, as that decision correctly points out, found expression in certain ancient rules against restraints on alienation, and also in the comparatively modern rule against remoteness in vesting.

It is desirable that the legislature enact a rule or rules as to the period within which future interests, legal and equitable, and in property of all sorts, must vest in order to be valid. At present, as noted, we have nothing better than a dictum, contradicting earlier dicta, with respect to the existence of such a rule. A statute drafted to settle the uncertainty as to the existence of the rule against perpetuities in California should do away with the abortive provision of section 773 that a fee may be limited upon a fee, to take effect "within the period prescribed in this title." This obviously was intended as a rule against remoteness in vesting. One cannot tell what effect, if any, will be given to this section, since there is no period prescribed in the title in question which can be identified as the period referred to. Apparently a blunder in draftsmanship occurred in adopting the language of the corresponding New York statute. In the latter, the period referred to was apparently the period specified in the same article by the section on suspension of the power of alienation. Our Civil Code, however, places section 773 in a title dealing wholly with real property, whereas section 715 on suspension occurs in an earlier title, dealing with property in general.

Even if the reference in section 773 to a period elsewhere prescribed were clear, the section would be unsatisfactory as a rule against remoteness in vesting because (1) it refers only to future estates in fee, and not to lesser interests, (2) among future limitations in fee it singles out only those analogous to shifting uses, and fails to include those analog-

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88 Ibid.
89 For the proper interpretation of the term "perpetuities" in the California constitution, and for comments on the McCray case, see Gerdes, Perpetuities and the California Rule against Suspension of the Absolute Power of Alienation (1927) 16 Calif. L. Rev. 81; Burby, The Meaning of the California Constitutional Provision Prohibiting Perpetuities (1928) 1 So. Calif. Rev. 107. On the policy subserved by the common-law rule against perpetuities, see Chaplin, op. cit. supra note 79, §§ 12, 372.
90 The text of the New York Revised Statutes of 1830 in which the rules against suspension etc. first appeared is not available to the writer, but will be found in Canfield, The New York Revised Statutes and the Rule against Perpetuities (1901) 1 Col. L. Rev. 224, 226-230; see Rundell, op. cit. supra note 6, at 254-256. The present provision is section 50 of the New York Real Property Law. N. Y. Cons. Laws (Cahill, 1930) c. 51, §50.
91 The same is true of the Civil Code as it appeared in 1872. Cal. Civ. Code §773.
ous to springing uses, if it applies only to realty, and (4) it does not expressly include equitable interests and whether it will be held to do so by implication is a matter that can be settled only by litigation.

If the legislature enacts a statute limiting the time within which future interests must vest, what ought that limit to be? The history of section 773, as already noted, indicates an intent to adopt the period of section 715, as to suspension of the power of alienation, as the limit for the vesting of a fee upon a fee. To apply the same period as a limitation both on suspension and on remoteness in the vesting of all future interests would have the advantage of simplicity. However, it would be open to serious objections.

In the first place, section 715 allows a gross period of 25 years after the creation of the limitations. Since this exceeds the common-law period for vesting, a question of constitutionality would arise under the dicta of the *McCray* case.

Secondly, section 715 is less liberal than the common-law rule against perpetuities in that the section allows no period at all after lives in being, with the exception of the situation covered in section 772, namely: in limitations of real property, contingent remainders in fee, or, in common-law terminology, conditional limitations, may be made to take effect upon the death of a prior remainderman under 21, or upon some other contingency during the minority of such prior remainderman. It is true that a considerable number of states, by statute, alter the common-law period of 21 years after lives in being, and some ten of them allow no gross period at all after lives in being. The latter, after all, are a small minority. No one, so far as the writer is aware, has ever undertaken to show that the allowance of a period in gross after lives' in being, during which future interests must vest in order to be valid, is incompatible with sound policy today. No sufficient reason for a less liberal rule as to vesting than that of the common law appears. If merely out of a desire for uniformity the period of section 715 is to be adopted for vesting, the exception embodied in section 772 ought at

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92 In *Walker v. Marcellus & Otisco Lake R. Co.* (1919) 226 N. Y. 347, 350, 123 N. E. 736, 737, the court noted that literally section 24 of the New York Real Property Law, like our section 773 refers only to shifting interests, but applied the section also to springing interests "to carry out the intent" of the legislature.

93 One reason why we cannot safely assume that a statute dealing expressly with legal property interests, such as section 773, will be held by implication to apply also to equitable interests is the provision of section 863 that the beneficiaries of an express trust of realty "take no estate or interest in the property, but may enforce the performance of the trust." But cf. Cal. Civ. Code §722.

94 When the historical import of the term "perpetuities" is properly argued to the court, section 9 of article XX will probably not be construed so literally as to prevent the legislature from altering the common-law rule against perpetuities.

95 These are listed in Note (1929) 7 Tex. L. Rev. 434, 435, n. 4.
any rate to be extended also to personal property and to equitable interests in both real and personal property.\(^{96}\)

In drafting any perpetuity statute, the concepts of public policy with respect to alienability, and with respect to the extent of control over future property interests which it is wise to allow owners of present estates must be overhauled. It will be well to inquire whether restrictions in so general a form as the common-law rule against remoteness in vesting or the statutory rule against suspension of the power of alienation (or both) are satisfactory. The advantage of a simple rule of general application ought not to mislead us into disregard of factual differences which are important from the standpoint of the policy behind the rule. Thus, as between two non-vested future interests, both equally alienable in theory, one may have a calculable value and therefore in practice may not constitute a serious restraint on the alienability of the property, whereas the other, depending perhaps on some unpredictable contingency, may have no calculable value and may constitute a real clog upon alienation.\(^{97}\)

On the other hand, we may well consider whether the common-law rule, by its prospective application,\(^{98}\) does not discriminate between cases which should be treated similarly. Consider the following examples. (1) A devise of Blackacre "to my son George White and his heirs. But if during George's lifetime or for 21 years thereafter the White Hotel Company ceases to operate a hotel upon the premises, Blackacre shall go over to my daughter Sarah and her heirs." (2) The same devise, but omitting the words, "during George's lifetime or for 21 years thereafter." The conditional limitation to Sarah and her heirs in the first

\(^{96}\)For the difficulty in construing the provisions of sections 755 to 781 of the Civil Code as applicable to equitable interests, under the peculiar wording of section 863 as to the rights of beneficiaries of a trust, see note 93, supra.

\(^{97}\)Contrast the following two cases:

Case (1): a devise "to \(B\) and his heirs, 30 years after my death." \(B\)'s interest can be appraised, and therefore is likely to be released or sold. In practice it would not seem, therefore, objectionable. But it would fall under the condemnation of a rule against remoteness in vesting (being an executory devise) if such a rule adopted either the common-law period of 21 years or the statutory period of 25 years in section 715.

