May 1913

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Wesley N. Hohfeld

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Recommended Citation
Wesley N. Hohfeld, Need of Remedial Legislation in the California Law of Trusts and Perpetuities, 1 CALIF. L. REV. 305 (1913).

Link to publisher version (DO1)
https://doi.org/10.15779/Z38781W

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The Need of Remedial Legislation in the California Law of Trusts and Perpetuities

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. The immediate purpose and scope of the present paper, however, are comparatively limited. The aim is to deal only with a few of the most conspicuous and far-reaching defects in the law governing Trusts and Suspensions of the Power of Alienation. As regards these two subjects, some discussion seems timely in view of the fact that certain amendments relating thereto have already been proposed in bills now pending before the legislature, that in Senate Bill No. 286, applying to Trusts, and Senate Bill No. 767, applying to Suspension of the Power of Alienation.

1 The term "remedial" in the title of this article is employed according to its natural meaning; not in its technical sense as indicating a statute modifying, instead of declaring, the common law.

2 See also Senate Bill, No. 290; Assembly Bills, Nos. 243 and 245.
Both of these bills are believed to be inadequate as cures for the defects of the existing law; and the one relating to Trusts may well be thought seriously ambiguous as to its scope and meaning. For these reasons, whether the bills in question are or are not passed by the present legislature, it is hoped that the following pages may not be altogether without interest by way of tentative criticism and suggestion.\(^3\)

For the sake of clearness, the discussion will deal first, with the subject of Trusts; and second, with the intimately related subject of Suspension of the Power of Alienation.

1. SUGGESTED AMENDMENTS TO THE CIVIL CODE SECTIONS RELATING TO TRUSTS.

Under this branch of the discussion, it will be convenient to consider:

1. The defects of the present law;
2. The amendments proposed by Senate Bill No. 286;
3. Amendments proposed herein by the present writer.

1. The Defects of the Present Law.

The defects of the present code provisions relating to the subject of trusts in real property, while existing ever since the sweeping legislative innovation of the year 1874, were first made conspicuous to the legal profession of the state by the failure of the trust provisions of Senator Fair's will (involving a fortune of many millions), as declared in Estate of Fair.\(^4\) The invalidity and failure of the will depended, as is well-known, upon the illegality of the express trust to convey. Since that decision, which the writer believes to have represented a correct and necessary application of the existing law relating to real property trusts and to the interpretation of wills, other trust wills and trust deeds have similarly been held invalid by our supreme court,—that is, exclusively because of the peculiar

\(^3\) In explanation of the form that the discussion takes, it seems necessary to state that the substance thereof was embodied in an opinion rendered on the pending bills at the request of certain members of the legislature.

\(^4\) (1901) 132 Cal. 523; 64 Pac. 1000.
and arbitrary limits placed upon the purposes for which real property trusts may be created under section 857 of the California Civil Code.

In three cases besides the estate of Fair testatorly trusts to convey have been declared void for all purposes, and the plans of the testators necessarily defeated beyond repair.\(^5\) In four other cases, the same doctrine has been applied to instruments intended to operate inter vivos.\(^6\) How many wills and deeds have completely failed on similar grounds, as the result of amicable determination and settlement by lawyers out of court, it is of course impossible to say.

In Estate of Heberle\(^7\)—a case sui generis in this State—the trust to convey was declared void within the rule of the Fair case; but, the testator having, according to fair interpretation, expressly indicated that his property should go to the named beneficiaries either with or without the machinery of a trust to convey, those beneficiaries were held to take as direct devisees.\(^8\)

In yet another class of cases, some of them very recent, the doctrine of the Fair case was recognized as still representing the law of this State.\(^9\) In some of the cases belonging to the group last cited, the instruments were given effect on the theory that they might be construed as creating only direct devises, and not trusts to convey; but this result was reached only as against plausible attacks on the ground that the in-

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\(^5\) Estate of Sanford (1902), 136 Cal. 97, 68 Pac. 494; Estate of Pichoik (1903), 139 Cal. 682, 73 Pac. 606; Estate of Dixon (1904), 143 Cal. 511, 77 Pac. 412.

