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FUTURE INTERESTS-RULE AS TO REMOTENESS OF VESTING IN CALIFORNIA

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FUTURE INTERESTS—RULE AS TO REMOTENESS OF VESTING IN CALIFORNIA—*T* devised the income of a trust to his unmarried daughter for life. If at her death there were living issue of the daughter, the income was to be distributed to such issue until 24 years after *T*'s death. The trust was then to terminate, unless issue, who had been living at *T*'s death, should survive the 24-year period, in which event the income was to continue to be distributed until the death of such issue. It was further provided, "*if my said daughter survives me, but at the time of her*

death leaves no issue of hers then living, the trust shall at the time of her death terminate. . . ."[1] On termination of the trust, gifts in remainder were limited to surviving children of the life tenant, to surviving issue of deceased children, to surviving named relatives and friends, and to surviving issue of those deceased. If none of these distributees or their children were living at the time of distribution, *T*'s heirs were to take the corpus. The probate court found the entire trust invalid because non-separable gifts in remainder violated both the common law rule against perpetuities and the statutory rules prohibiting restraints on alienation. On appeal, *held*, reversed. Although the contingent remainders did not violate the statutory rule against restraints on alienation,[2] all contingent remainders except those to named relatives and friends were void under the common law rule against perpetuities, which is in force in California.[3] However, the valid portions of the trust are separable from the void ones. *In re Sahlender's Estate*, (Cal. App. 1948), 201 P. (2d) 69.

Because of the uncertain meaning of the word "perpetuity" when the California constitutional prohibition of perpetuities was adopted in 1849, it seems clear that this provision was not intended to embody the common law rule against perpetuities. Probably it was just a general statement of policy against tying up estates for long periods.[4] The common law rule against perpetuities became a part of the law of California in 1850, when the state formally adopted the English common law.[5] Most authorities agree that the statutory rules enacted in 1872 were intended to supplant the common law rule against perpetuities, and not, as the principal case holds, to codify a rule against restraints on alienation, leaving the common law intact.[6] The current status of California law as to the existence of any general rule against remoteness of vesting remains uncertain, in spite of the holding in the principal case. Much early dicta supports the view that the statutes have displaced the common law rule against perpetuities.[7] There is no judicial support, however, for the view that these statutes enact a broad rule against remoteness of vesting.[8] There are now two decisions at the intermediate appellate

[1] Principal case at 72 (italics added).

[2] Cal. Civil Code (Deering, 1941) §§715, 716.

[3] The court stated that the common law rule was in force by reason of either Cal. Const. (1849), art. XI, §16; Cal. Const. (1879), art. XX, §9, which prohibits "perpetuities"; or Cal. Political Code (Deering 1944) §4468, which makes the common law of England the rule of decision in California.

[4] See 2 SIMES, FUTURE INTERESTS, §§479, 572 (1936); 4 PROPERTY RESTATEMENT, appendix, c. B, 30 (1944); Burby, "The Meaning of the California Constitutional Provision Prohibiting Perpetuities," 1 S. CAL. L. REV. 107 (1928).

[5] 2 SIMES, FUTURE INTERESTS, §572 (1936).

[6] 4 PROPERTY RESTATEMENT, appendix, c. B, §§3, 4 (1944); GRAY, THE RULE AGAINST PERPETUITIES, §§747, 752 (1942); 2 SIMES, FUTURE INTERESTS, §565 (1936). See also Rodey v. Stotz, 280 Mich. 90, 273 N.W. 404 (1937).

[7] Blakeman v. Miller, 136 Cal. 138, 68 P. 587 (1902).