Case (2): a devise to \(B\) and his heirs, but if the \(X\) event happens within \(B\)'s lifetime, then to \(C\) and his heirs. \(B\) at the testator's death is a child of 5 years. \(C\)'s conditional limitation, being dependent upon a wholly unpredictable event cannot be appraised and therefore is not likely to be released or sold. Moreover, in view of \(B\)'s age, \(C\)'s interest may hang as a cloud upon alienability for a considerably longer period than the limitation in case (1) could have remained unvested. Yet \(C\)'s interest today would be valid both under the common-law rule against perpetuities, under a similar rule against remoteness having the period of section 715 instead of that of the common law, and under the rule of section 715 as to suspension of alienability. See Note (1927) 27 Co. L. Rev. 959, 965-966.

\(^{98}\)See Gray, op. cit. supra note 9, §214.
instance is valid under the rule against perpetuities. In the second instance the gift to Sarah and her heirs is invalid, because the contingency upon which it is to vest may not happen until later than the prescribed period. Now if there is no objection to the gift-over in the first instance, although that limitation may remain unvested as a cloud upon George's fee simple for his life and 21 years thereafter, why should not the gift-over in the second instance be allowed the same chance for effectiveness, that is, be recognized as conferring a good title upon Sarah or her heirs in case the contingency does in fact occur during the life of George or Sarah, and for 21 years thereafter?

As to trusts there are several possible bases of factual distinction to be considered. One example will suffice. Under section 771 of the Civil Code, as construed by the supreme court, it makes no difference in applying the test for suspension of the power of alienation whether the trustee has a power to exchange, or to sell and reinvest. Parenthetically, it should be noted that the section, though intended to be explicit on this point, is worded with such ingenious ambiguity that without the decision of the supreme court, one could not say confidently what is meant. Now if we are concerned solely with alienability — and this is the point to which sections 715 and 771 purport to be directed — it is nonsense to declare, as does section 771, that a power of sale in the trustee is immaterial. It may well be that even where such a power exists, private trusts ought not to be continued, unbarrable, for an unreasonable length of time. In the case of such trusts, however, the objection is not the inalienability of the property, but the perpetuation of one generation's control over a fund, however liquid, of the economic assets of a later generation. If this latter problem is adequately dealt with by sections 715 and 771, even though these sections purport to be concerned only with alienability, an objection would be captious. This, however, is not the case. The appropriate remedy for a trust the only obnoxious feature of which is the unreasonable postponement of the

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60 One might consider also whether the trust instrument imposed any restraint upon the alienation of the present and future equitable interests. Again, it may be pertinent to consider whether the trust would in any event, or upon probable contingencies become terminable at the wish of the beneficiaries prior to the stated expiration thereof.

100 Estate of Maltman (1925) 195 Cal. 643, 234 Pac. 898.

101 See Dwight, Powers of Sale as Affecting Restraints on Alienation (1907) 7 Col. L. Rev. 589, 594; Note (1927) 27 ibid. 959, 960.

102 In jurisdictions following Claflin v. Claflin (1889) 149 Mass. 19, 20 N. E. 454, in refusing to terminate a trust even where all the interests are vested in persons of full age, who seek its termination, some limit on the duration of such trusts is nevertheless imposed. See Southard v. Southard (1911) 210 Mass. 347, 357, 96 N. E. 941, 943; Gray, op. cit. supra note 9, §898; Note (1928) 7 Tex L. Rev. 434, 437; (1930) 4 So. Calif. Rev. 161.
beneficiary's right to the property is to shorten the postponement to the time allowable, not to strike down the trust from the start, as section 715 does except in cases where the limitations causing the postponement are severable. In any event, sections 715 and 716, logically construed, are a check upon the creation of long-term trusts only in cases where the interests of the beneficiaries do not all become vested and alienable within the allowable period of suspension.

In any general revision of the law on perpetuities, Gray's classic characterization of the results of New York's legislation of 1830 on that subject, "and what a mess they made of it!", ought to remind us again of the need for caution. Whether or not such a general revision is undertaken, our code provisions with respect to suspension of the power of alienation ought to be amended so as to remove a certain troublesome question discussed in the paragraphs immediately following, as to the validity of common types of trusts.

If some of the possible beneficiaries of a trust may not be ascertained until after the expiration of the period named in section 715, the absolute power of alienation will be suspended too long, for the interests of such unascertained beneficiaries cannot be conveyed in the meantime. The law is settled with regard to cases of this type. Suppose, however, a trust is created which by its terms will outlast lives in being, or which will outlast a gross period of 25 years, but within those limits, the interests of all beneficiaries will vest absolutely and indefeasibly and be alienable. Two illustrations may aid.

(1) A trust to pay the net income to A for his life, and then to hold the property for the benefit of whatever child may first be born to A, until such child reaches thirty, paying to such child the income meantime, and transferring the corpus to such child at thirty, after A's death; the interest of such child in the corpus to vest at birth. Here, treating a posthumous child as born at its father's death, the entire beneficial interest is certain to vest not later than the death of A, a life in being, either in A's first-born child or in whoever is entitled to the reversionary interest upon failure of the trust at this point. If at the death of A, all interests in the property will be transferable so that by conveyances to some one person a present absolute estate in possession may be created, the trust does not offend Civil Code section 715. Under this test, the

103 See Estate of Rider (1926) 199 Cal. 724, 739-741, 251 Pac. 799, 804-805. 104 Gray, op. cit. supra note 9, §871, p. 616. 105 Estate of Walkerly, supra note 81; Estate of Cavarly (1897) 119 Cal. 406, 51 Pac. 629; Estate of Van Wyck (1921) 185 Cal. 49, 196 Pac. 50; Estate of Maltman, supra note 100. 106 CAL. CIV. CODE §§ 698, 739; CAL. PROF. CODE §123. 107 CAL. CIV. CODE §716; see Estate of Campbell, supra note 19.
trust is good, so far as the transferability of the interests of all possible beneficiaries is concerned. But is the legal title of the trustee after A's death so untransferable as to incur the prohibition of sections 715 and 716 of the Civil Code? After A’s death, his child cannot compel the trustee to convey the property to such child until the latter reaches thirty. But if, prior to reaching thirty, the child should make a proper conveyance of his interest to some third party, the trustee ought not to be considered to be acting wrongfully or in breach of trust if he conveys legal title to the third party and thus terminates the trust.

On principle, therefore, this trust should be held good. No one can predict, however, that it would be so held, and the inference from certain California decisions is to the contrary.