\(^6\) McCurdy v. Otto, (1903), 140 Cal. 48, 73 Pac. 748; Hofsas v. Cummings (1904) 141 Cal. 525, 75 Pac. 110; Sacramento Bank v. Montgomery (1905) 146 Cal. 745, 81 Pac. 138; Campbell-Kawannahoa v. Campbell, (1907) 152 Cal. 201, 204, 92 Pac. 184. Compare also Wittfield v. Forster, (1899) 124 Cal. 418, 57 Pac. 219; Carpenter v. Cook, (1901) 132 Cal. 683, 64 Pac. 97 (passive trusts void).

\(^7\) (1908) 153 Cal. 275, 95 Pac. 41.

\(^8\) While other expressions are also important, it will suffice to quote a single (complete) sentence from the will: “It being my will that the said children and grandchildren of my deceased brother shall receive from my estate the said real estate or its value.”

\(^9\) Estate of Dunphy, (1905) 147 Cal. 95, 81 Pac. 315; Estate of Heywood (1905), 148 Cal. 184, 82 Pac. 755; Estate of Peabody (1908), 154 Cal. 173, 97 Pac. 184; Keating v. Smith (1908), 154 Cal. 186, 191, 97 Pac. 300; In re Leavitt (1908), 8 Cal. App. 756, 97 Pac. 916; South End Warehouse Co. v. Lavery, (1910), 12 Cal. App. 449, 107 Pac. 1008; Estate of Blake, (1910) 157 Cal. 448, 460; Lauricella v. Lauricella, (1911), 161 Cal. 61, 118 Pac. 430; Estate of Spreckels (1912) 162 Cal. 559, 123 Pac. 371.
struments involved fell within the rule of the Fair case. Moreover the construction and effectuation of these instruments involved what was necessarily very expensive and speculative litigation, capable of being resolved only by the supreme court of the state.

How has this very unfortunate—and probably unintended—condition of the law been brought about? As pointed out by Mr. Justice McFarland in Estate of Fair, our Civil Code sections relating to the present matter were originally taken almost verbatim from the Revised Statutes of New York, which went into effect in that state in 1830. The distinguished New York revisers, however, had not the remotest idea of modifying and narrowing the common-law system of uses and trusts to the extreme degree now represented by section 857 of the Civil Code of this state. Their thought—however erroneous it seems to have proved in the many decades that have since elapsed—was that it would be possible, while preserving all desirable trust purposes, to do so through a supposedly simplified system providing, in most instances, for the substitution of mere powers in trust for the ordinary common law trusts actually intended and expressed in the wills or deeds involved.

The explanation as given by the authors of the New York Revised Statutes is as follows:

"As the creation of trusts is always in greater or less degree the source of inconvenience and expense, by embarrassment of the title, and requiring the frequent aid of a court of equity, it is desirable that express trusts should be limited as far as possible, and the purposes for which they may be created strictly defined. The object of the revisers in this section is to allow the creation of express trusts, in those cases and in those cases only where the purposes of the trust require that the legal estate should pass to the trustees * * * *After much reflection, the revisers have not been able to satisfy themselves that there are any cases not enumerated in this section (I, R. S. 728, sec. 55), in which, in order to secure the execution of the trust, it is necessary that the title or possession should vest in the trustees. Where no such necessity exists, (as where the trust is to convey, or to make partitions, etc.), it is obvious that without giving any estate to the trustees, the trust may as well be executed as a power."

It will thus be seen that the idea of the revisers was to effectuate certain specified trust purposes by means of
ordinary trusts, precisely as at common law; and to effectuate all other trust purposes (not violating public policy) by means of powers in trust. In accordance with this idea, the New York Revisers, by section 55 of the Revised Statutes, limited ordinary trusts to four specific kinds,—this section having subsequently been copied almost verbatim in section 857 of the California Civil Code. But the important and noteworthy point for present purposes is that by section 58, they went on to provide as follows:

"Where an express trust shall be created, for any purpose not enumerated in the preceding section no estate shall vest in the trustees; but, the trust, if directing or authorizing the performance of any act which may be lawfully performed under a power shall be valid as a power in trust, subject to the provisions in relation to such powers contained in the third article in this title."

