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RULE AGAINST PERPETUITIES - TESTAMENTARY PROVISION MAKING GIFT VEST ON DISTRIBUTION OF TESTATOR'S ESTATE

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RULE AGAINST PERPETUITIES — TESTAMENTARY PROVISION MAKING GIFT VEST ON DISTRIBUTION OF TESTATOR'S ESTATE — Testator devised and bequeathed the residue of his estate to four specified chair officers of a lodge who were to be "the four chair officers in office at the time of distribution of my estate." These officers were elected annually. The lower court found that the clause was void as in contravention of sections 715 and 716 of the Civil Code of California.[1] The four individuals holding the named offices in the lodge appealed. *Held*, affirmed. *In re Campbell's Estate*, 94 Cal. App. Dec. 482, 82 P. (2d) 22 (1938).

In view of the clear and unequivocal wording of the statutory prohibition relative to suspension of the power of alienation found in the California Civil Code, it would be extremely difficult to give effect to the testamentary provision in question without ignoring the words "by any possibility." While relying most heavily on the statutes, the court also pointed out that the provision was invalid under the state constitution,[2] which has been interpreted as an enactment of the common-law rule against perpetuities.[3] It seems to be generally accepted today that this rule is directed against remoteness of vesting, not against suspension of the power of alienation.[4] The instant case raises a question over which there has

[1] Cal. Civ. Code (Deering, 1937), § 716: "Every future interest is void in its creation which, by any possibility, may suspend the absolute power of alienation for a longer period than is prescribed in this chapter." Sec. 715 provides inter alia that such a power shall not be suspended for more than twenty-five years from the time of the creation of the suspension.

[2] The California Constitution, Art. XX, § 9, provides: "No perpetuities shall be allowed except for eleemosynary purposes."

[3] Estate of McCray, 204 Cal. 399, 268 P. (2d) 647 (1928).

[4] Rundell, "The Suspension of the Absolute Power of Alienation," 19 MICH. L. REV. 235 at 236 (1921), and cases and texts there cited. But it should also be noted that at the time these statutory rules against suspension of the power of alienation were first enacted, there was still much confusion as to the precise meaning of the common-law rule against perpetuities. It is probable that the early legislators intended a

been much discussion. The overwhelming weight of authority is to the effect that if at the time the instrument takes effect there is any possibility of the interest not vesting within the required period, it is void.[5] Buttressed by this rule, it is generally held that if (as here) vesting is contingent upon the completion of probate of the estate, the interests are void for remoteness, because of the slight possibility that the probate will not be completed within the prescribed period.[6] The objection to any relaxation is said to be the need for absolute certainty.[7] This rigid application of the rule has been expressly rejected in the much criticized *Belfield* case [8] and has been questioned by some writers.[9] It is not surprising to find that even the courts following the strict view will often strain a provision in order to call the interest vested with only the right of enjoyment postponed.[10] Again, the courts appear to have no qualms about upholding a provision where vesting is to take effect "in a reasonable time," and under the circumstances a "reasonable time" can be construed to be less than twenty-one years.[11] The difficulty with applying the last mentioned reasoning to the principal case is that the will did not provide for a vesting of the interest within a time that the court could easily construe to mean a reasonable time, because the named officers would not be known and were not to take the residue of the testator's property until such time as his estate would be ready

kind of codification of the common-law rule with only minor changes. See: GRAY, RULE AGAINST PERPETUITIES, 3d ed., § 748 (1915); Burby, "The Meaning of the California Constitutional Provision Prohibiting Perpetuities," 1 So. CAL. L. REV. 107 (1928). For comment on the various state interpretations of the scope of their respective statutory rules against suspension of power of alienation, see 46 HARV. L. REV. 701 (1933).

[5] 2 SIMES, FUTURE INTERESTS, § 496 (1936); GRAY, RULE AGAINST PERPETUITIES, 3d ed., § 214 (1915); KALES, ESTATES AND FUTURE INTERESTS, 2d ed., § 653 (1920).

[6] Miller v. Weston, 67 Colo. 534, 189 P. 610 (1920); Johnson v. Preston, 226 Ill. 447, 80 N. E. 1001, 10 L. R. A. (N. S.) 564 (1907); Ryan v. Beshk, 339 Ill. 45, 170 N. E. 699 (1930).

[7] 2 SIMES, FUTURE INTERESTS, § 496 (1936).

[8] Belfield v. Booth, 63 Conn. 299, 27 A. 585 (1893). For criticisms, see GRAY, RULE AGAINST PERPETUITIES, 3d ed., § 214c (1915); KALES, ESTATES AND FUTURE INTERESTS, 2d ed., § 674, note 2 (1920); 2 SIMES, FUTURE INTERESTS, § 496 (1936).

[9] WALSH, LAW OF PROPERTY, 2d ed., § 269, note 1 (1927). Also see annotations in 47 HARV. L. REV. 884 (1934), and 51 HARV. L. REV. 933 (1938).

[10] E.g., in Trautz v. Lemp, 329 Mo. 580, 46 S. W. (2d) 135 (1932), noted in 17 ST. LOUIS L. REV. 370 (1932), a provision in a will setting up a trust "to commence immediately upon the termination of the administration of my estate" was interpreted as a creation of a trust which commenced at the death of the testator, even though the trustees could have no active duties until the end of administration of the estate. Cases on this point are collected in 13 A. L. R. 1033 (1921); 110 A. L. R. 1450 (1937).

[11] Brandenburg v. Thorndike, 139 Mass. 102, 28 N. E. 575 (1885); Plummer v. Roberts, 315 Mo. 627, 287 S. W. 316 (1926).

for final distribution.[12] Thus the California court was in line with the weight of authority in its interpretation of the common-law rule against perpetuities. However, this does, indeed, appear to be pressing a legal principle to what the late Justice Holmes so aptly termed a "drily logical extreme." [13] From a realistic viewpoint there is not much difference between a case where the testator provides that the interest will vest within a named time which is indefinite, but which the court construes to be within the period prescribed by the rule,[14] and a case similar to the present one. The ultimate purpose of the rule, itself a product of judicial legislation, is to prevent present owners from exercising excessive control over the future devolution of their property.[15] Just how that policy would be violated by validating a provision similar to the one under discussion has never been explained either by the courts or the writers in the field.[16]

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[12] It might be suggested, however, that it would not have been unreasonable for the court to have construed the language of the testator here to mean that the officers should take who would be in office at the expiration (within 25 years, of course) of a time which might reasonably and normally be expected to be consumed by the probating of his estate.

[13] Noble State Bank v. Haskell, 219 U. S. 104 at 110, 31 S. Ct. 186 (1910).

[14] In Plummer v. Roberts, 315 Mo. 627, 287 S. W. 316 (1926), the court upheld a provision directing trustees to close the trust vested in them by the will of the testator "at any time they may think it for the best interest of all concerned. for them to do so." Also see, West Texas Bank & Trust Co. v. Matlock (Tex. Comm. App. 1919) 212 S. W. 937.

[15] KALES, ESTATES AND FUTURE INTERESTS, 2d ed., § 113 (1920); Rundell, "The Suspension of the Absolute Power of Alienation," 19 MICH. L. REV. 235 (1921).

[16] The principal case is also noted in 27 CAL. L. REV. 86 (1938).