(2) Suppose a trust to hold property for a period of thirty years, meantime paying specified annuities out of the income to A, B and C, and at the end of the thirty-year period, to distribute the property equally among A, B and C, the shares of each to vest in interest from the beginning of the trust. Will the trust fail under Civil Code section 715? Plainly the beneficial interests are all vested and all transferable. Can the trustee properly convey the property to a person who has taken an assignment of the rights of the beneficiaries? Those beneficiaries, assuming them to be of age, could have compelled a conveyance to themselves and a termination of the trust. Clearly, therefore, the trustee is not restrained by the trust from conveying legal title to an assignee of the beneficiaries. The trust ought not to be held to offend Civil Code section 715, but as in example (1) above, we can by no means be sure that such would be the holding in view of decisions on suspension already referred to.

It is not intended to argue for a rule upholding either of the preceding trusts. The discussion is merely to show that the Civil Code at present furnishes no clear and reliable rule on limitations as simple as

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108 In applying the test of section 716 regarding transferability, it is immaterial that a person having an interest in the trust may be a minor. The disability of such person is considered to be created by law, not by the settlor. See Estate of Campbell, supra note 19, at 718, 87 Pac. at 575.

109 Estate of Yates (1915) 170 Cal. 254, 149 Pac. 555.

110 See Hohfeld, op. cit. supra note 1, at 325-326.

111 Counsel’s argument along the lines above suggested is stated by the court in Estate of Van Wyck, supra note 105, but the court finds it unnecessary to pass upon the correctness of this reasoning.

112 Cf. Crew v. Pratt (1897) 119 Cal. 139, 146-147, 51 Pac. 38, 41; In re Estate of Fay (1907) 5 Cal. App. 188, 89 Pac. 1065; Sup. Ct. hearing den., ibid. at 191; see Estate of Heberle (1908) 153 Cal. 275, 276, 95 Pac. 41, 41.

113 Moor v. Vawter (1927) 84 Cal. App. 678, 258 Pac. 622; cf. Eakle v. Ingram (1904) 142 Cal. 15, 75 Pac. 566.

114 Cf. cases cited in note 112, supra.
these and that counsel cannot advise until the supreme court has spoken.115

IV. CIVIL CODE SECTION 859

Nowhere in the Civil Code are defects more evident or more easy to correct by amendment than in respect to the important question of spendthrift trusts. Section 859 applies only to realty and limits the effect of spendthrift clauses. The surplus income, above the sum necessary for the education and support of the beneficiary is made available to the latter's creditors. No objection can be made to this aspect of the section, unless indeed our democratic instincts are offended by the fact that, under the supreme court's interpretation,116 the scion of wealth is entitled to more liberal treatment than a beneficiary of humble origin. But the section appears to have the somewhat extraordinary effect of making every trust to receive the rents and profits of realty a spendthrift trust, that is, to shield the income so far as needed for the support of the beneficiary from the claims of his creditors, even though the instrument contains no provisions to that effect.117 Surely there is sufficient substance in the strictures of Professor Gray on spendthrift trusts in general118 to indicate the unwisdom of erecting legislative protection against creditors where the settlor himself has not so provided. Why should persons who happen to have property settled upon them be granted an exemption from execution not enjoyed by those whose incomes are derived from their own accumulations?

A more serious defect in our law of spendthrift trusts, however, is the difference in treatment as between realty and personalty. Although the supreme court has not in terms so decided, it would seem that an equitable life interest in personalty may be made free of creditors' claims, regardless of the size of the trust and of the income therefrom.119

115 For examples of more complicated questions involved in attempting to apply section 715 of the Civil Code see Estate of Campbell; Estate of Phelps, both supra note 19. No one would contend that a code section could be drafted which would provide a ready solution for every set of limitations.

116 Magner v. Crooks (1903) 139 Cal. 640, 73 Pac. 585.

117 Ibid. The report does not state that there was or was not a spendthrift clause in the instrument, but the transcript on appeal showed that there was not. It also showed that the property was realty. See Griswold, Reaching the Interest of the Beneficiary of a Spendthrift Trust (1929) 43 Harv. L. Rev. 63, 75, n. 65. Inconsistently, our statute does not make an equitable interest in income from a trust of realty inalienable. Blackburn v. Webb (1901) 133 Cal. 420, 65 Pac. 952; see Griswold, op. cit. supra, at 75. The New York statute did so in 1830 thus creating "spendthrift trusts" by legislative enactment long before the doctrine of the spendthrift trust had been developed by judicial decision in the United States. See Rundell, op. cit. supra note 6, at 248.

118 GRAY, RESTRAINTS ON ALIENATION (2d ed. 1895) §§ 251-265a.

119 That is, the holding of Seymour v. McAvoy (1898) 121 Cal. 438, 53 Pac. 946, generally sustaining spendthrift trusts, would be limited only as to realty by Civil Code section 859. San Diego Trust & Savings Bank v. Heustis (1932) 68 Cal. App. Dec. 1270, 10 P. (2d) 158.
In New York, the original statutory limitation upon spendthrift clauses in trusts of realty, substantially identical with section 839, was extended by judicial decision to trusts of personalty also. An amendment to the New York Code of Civil Procedure in 1908 makes income from trust funds of all kinds, if such income exceeds $12 a week, subject to the claims of judgment creditors up to ten per cent thereof.

A recent California case, San Diego Trust & Savings Bank v. Heustis, illustrates the unfairness of permitting spendthrift clauses in trusts of personalty to have unlimited effect. Here the beneficiary of a spendthrift trust administered by a California trust company was a husband who had defaulted on a judgment for maintenance and support recovered by his wife in California and had departed to live in Texas. The wife, as judgment creditor, was held not entitled to levy execution against her absconding spouse's interest in the trust. Thus apparently she was left empty-handed, while he continued to draw a considerable income.

The case also suggests the desirability of a statute such as has been enacted in two states, making all spendthrift clauses void as against the claims of a wife or children for support and maintenance.

In the Heustis case, the judgment debtor was beneficially entitled not only to the income during the ten-year duration of the trust, but also to the corpus at the expiration of the term, provided, however, that if he should die during the term, the corpus should at once be distributed to other named persons. Following the usual construction of such limitations at law, one would say that the judgment debtor's interest in the corpus was a vested equitable remainder, defeasible on the condition named. This interest in the corpus was also expressly covered by the spendthrift clause. The court, in upholding the full validity of the clause as against the attempted execution, makes no distinction between the equitable interest in the term and the equitable remainder. This is an extension of the Nichols v. Eaton doctrine,

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120 Williams v. Thorn (1877) 70 N. Y. 270.
122 Supra note 119.
123 See Runk, American Statutory Modifications of the Rule against Perpetuities, of Trusts for Accumulation and of Spendthrift Trusts (1932) 80 U. of P. L. Rev. 396, 407-408. These states, according to Mr. Runk, are Missouri and Pennsylvania. In the latter, the "home of spendthrift trusts," the statute makes 50 per cent of the trust income liable for the maintenance of the wife and minor children. For an interesting and able study of decisions, exempting certain types of claims from the operation of spendthrift clauses, see Griswold, loc. cit. supra note 117.
124 (1876) 91 U. S. 716. See Gray, op. cit. supra note 118, §251.
approved, so far as the writer is aware, in only two other jurisdictions.\textsuperscript{125} The arguments against permitting equitable interests in fee or absolute equitable interests in personalty to be held free of the claims of creditors have been sufficiently marshalled, without dissent, by textbook writers.\textsuperscript{126} The \textit{Heustis} case shows the need of a code provision to prevent our courts—perhaps unwittingly, for the opinion in the \textit{Heustis} case does not discuss the point—from following the two heterodox states already mentioned.