And also, by section 59:

"In every case where the trust shall be valid as a power, the lands to which the trust relates, shall remain in, or descend to the persons otherwise entitled, subject to the execution of the trust as a power."

It is also important to observe that the Civil Code of this state as originally enacted in 1872, did not commit the folly of adopting merely a fragment of the New York revisers' system. On the contrary, while limiting the permissible kinds of ordinary trust purposes under section 857, the original code went on to provide in sections 858-862 that all other trust purposes permitted at common law should be effectuated by means of powers in trust, precisely as in New York. Thus, e. g., section 860 is verbatim, or almost verbatim, like section 58 of the New York revised statutes, above quoted; and so also as regards the other corresponding provisions.

It is, to say the least, extremely doubtful whether the system of substituting powers in trust in place of ordinary trusts has simplified the law of New York, or made any improvement as contemplated by the revisers. On the contrary, it may well be thought that the tampering with the old common law system has had as its chief effect an extraordinary increase of litigation, and the introduction into the law of numberless intricacies and uncertainties, some of which even today appear to remain unsolved. Some idea of the difficulties of the peculiar statutory property system of New York, considered as a whole, may be gathered from the
remarks made by the highest court of New York in the comparatively recent case of In re Trumble. 10

"It has been conceded by all the parties to this proceeding that a trust has been created in the residue . . . mentioned in the fourth paragraph of his will. It has been so assumed and treated by the learned surrogate of the Appellate Division. It seems also to have been conceded that the sisters named in the fourth paragraph of the will take equitable non-transferable estates only as beneficiaries under the trust. . . . All of the parties to the proceeding and their respective counsel have apparently overlooked the fact that the gifts to the sisters create in them severally a legal estate transferable by them at will."

No doubt a system of property law as intricate and uncertain as that which is fairly exemplified by the remarks just quoted from In re Trumble is not to be commended; but, on the other hand, it may well be thought that no state should go to the opposite extreme of allowing only four kinds of ordinary express trusts and at the same time failing to effectuate other classes of common law trust purposes through the medium of powers in trust. Curiously enough, however, in 1874 the legislature of California, while retaining the narrow and arbitrary system of ordinary trusts represented by section 857, blotted out, by a single stroke, those code provisions that related to powers in trust. As said by Mr. Justice McFarland in Estate of Fair:

"The New York statutes, which are very similar to ours, in enumerating those trusts as to real property which alone are valid, expressly provide for a power in trust to convey; but there is no such provision in our statutes, although we had such a one for a short time. It was section 860, in the same title IV of the Civil Code, which declares what trusts are and what are not valid. and was as follows: ‘Where an express provision as to real property is created for any purpose not enumerated in the preceding section, such trust vests no estate in the trustees; but the trust, if directing or authorizing the performance of any act which may be lawfully performed under a power, is valid as a power in trust, subject to the provisions in relation to such powers contained in title V of this part.’ It was followed by two other sections on the subject, but they were all three repealed in
1874, and in the same year the entire title V, which was on the subject, and to which said section 860 above quoted refers, was also wholly repealed.\textsuperscript{11}

This bit of legislative history explains, of course, the anomalous condition of our law as typified by Estate of Fair and Estate of Spreckels. Neither in any part of Great Britain nor in any state other than California would a will or deed creating a trust to convey or divide fail of its intended purpose. In common law jurisdictions, such as England,\textsuperscript{12} Massachusetts,\textsuperscript{13} New Jersey,\textsuperscript{14} Illinois,\textsuperscript{15} etc., such trusts would be valid according to the very form provided by the instrument; in New York,\textsuperscript{16} and a few other states following completely the New York system, such as Minnesota,\textsuperscript{17} South Dakota,\textsuperscript{18} and Wisconsin,\textsuperscript{19} the trust purposes represented would be effectuated by means of powers in trust; that is to say, even in the latter jurisdictions the testator's or settlor's intention would be accomplished in substance.\textsuperscript{20} In California alone are such trust provisions wholly void.