[8] California has substantially the same statutory provisions as those used by New York and Oklahoma as the basis for a broad rule against remoteness of vesting. See 4 PROPERTY RESTATEMENT, appendix, c. A, §§11, 12; appendix, c. B, §11 (1944); Cal. Civil Code (Deering, 1941) §§770, 773, 776. Sec. 776 states, "A contingent remainder cannot be created on a term of years, unless the nature of the contingency on which it is limited is such that the remainder must vest in interest during the continuance or at the termination of lives in being

level, both relying on dictum in *Re McCray*,[9] that the common law rule against perpetuities is in force in California.[10] The Supreme Court of California has not yet authoritatively passed on the question, and its most recent dictum expresses doubt.[11] Even assuming that the common law rule is in force in California, the decision in the principal case holding some of the contingent remainders invalid seems erroneous. The law is well settled that when a settler or testator separately states two or more contingencies or events and limits property differently and alternatively on these events, the validity of each limitation under the rule against perpetuities must be judged independently.[12] If property is limited to *B* on the occurrence of either event *X* or event *Y* (separately stated), and event *X* is remote but event *Y* is not, the limitation will take effect if event *Y*, the valid contingency, occurs.[13] The principal case clearly falls within the above rule or rules, the italicized portion of the will (stated supra) being a valid separately stated contingency. If *T*'s daughter dies leaving no surviving issue, the valid contingency will have occurred and the contingent remainders in the will should be valid. Only if one of the other stated contingencies happens, should the contingent remainders be held void under the rule against perpetuities.[14]

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at the creation of such a remainder." One reason for the court's reluctance to use this section in the principal case is its doubt as to whether the statute had been intentionally left unaffected by the 1917 amendment to sec. 715, which changed the allowable period specified therein from lives in being to lives in being or twenty-five years. In New York, where the provisions originated, the allowable periods in both statutes are the same. See N. Y. Real Property Laws (McKinney, 1945) §§42, 46. If the common law rule is in force in California, and if sec. 776 is literally applied, a draftsman will be in the unenviable position of having to comply with overlapping rules specifying three different allowable periods.

[9] 204 Cal. 399, 268 P. 647 (1928).

[10] Dallapi v. Campbell, 45 Cal. App. (2d) 541, 114 P. (2d) 646 (1941); the principal case.

[11] In re Micheletti's Estate, 24 Cal. (2d) 904, 151 P. (2d) 833 (1944).

[12] Leach, "Perpetuities In A Nutshell," 51 HARV. L. REV. 638 at 654, 657 (1938); 2 SIMES, FUTURE INTERESTS, §§521, 531 (1936); GRAY, THE RULE AGAINST PERPETUITIES, §§341-354 (1942); 4 PROPERTY RESTATEMENT, §376(c) (1944); Goring v. Howard, 16 Sim. 395, 60 Eng. Rep. 926 (1848). This rule has been held applicable to analogous situations under the statutory rules against restraints on alienation in New York, In re Schwamm's Estate, 53 N.Y.S. (2d) 654 (1945); and in California, In re Troy's Estate, 214 Cal. 53, 3 P. (2d) 930 (1931). It would probably be applied in cases arising under Cal. Civil Code (Deering, 1941) §776, discussed supra, note 8.

[13] Longhead v. Phelps, 2 W. Bl. 704, 96 Eng. Rep. 414 (1770); Miles v. Harford, 12 Ch. D. 691 (1879); GRAY, THE RULE AGAINST PERPETUITIES, §§341-354 (1942). See In re Irving Trust Company, 65 N.Y.S. (2d) 824 (1946), applying the doctrine under the statutory rule against restraints on alienation. In California, the recent case of In re Gump's Estate, 16 Cal. (2d) 535, 107 P. (2d) 17 (1940), indicates that though the California Supreme Court may not talk in terms of the rule of severability, it will reach a decision in accord with that rule.

[14] In cases involving separable limitations, one of which is valid, courts have differed in the form of their decisions, though not in their substantive results. Thus the decision in Re Schwamm's Estate, 53 N.Y.S. (2d) 654 (1945), stated that since one of the alternative provisions was valid, the validity of the questioned provision would not be adjudicated until it happened, this question, until then, being premature. In California, the supreme court in an identical situation handed down what was in fact a declaratory judgment holding certain alternative contingencies invalid, and rewriting the will with these provisions stricken out. In re Troy's Estate, 214 Cal. 53, 3 P. (2d) 930 (1931).