The \textit{Heustis} case contains an alternative ground of decision, apart from the effect of the spendthrift clause, \textit{viz.}, that the interest of the beneficiary in question is contingent, and therefore not subject to execution.\textsuperscript{127} The court does not say whether this contingent interest is legal or equitable, and apparently considers this distinction immaterial. Assume that the court is right in construing the future interest here as simply contingent, rather than as vested, subject to defeasance. Under our statutes\textsuperscript{128} and under dicta of our supreme court\textsuperscript{129} (the writer knows of no decisions), one would infer that contingent interests in the nature of remainders are subject in some manner to execution. This is the rule in Pennsylvania\textsuperscript{130} and New York.\textsuperscript{131}

The uncertainty produced by the \textit{Heustis} case as to execution upon contingent interests in California might properly be settled by statute. There are, of course, good arguments for exempting contingent interests from execution—particularly the danger that interests which might turn out to be of large value to the judgment-debtor will be sacrificed if sold while they remain contingent.\textsuperscript{132} Such considerations are for the legislature.

\textsuperscript{125} Wallace v. Foxwell (1911) 250 Ill. 616, 95 N. E. 983; Boston Safe Deposit & Trust Co. v. Collier (1916) 222 Mass. 390, 111 N. E. 163; see Gray, op. cit. supra note 118, \S 113.

\textsuperscript{126} See Gray, op. cit. supra note 118, \S\S 115, 124-K, 124-O; Note (1913) 7 Ill. L. Rev. 445; (1916) 29 Harv. L. Rev. 557.

\textsuperscript{127} 68 Cal. App. Dec. at 1282, 10 P. (2d) at 166.


\textsuperscript{129} See Le Roy v. Dunkerly (1880) 54 Cal. 452, 460; Fish v. Fowlie (1881) 58 Cal. 373, 375.

\textsuperscript{130} Kenyon v. Davis (1908) 219 Pa. 585, 69 Atl. 62.

\textsuperscript{131} Cohalan v. Parker (1910) 138 App. Div. 849, 123 N. Y. Supp. 343; see In re Bendheim's Estate (1924) 124 Misc. 424, 427, 209 N. Y. Supp. 141, 144. In some states, a remainder if contingent as to the person entitled, cannot be taken on execution. The cases are collected in Roberts, \textit{Transfer of Future Interests} (1931) 30 Mich. L. Rev. 349, 355; Notes (1893) 23 L. R. A. 642, 645; (1910) 27 L. R. A. (n.s.) 454; (1910) 30 ibid. 115, 116; (1932) Col. L. Rev. 1043. Contingent future interests, when as freely transferable as other non-possessory interests, pass to a trustee in bankruptcy, regardless of whether the bankrupt, in order to be entitled must survive to a certain time, or whether the contingency depends upon the happening of some event. Clowe v. Seavey (1913) 208 N. Y. 496, 102 N. E. 521, 47 L. R. A. (n.s.) 284; 3 Remington, \textit{Bankruptcy} (3d ed. 1923) \S 1199.

\textsuperscript{132} See Roberts, op. cit. supra note 131, at 368.
V. CIVIL CODE SECTION 779

The rule in Shelley's case, taking Civil Code section 779 at its face, is dead,
but the ghost of the rule, thanks to certain dicta of the supreme court in the recent case of *Dickey v. Walrond*,
still stalks. Contrast the following two cases:

(1) A devise of Blackacre "to Joseph for his life, remainder to the heirs of Henry." This of course is not a situation for the application of the rule in Shelley's case. At common law, as well as in California, the heirs of Henry take as purchasers, or in the language of Probate Code section 108, the words, "to the heirs [of Henry]", are words of donation, not of limitation. Moreover, the heirs take in the proportions which would be applicable if the property came to them by intestate descent from Henry, not in equal shares as members of a class. Such is the settled and reasonable construction of Probate Code section 108 where there is a gift to "heirs" as purchasers. So far, no criticism is intended.

(2) Suppose a devise to Henry for his life, remainder to the heirs of Henry. Here, at common law, the rule in Shelley's case would have applied, with the result that the words, "to the heirs [of Henry]", would have been read as words of limitation, not of donation. This was not a rule of construction, based on the presumed intent of the devisor—it applied even if the devisor had expressly indicated a different intent. At any rate, the rule has been abolished in California. Shall the heirs of Henry, who must take as purchasers by the express provisions of section 779, share the property in the proportions in which they would take property by intestacy from Henry, in other words, as in case (1)? No, say the dicta of the supreme court; here the heirs take as members of a class, that is, equally; the case does not fall within Probate Code section 108, as did case (1). And why not? Because the words, "to the heirs [of Henry]", here are not words of donation within the meaning of Probate Code section 108, since at common law, under the rule in Shelley's case, they would be words of limitation.

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133 Barnett v. Barnett (1894) 104 Cal. 298, 37 Pac. 1049. For legislative inroads upon the rule in Shelley's case, generally, see Powell, *Cases on Future Interests* (1928) 202; Note (1932) 45 Harv. L. Rev. 571.

134 (1927) 200 Cal. 335, 342, 253 Pac. 706, 709.


136 Probate Code section 108 embraces what were formerly sections 1334 and 1335 of the Civil Code.

137 Dickey v. Walrond, *supra* note 134; Estate of Watts (1918) 179 Cal. 20, 175 Pac. 415.


This, it is submitted, is absurd. It is admitting in one breath that the rule in Shelley's case has been abolished, and in the next breath, saying that Probate Code section 108 will be applied as if the rule in Shelley's case still existed in California. It is to be hoped that these dicta will not become law by decision. But to avoid that possibility, and to remove the confusion which the dicta may cause in lower courts, an amendment might be made to section 779 of the Civil Code declaring what the section ought to be held to declare anyway, viz., that in the limitation of a remainder to the heirs or the heirs of the body of a person to whom a life estate is given, the words, "heirs" or "heirs of the body," shall be construed for all purposes as words of donation.