2. The amendments proposed by Senate Bill No. 286.

Senate Bill No. 286, introduced in the legislature on January 15, 1913, reads as follows:

"Section 1. Section eight hundred fifty-seven of the Civil Code is hereby amended to read as follows:

857. Express trusts may be created for any of the following purposes:
1. To sell and convey real property and to hold or rein-

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\textsuperscript{11}(1901) 132 Cal. 523, 537, 60 Pac. 442.
\textsuperscript{12}Abbiss v. Burney (1881) 17 Ch. D. 211, 232.
\textsuperscript{13}Boston Safe Deposit Co. v. Mixter (1888) 146 Mass. 100, 15 N. E. 141.
\textsuperscript{14}Story v. Palmer (1889) 46 N. J. Eq. 1; 18 Atl. 363.
\textsuperscript{15}Lord v. Comstock (1909) 240 Ill. 492, 88 N. E. 1012.
\textsuperscript{16}Cooke v. Platt (1885) 98 N. Y. 35; Townshend v. Frommer (1891) 125 N. Y. 446, 26 N. E. 805.
\textsuperscript{17}See Randall v. Constans, (1885) 33 Minn. 329; 23 N. W. 530.
\textsuperscript{18}See Murphey v. Cook (1898) 11 S. D. 47; 75 N. W. 387.
\textsuperscript{19}See Lenegan v. Yeiser (1902) 115 Wis. 304; 91 N. W. 682.
\textsuperscript{20}It is to be noted, as a matter of analysis, that, though not labeled as such, the New York law—more especially Rev. Stat. secs. 58 and 59, quoted ante, presents the interesting phenomenon of statutory cy pres, or "approximation." One provision of the New York statutes makes invalid the specifically intended ordinary trust; while another, having concomitant operation, effectuates the generic intention by creating, substitutionally, a mere power in trust.
vest or apply or dispose of the proceeds in accordance with the instrument creating the trust.

2. To mortgage or lease real property for the benefit of annuitants, or devisees or legatees, or other beneficiaries, or for the purpose of satisfying any charge thereon.

3. To receive the rents and profits of real property, and pay them to, or apply them to the use of any person, whether ascertained at the time of the creation of the trust or not, for himself or for his family during the life of such person, or for any shorter term, subject to the rules of title two of this part.

4. To receive the rents and profits of real property and to accumulate the same for the purposes and within the limits prescribed by the same title; or

5. To take or receive the fee or any lesser estate in real property and to hold, manage, and convey the same in accordance with the instrument creating the trust subject to the limitations of the same title.”

With the greatest respect to the good intentions underlying this bill, it is submitted that the amendments proposed are unsatisfactory both on negative and on affirmative grounds.

Negatively considered, the amendment of subdivision 1 and the addition of the entirely new subdivision 5 are, it would seem, defective because not going far enough by way of legalizing possible trust purposes. After mature deliberation, it seems to the present writer that there is no good reason why any trust purpose valid at common law should not be legal in this state. In other words, every trust purpose should be permitted by means of an ordinary trust unless some specific public policy is violated. Thus, in support of this suggestion it is to be observed that under section 2220 of the California Civil Code all possible kinds of trusts are permitted as regards personality, subject only to the proviso of public policy.

“A trust may be created for any purpose for which a contract may lawfully be made, except as otherwise prescribed by the title on uses and trusts and on transfers.”

It is obvious that under this section a trust to convey or transfer personal property is lawful and effective; and so, curiously enough, in Estate of Pichoir21 the supreme court in construing a will providing in the same clause for a trust to convey both real property and personal property, found itself

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21 (1903), 139 Cal. 682, 73 Pac. 606.
obliged to sustain that trust in relation to the personal property, while holding the instrument wholly void in relation to the real property.

As already intimated, there seems to be no good reason for any such arbitrary distinction as regards real property and personal property. Indeed, it must not be forgotten that, in effect, ordinary passive trusts in real property are permitted by section 853 of the Civil Code, which reads as follows:

"When a transfer of real property is made to one person, and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made."

In relation to this section of the code suppose that A were to transfer Whiteacre to B, the purchase price, however, being paid by C, and an oral agreement existing as between B and C, that B should hold the property in trust for C—including, ultimately a trust to convey the said property to C upon his request. It seems plain that such oral trust to convey would, in net result, be good; B would hold on a so-called resulting trust for C until, pursuant to his duty thereunder he has conveyed as requested by C. Yet, under the anomalous condition of our law, an ordinary express trust to convey, sought to be created in writing, would be void, and the instrument attempting to create it wholly ineffective.