VI. FOUR SUGGESTED ADDITIONS TO THE CIVIL CODE ON FUTURE INTERESTS

A. Abolition of the Presumption of Capacity to Bear Children (Apropos of the Termination of Trusts and the Rule Against Perpetuities.) Although our courts have repeatedly attempted to state a compendious rule as to when equity will direct the termination of a trust, prior to its stated expiration, the decisions in theory are not altogether harmonious. Probably it is better to leave this matter to be gradually worked out on general equitable principles than to try to regulate it by statute. In one respect, however, the precedents thus far established might well be altered by a code amendment. Suppose a testamentary trust, to pay the income to the testator's daughter, Annie, for life, and at her death to transfer the corpus of the trust to her children in equal shares. During the trust period, Annie and her only

140 A still more absurd distinction would result from following the dicta of the Dickey case where on the one hand the remainder to heirs is a legal remainder after an equitable life estate in the ancestor (here, the rule in Shelley's case not being applicable, the heirs would take in the proportions applicable upon intestacy of the ancestor); and on the other hand, where the remainder to heirs was equitable in nature, following an equitable life estate. Here, the rule being applicable, the heirs would take as a class equally.


142 If a settlor desires of establishing a trust to pay an income to his son until 30 and then to transfer the corpus to the son, calculates the number of years which must elapse before his son reaches 30, and provides that the trust shall continue for that number of years, the son can nevertheless procure its termination, upon arriving at majority. Moor v. Vawter; Eakle v. Ingram, both supra note 113; Woestman v. Union Trust & Savings Bank, supra note 141. But if the settlor seeks to accomplish the same result by providing that the trust shall continue until the son is 30 years of age, here, even though the interest in remainder is indefeasibly vested, as in the case first put, the son will be unable to compel termination and delivery of the corpus to himself until he arrives at the stated age. Estate of Yates, supra note 109.
child, Kimball, both being of full age and competent, apply to have the trust terminated. To prove that they are the only persons who can ever have a beneficial interest under the trust and thereby to bring the case within the established rule permitting termination \(^{143}\) they offer evidence that by reason of advanced age and consequent sterility it is impossible that Annie should bear other children. Our supreme court, choosing to follow some six American jurisdictions rather than the English rule, \(^{144}\) holds such evidence inadmissible, and establishes a "conclusive presumption that a woman is capable of bearing children as long as she lives." \(^{145}\) The court rests its decision on American authority and fails to adduce any reasoning whatever, which is not surprising in view of the utterly insubstantial grounds suggested by other courts. \(^{146}\)

The origin of this conclusive presumption is of course in the cases on the rule against perpetuities, in which, both in England and in the United States, courts have refused to admit evidence of a woman's sterility in order to save a limitation otherwise too remote. \(^{147}\) The parent authority is *Jee v. Audley*. \(^{148}\) Here the Master of the Rolls, Sir Lloyd Kenyon, objected to evidence of sterility from advanced age on the ground that it was "conjecture." However this may have been in the state of medical science in 1787, the same reason cannot be urged for a sweeping presumption in 1932. If in fact there are "borderline ages" when proof is liable to be uncertain, \(^{149}\) the difficulty may be taken care of by a rule requiring that the proof of sterility, to be sufficient, must be clear and convincing.

Why declare a future interest void as too remote solely on the

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\(^{143}\) Eakle *v.* Ingram, *supra* note 113, and cases cited.

\(^{144}\) These authorities are cited in the opinion in Fletcher *v.* Los Angeles Trust & Savings Bank, *supra* note 141, at 180-181, 187 Pac. at 426-427.

\(^{145}\) Ibid.

\(^{146}\) Three reasons have been suggested for the rule: (1) the "indelicacy" of the proffered proof; (2) the uncertainty of it (for these two reasons, see Bowlin *v.* Rhode Island Hospital Trust Co. (1910) 31 R. I. 289, 293, 76 Atl. 348, 350; May *v.* Bank of Hardinsburg & Trust Co. (1912) 150 Ky. 136, 138, 150 S. W. 12, 12-13); (3) the inducement which otherwise would be held out to women to have operations performed to produce sterility, in order to bring such trusts within the rule for termination. See *In re Ricard's Trust Estate* (1903) 97 Md. 608, 616, 55 Atl. 384, 387. American courts sometimes adopt the presumption without troubling themselves to support it by reasoning. Reeves *v.* Simpson, (Tex. Civ. App. 1915) 182 S. W. 68.

\(^{147}\) See *Gray*, *op. cit. supra* note 9, §§ 215, 215a.

\(^{148}\) (1787) 1 Cox 324. Co. Litt. *28a, and 2 Bl. Com. *125 which are frequently cited for the presumption of capacity to bear children do not apply that presumption either with respect to the rule against perpetuities (which to be sure is later than Coke) or the termination of trusts.

\(^{149}\) For English cases of trust termination, indicating how far their courts have gone in permitting sterility to be inferred on the basis of age, see Fletcher *v.* Los Angeles Trust & Savings Bank, *supra* note 141, at 182, 187 Pac. at 427.
ground that a certain woman may have more children when there is convincing evidence that she cannot? And, similarly, why refuse to terminate a trust because of a presumption of a capacity for child-bearing which is contrary to the fact? A code amendment should wipe out the presumption in both cases.

B. Limitation Upon the Duration of Certain Types of Options.

1. Option to Purchase Land. An option to purchase land, whether analyzed as an interest in real property or as a mere contract right, amounts in effect to a power in the holder of the option to create an equitable interest in the land whenever he shall exercise the option. This equitable interest interrupts the previously existing equity of the owner. It is in fact a good example of a springing use. The existence of such a power to create a future estate is obviously in some degree a barrier to free alienation, analogous in that respect to powers of appointment and to rights of reentry for condition broken. Options, therefore, must be considered from the standpoint of the policy against tying up property for long periods of time.

Technically it would seem that options to purchase, both where they are appendant to leases and where they are in gross, that is, held by persons having otherwise no interest in the land, are within the scope of the rule against perpetuities. Kales, Gray, and Tiffany so indicate. There are, however, important practical differences between the two types and they will be considered in order.

In England in spite of the fact that options to renew leases have never been held subject to the rule against perpetuities, appendant options to purchase the fee are subject to the rule and probably are not specifically enforcible either against the lessor or his assigns, if exercisable later than the period of the rule.

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150 See Manchester Ship Canal Co. v. Manchester Racecourse Co. [1900] 2 Ch. 352, 366, aff'd, [1901] 2 Ch. 37; Notes (1919) 29 Yale L. J. 87, 90; (1925) 35 ibid. 213, 219, n. 31.

151 This is the Illinois view. Keogh v. Peck (1925) 316 Ill. 318, 147 N. E. 266. See criticism in Notes (1925) 39 Harv. L. Rev. 135; (1925) 35 Yale L. J. 213, 219, n. 31.

152 See ibid. at 216-217, 219, n. 31.

153 Kales, op. cit. supra note 36, §665.

154 Gray, op. cit. supra note 9, §230-b.

155 1 Tiffany, op. cit. supra note 28, §183, p. 607; see Notes (1905) 18 Harv. L. Rev. 379; (1925) 35 Yale L. J. 213, 216.

156 Note (1905) 18 Harv. L. Rev. 379; see 1 Tiffany, op. cit. supra note 28, §183, p. 608; Notes (1927) 27 Col. L. Rev. 959, 966, n. 30; (1925) 35 Yale L. J. 213, 215, nn. 6, 7.

157 There are two cases. One, Woodall v. Clifton [1905] 2 Ch. 257, merely holds that specific performance will not be granted as against an assignee of the lessor. This is on the ground that the rule against perpetuities prevents the option from creating any interest in the land itself; and as a mere contract the option is
In the United States, however, appendant options to purchase have uniformly been upheld, regardless of the rule against perpetuities. When the point eventually was made, the court relied upon the established practice of granting such options in long-term leases, and the logical impossibility of distinguishing options to purchase from options to renew, everywhere held not subject to the rule.

California has twice approved purchase-options in leases which ran not more than twenty years. The leading case, Blakeman v. Miller, was decided at a time when our court recognized no rule against perpetuities other than the provisions of Civil Code sections 715 and 716 regarding suspension of the absolute power of alienation. The court correctly held that in these option cases there were persons in being who could at all times convey an absolute estate in possession and, therefore, that sections 715 and 716 did not apply. The court adds a significant dictum that, if faced with an option for 500 years, equity might deny specific performance, establishing a principle of reasonableness after the mode in which common-law rules with respect to restraints on alienation were worked out.

Probably the text-writers are right who argue that, on the whole, public policy does not require options appendant to be limited to the period of the rule against perpetuities. Even if such options impede alienation of the reversion, this disadvantage is more than offset by the fact that they provide a protection for the lessee and an incentive to him in improving the property. No legislation is therefore needed with respect to appendant options to purchase.

But options for purchase, in gross, are another story. Here the impediment to free alienation is not offset by any corresponding advantage. Instead of being an incentive for the improvement of the property under option, they tend in the opposite direction. The leading English case, probably not enforcible against the lessor's assignee. The second case, Worthing Corporation v. Heather [1906] 2 Ch. 532, denied specific performance as against a devisee of the lessor, the lessor's executor also being joined as defendant. This case indicates that the rule is thought of as preventing any remedy on the contract, even as between the original parties, which would create an interest in the land. Perhaps, however, these cases do not finally settle the English law. See Langeluttig, Options to Purchase and the Rule against Perpetuities (1931) 17 VA. L. Rev. 461, 463-464; (1923) 27 Law Notes 137; (1915) 14 Mich. L. Rev. 231.

—See cases cited in Langeluttig, op. cit. supra note 157, at 462-466.


—Hall v. Center (1870) 40 Cal. 63; Blakeman v. Miller, supra note 83. This case states the maximum length of the lease in Hall v. Center as 20 years.

—See (1927) 27 Coz. L. Rev. 959, 961, n. 10; (1920) 1 Wis. L. Rev. 180, 182.

—156 Cal. at 142, 68 Pac. at 588.

—See, e.g., Langeluttig, op. cit. supra note 157, at 464-465.
London & South Western Ry. v. Gomm,165 is regularly cited as holding an option in gross invalid where not limited to the period of the rule against perpetuities.166 In fact it only holds that such an option cannot be specifically enforced against a purchaser with notice from the property-owner who gave the option.167 The weight of authority in the United States denies specific enforcement of long options in gross both as against the original covenantor and his transferees. Some of the cases proceed on other grounds than the rule against perpetuities, for example, on lack of "mutuality" in the option-contract.168 Preemptions in gross, as for example, agreements to give others "the refusal" of the property at a price before offering it for sale generally, similarly are held objectionable.169 But in New York and several other states where, as in California, there is a statutory rule against suspension of the absolute power of alienation and no statutory enactment of the rule against perpetuities, options in gross have been upheld, regardless of duration, on the theory that they do not suspend alienability.170 This is of course correct, since the option-holder can at all times release his option to the owner of the property, thus enabling the title to be conveyed free of the option. However, these courts, at least in New York, have failed to consider the objections to such options, already mentioned, which can only be obviated by applying to such options a test of remoteness as to the time when the interest covered by the option may vest.171

When the validity of long options and preemptions in gross is raised in California, our courts will be very likely to follow this latter group of decisions, particularly if no case has by that time established by decision that we have a rule as to remoteness in vesting distinct from the provision of Civil Code section 715 as to suspension. It is therefore desirable to place in the Civil Code a specific limitation upon the duration of options and preemptions in gross.172 In this connection, it may

165 (1882) 20 Ch. D. 562.
166 KAES, op. cit. supra note 36, §664; 1 TIFFANY, op. cit. supra note 28, §183, p. 607. Gray's statement of the facts, op. cit. supra note 9, §275, is accurate but his statement of the holding, namely that the option to purchase was void, is subject to criticism.
168 The cases are cited in Langeluttig, op. cit. supra note 157, at 467, n. 36.
169 Ibid. n. 37.
170 See cases cited in Notes (1927) 41 HARV. L. REV. 406; (1919) 29 YALE L. J. 87, 88, nn. 6, 7; (1928) 28 COL. L. REV. 382; (1927) 26 MICH. L. REV. 112.
171 Such a test might logically be applied in New York. See Notes (1927) 27 COL. L. REV. 959, 963, n. 24; (1924) 9 CORN. L. Q. 220, 223; (1927) 40 HARV. L. REV. 913, 914. Also in California under the implications of the McCray case, supra notes 84, 85.
172 It has been contended, on the basis of Illinois authority that a proper limit would be a maximum term of 5 years. See Langeluttig, op. cit. supra note 157, at 471.
be well to consider also whether a party to such an agreement shall be entitled to maintain an action at law to recover damages for its breach even though, because of its invalidity as a matter of the law of real property, equity will not specifically enforce it.\textsuperscript{173}

2. \textit{Options to Purchase Personalty}. Judging from the cases, the commonest type of long-term or indefinite option in respect to personal property is the option to repurchase stock, reserved by corporations or by individual transferors.\textsuperscript{174} These options have generally been sustained regardless of duration.\textsuperscript{175} An objection to such an option under the rule against perpetuities was met in the leading English case on the subject by the answer that the rule has no application to personal contracts.\textsuperscript{176} This reasoning is satisfactory if the option-contract is for such property that damages alone could be recovered upon its breach. Where, however, the holder of the option could obtain specific performance, the exercise of the option creates an interest in property, and therefore in theory should be subject to the rule against perpetuities.\textsuperscript{177}

The cases on personal-property options have recently been collected and commented upon, and the opinion expressed that a legislative limitation upon the duration of such options is desirable.\textsuperscript{178} Here, again, we must be cautious in concluding that a single blanket rule will be satisfactory. When the ordinary uses of long-term personal-property options and preemptions are studied, some will inevitably be found to have better economic justification than others.\textsuperscript{179}

3. \textit{Options to Renew Leases}. As already indicated, options for renewal of leases, even if providing for such renewals perpetually, have been upheld as exceptions to the rule against perpetuities both in England and in the United States.\textsuperscript{180} Gray defends this view,\textsuperscript{181} notwithstanding Massachusetts refuses damages wherever the option-contract is not specifically enforceable (Eastman Marble Co. v. Vermont Marble Co. (1920) 236 Mass. 138, 128 N. E. 177), and this holding has been commended. See Langeluttig, \textit{op. cit. supra} note 157, at 472; (1920) 1 Wis. L. Rev. 180. But there is no clear justification for wholly invalidating a contract because it looked toward the creation of a future interest at a time when by a law of real property such interest would be too remote. If the option is held not specifically enforceable, the owner is free to alienate and can give a marketable title. The only good ground for the Massachusetts rule is that if the owner is still liable in damages to the option-holder, the owner is to some degree discouraged from alienating the property during the entire term of the option. The English cases allow damages and this holding also has its proponents. See (1920) 34 Harv. L. Rev. 440.

\textsuperscript{173} Massachusetts refuses damages wherever the option-contract is not specifically enforceable (Eastman Marble Co. v. Vermont Marble Co. (1920) 236 Mass. 138, 128 N. E. 177), and this holding has been commended. See Langeluttig, \textit{op. cit. supra} note 157, at 472; (1920) 1 Wis. L. Rev. 180. But there is no clear justification for wholly invalidating a contract because it looked toward the creation of a future interest at a time when by a law of real property such interest would be too remote. If the option is held not specifically enforceable, the owner is free to alienate and can give a marketable title. The only good ground for the Massachusetts rule is that if the owner is still liable in damages to the option-holder, the owner is to some degree discouraged from alienating the property during the entire term of the option. The English cases allow damages and this holding also has its proponents. See (1920) 34 Harv. L. Rev. 440.

\textsuperscript{174} See Note (1927) 12 Corn. L. Q. 530, 532.

\textsuperscript{175} \textit{Ibid.}

\textsuperscript{176} Borland's Trustees v. Steel Bros. & Co. (1901) 1 Ch. 279, 289.

\textsuperscript{177} \textit{Gray, op. cit. supra} note 9, §330; (1918) 31 Harv. L. Rev. 660.

\textsuperscript{178} Note (1927) 12 Corn. L. Q. 530.

\textsuperscript{179} See Note (1915) 14 Mich. L. Rev. 231, 233.

\textsuperscript{180} See authorities cited in note 156, \textit{supra}.

\textsuperscript{181} See \textit{Gray, op. cit. supra} note 9, §§ 230-230b.
standing his contention that options to purchase, given to the lessee, are within the rule against perpetuities. The law in California on leases with provisions for indefinite renewal at the option of the lessee is unsettled. In 1885, in *Morrison v. Rossignol*, the supreme court held as one of two grounds of decision that such a provision was "in effect, the creation of a perpetuity" and was "therefore against the policy of the law. In 1921, the district court of appeal of the second district held that an option in a ten-year lease for perpetual renewal was valid, and affirmed a judgment refusing to eject a tenant who was seeking for the second time to renew the lease. The *Morrison* case was not cited in the briefs of counsel or in the opinion of the court. However, counsel for the lessor did cite the *Morrison* case in his petition for hearing by the supreme court. The supreme court denied the petition.

Perpetually renewable leases are an exceedingly common form of property-holding in certain eastern states. They are not so numerous in California, but the legislature might well resolve the present uncertainty as to their validity, according as it views the question of policy involved.

C. Enactment of Provisions for Future Interests in Personal Property. With respect to property, both real and personal, the Civil Code begins sententiously as if to erect a grand legal edifice. Interests in property, it declares, may be either present or future; and future interests are either vested or contingent (defining each); future interests may be created to take effect in the alternative, and they are to be transferable in the same manner as present interests; they are not subject to be defeated by act of the owner of the precedent interest, nor by forfeiture, surrender, merger or gap; and lastly (except for certain provisions not material here) the Code declares that no future interest

182 (1855) 5 Cal. 65.
183 Ibid. at 66.
184 Becker v. Submarine Oil Co. (1921) 55 Cal. App. 698, 204 Pac. 245.
185 Reliance is upon a copy of the petition in the Stanford Law Library.
186 Becker v. Submarine Oil Co., *supra* note 184, at 704, 204 Pac. at 245.
187 By 1908, about 75 per cent of all the land in Maryland was held subject to such leases. See Langeluttig, *loc. cit. supra* note 157, at 463.

188 From the time limits placed upon leases by Civil Code sections 717-718c, it might be argued that covenants for perpetual renewal at the option of the lessee are inconsistent with our policy, if not indeed inconsistent with the letter of the code sections. For an argument that the rule against perpetuities should apply to perpetual renewals (unless the parties contemplated a continuing tenancy and viewed the option as a condition subsequent, giving the lessee the power to cut off an already vested estate), see Note (1924) 9 Corn. L. Q. 220, 223.

189 CAL. CIV. CODE §688.
190 Ibid. §§ 693-695.
191 Ibid. §§ 696, 699.
192 Ibid. §§ 741-742.
is recognized except as defined in the Code.\textsuperscript{193} Having thus broadly classified interests in property of all sorts, banished certain anachronisms of the common law and declared a purpose to create a complete system, the Civil Code, so far as future interests in personality are concerned, is silent. It would be less surprising to find the courts left with the whole task of determining what future interests in personality are allowable and defining the incidents of such interests, if there existed a well-settled body of common-law precedents in this matter. Professor Simes in a valuable paper\textsuperscript{194} has recently shown that such is not the case, either in England or in the United States. He quotes Professor Holdsworth's apt figure: "... the whole topic is and long has been a little explored backwater of the law."\textsuperscript{195} The reason for the comparative paucity of decisions is of course the general custom of placing personal property in trust when it is not desired to transfer full legal and beneficial ownership to the person first entitled.\textsuperscript{196}

One type of future interest in personality is established by the decisions of the supreme court\textsuperscript{197} and, indeed, is assumed by section 1065 of the Probate Code,\textsuperscript{198} namely, an interest created by will, analogous to a remainder in fee in realty, following a legal interest for life. Doubtless a life interest in personality followed by a quasi-remainder may be created by an inter vivos conveyance, but no California case so holding, except where the interests are equitable,\textsuperscript{199} is known to the writer.\textsuperscript{200} One wonders whether successive life interests are allowable, and if so, whether the restriction\textsuperscript{201} applicable in terms only to realty, namely that such interests must be to persons in being at the creation of the interests, will be applied by analogy.\textsuperscript{202} Likewise, whether quasi-reminders after terms for years in personality are valid,\textsuperscript{203} and if so, whether a term of years could be interposed between a life interest and a quasi-

\textsuperscript{193} Ibid. §703.
\textsuperscript{194} Simes, loc. cit. supra note 15.
\textsuperscript{195} Ibid. at 773; 7 Holdsworth, A History of English Law (1925) 477.
\textsuperscript{196} Simes, op. cit. supra note 15, at 779. No consideration is here given to such future interests as arise in connection with bailments, conditional sales, and pledges.
\textsuperscript{197} In re Garrity (1895) 108 Cal. 463, 38 Pac. 628, 41 Pac. 485; Hardy v. Mayhew (1910) 158 Cal. 95, 110 Pac. 113; Luscomb v. Fintzelberg (1912) 162 Cal. 433, 123 Pac. 247; Colburn v. Burlingame (1923) 190 Cal. 697, 214 Pac. 226.
\textsuperscript{198} Providing that where a specific legacy is given for life only, the life-tenant must deliver to the remainderman an inventory of the property.
\textsuperscript{199} Gray v. Union Trust Co., supra note 19.
\textsuperscript{200} For the law elsewhere, see Simes, op. cit. supra note 15, at 783.
\textsuperscript{201} Cal. Civ. Code §774.
\textsuperscript{202} Section 715 of the California Civil Code, as to suspension of the absolute power of alienation, applies by its terms to personality as well as realty and would invalidate future interests in personality which do not vest within lives in being or a gross period of 25 years.
\textsuperscript{203} See Simes, op. cit. supra note 15, at 784.
remainder of the absolute interest, or between two life-interests, contrary to the rule as to realty. Could a contingent quasi-remainder be limited upon a gift of personalty for years, and if so, would the vesting of such an interest be confined by analogy to the realty rule?

It seemingly is possible to create executory interests in personalty which take effect like shifting uses by interrupting vested interests, and presumably, therefore, it is possible to create future interests analogous to springing uses. But as to interests analogous to possibilities of reverter (e.g., a bequest: "my Radio stock to John, his executors, administrators and assigns, so long as the Radio Company maintains a plant at X") and interests analogous to rights of reentry (e.g., "my Gainsborough to John, his executors, administrators, and assigns, but if the painting is removed from its present hanging, my heirs shall be entitled to take and retain it"), we have no aid in California law, so far as the writer knows, and not much elsewhere. Nor can we guess whether such limitations, if allowed, would be subject to the rule against perpetuities.

An important question which might well be settled by code provision arises where a person having a life interest in personal property purports to sell and convey the property absolutely to a bona fide purchaser, who has no notice of any remainder or reversionary interest therein. Professor Simes argues that the purchaser should be protected in such a case, but admits that what few decisions there are on the point do not support that conclusion. To reach the result contended for without the

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204 CA. Civ. Code §775.
205 See Simes, op. cit. supra note 15, at 784.
206 In the case of realty, the vesting of such a remainder would have to be not later than lives in being at its creation. CA. Civ. Code §776.
207 The cases cited in note 197, supra, (except In re Garrity) involve and approve a life interest in personalty with a power in the life-tenant to transfer the absolute interest. By analogy to realty, the exercise of such a power creates an executory interest, interrupting the vested quasi-remainder which is limited in default of execution of the power. Cf. CA. Civ. Code §781. For the general law allowing the creation of executory interests, see Simes, op. cit. supra note 15, at 785.
208 Estate of Campbell, supra note 19, seems at first glance to involve future gifts of money, taking effect like springing interests. The provision by will that his mines should be held for certain prices, and sold, at the latest, when his daughter reached 21. The first $600,000 was to be distributed to named individuals, the next $200,000 to others, etc. Under the provision of California Civil Code sections 1341 and 1384 (now CA. Prob. Code §§ 352, 300) the court held, however, that these legacies vested at T's death, although the amounts available to satisfy them were not then ascertainable. Such a holding would be impossible where the legacy was made subject to an outright condition precedent.
209 See Gray, op. cit. supra note 9, §321a (citing a dictum which would extend the rule against perpetuities to conditions in conveyances of personalty); Simes, op. cit. supra note 15, at 785-786.
aid of a statute, Professor Simes is forced to adopt perhaps the least popular of three possible theories as to the nature of the interests created by the original limitations, namely, that the first taker has the entire legal interest for his own benefit for life, and then in trust for the ultimate taker.211

In framing legislation in regard to future interests in personalty, it will be important to bear in mind Professor Simes' exortation that the law be moulded according to the dictates of policy, not by a blind adoption of analogies from real property.212 On the other hand, our Civil Code has already removed a great part of that "incubus of the all but obsolete feudal land law," the analogies from which Professor Simes deprecates. It ought therefore to be possible to frame a satisfactory scheme of future interests for both realty and personalty which will be largely identical, thus attaining simplicity and consistency, and above all else, curtailing the need of long, expensive, and uncertain litigation to settle the law.

D. Enactment of Provisions for Powers of Appointment. Certain types of powers to create estates and interests in property are authorized directly or inferentially by code provisions in this state, namely, powers of revocation213 and collateral powers of sale conferred by will.214 As to a third and broader class of powers, namely, powers of appointment, the law is not clear. Since 1874 when the original code sections authorizing powers of appointment were repealed, our supreme court has never clearly held that common-law powers of this sort exist in California.215

It is strange that a matter of as much importance as this, and in a field of the law where certainty is a desideratum, should still be involved in doubt. The history of powers of appointment in this state was ably written by Arthur B. Dunne of San Francisco in 1924, and reasons were given for his belief that such powers exist here.216 Additional authority to that effect is the case of O'Neil v. Ross, decided by the district court

211 Ibid. at 772, 790-797. The learned discussion in the article mentioned makes further treatment here unnecessary. See also Gray, op. cit. supra note 9, §§ 89, 90a-91.
212 Simes, op. cit. supra note 15, at 802.
213 As to realty, Cal. Civ. Code §1229; as to trusts, Ibid. §2280. This section, substituted in 1931 for the original section of the same number (Cal. Stats. 1931, p. 1955), does not obviously authorize the insertion of an express power of revocation in trusts, as did the original section.
216 See Dunne, op. cit. supra note 214, at 4-8.
of appeal of the first district in 1929,217 in which the court assumes the validity of certain common-law powers of appointment, and discusses them at length. The claim to property asserted by one of the parties in that case, although it conceivably might have been sustained on the basis of a certain contract to devise, seems in fact to have been sustained upon the basis of the validity of a certain mandatory power of appointment given by will.218

To remove all question, the Civil Code ought to be amended so as to authorize powers of appointment expressly. Probably no more detailed scheme will be necessary than is contained, for instance, in the present New York Real Property Law.219 Excellent discussions of common-law powers of appointment by eminent text-writers, particularly in the legal periodicals cited below,220 will serve to indicate wherein the common-law doctrines need clarification or change.

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218 Ibid. at 329-330, 277 Pac. at 133-134.