A further anomaly resulting from the arbitrary limitations of section 857, relating to express trusts, is to be found in the very recent case of Lauricella v. Lauricella. In that case, the owner of certain real property conveyed the same, by deed absolute on its face, to his wife, relying on her oral agreement that she would hold the same in trust for him during his life, (no definite trust purpose being stated), and that upon his death she would hold one-half thereof as her own property and convey the other half to his father and mother in equal shares. On the death of the grantor, his parents demanded that the wife convey one half the lands to them as agreed. She refused to...

22 Resulting trusts are essentially passive in character; and in one jurisdiction they are for that reason "executed" by the Statute of Uses. Hutchins v. Heywood, 50 N. H. 491; Osgood v. Eaton, 62 N. H. 512; Fellows v. Ripley, (1899), 69 N. H. 410, 45 Atl. 138.


24 (1911) 161 Cal. 61, 118 Pac. 430.
do so; whereupon the parents brought an action against her to establish and enforce an alleged constructive trust.

As against this trust attempted to be created by purely oral transaction, two principal objections were urged:

(1) That the trust intended for the husband during his lifetime was uncertain as to its trust purposes and therefore void under section 857 of the Civil Code:

(2) That the trust to convey to the father and mother was void under section 857, within the rule of Estate of Fair and McCurdy v. Otto.

If the trust agreement had been expressed in writing the first objection would clearly have been good under the squarely applicable decision in the case of Wittfield v. Forster; and the second objection would admittedly have been good under the rule of the Fair case and the long line of similar cases herefore cited. Owing, however,—as it would seem—to its hostility to the narrow system of trusts prevailing in this state under section 857 of the Civil Code, the Supreme Court in bank held that neither of these objections was good. The decision was rested on the suggestion that the oral transaction, together with the wife's subsequent refusal to convey on demand, gave rise to a constructive trust in favor of the husband's parents. Despite the court's argument that this oral arrangement could be given effect on the theory of a constructive trust, the anomalous and regrettable fact remains that the same trust arrangement, had it been expressed in writing, would, as conceded by the court, have been void for all purposes. In other words, the narrow limitations of section 857 of the Civil Code seem to have produced, in Lauricella v. Lauricella, a sort of legal somersault. Change of names does not make a change of substance. There is no magic in mere words.

However all this may be, if it be true that under section 853 of the Civil Code governing resulting trusts and likewise under the rule of Lauricella v. Lauricella, trusts may be

\[25\] (1899) 124 Cal. 418, 57 Pac. 219, (trust void under Civ. Code, sec. 857 if purpose not specified). See also Carpenter v. Cook (1901) 132 Cal. 619, 624, 64 Pac. 997: "A trust to hold property is not a trust to sell and dispose of the proceeds. . . . It is a mere passive trust. It is a trust and not specified by section 857 of the Civil Code, and is therefore void."

\[26\] For a full discussion of the peculiar difficulties of this case see Supplemental Note at the end of this article.
orally created either for indefinite purposes, or for merely passive trust purposes,27 or for active trust purposes such as a trust to convey, there certainly would seem to be even greater reason for permitting all such trust purposes to be created by written instruments. Certainly it must be admitted that any supposed possibility of conveyances being made for fraudulent or deceptive purposes are greatly diminished where such purposes are expressed in writing; and so too, in relation to the registry system, there seem to be no special difficulties in tracing title, so long as the trust purposes, either active or passive, are specified in the deed or other instrument of trust.

Returning, then, to the amendment proposed by Senate Bill No. 286, it is submitted that it does not go far enough: it fails to make valid all possible trust purposes that would be good at common law. Thus, for example, despite the proposed amendment embodied in the bill just mentioned, a comparatively important and common class of testamentary schemes would still be invalid. If, for example, a testator were to devise and bequeath all his real and personal estate to certain parties in trust to divide or segregate the totality of properties into a certain number of parts, and then to transfer those respective parts, to designated beneficiaries, the antecedent and discretionary trust to divide (as distinguished from the ulterior trusts to transfer) would not be fairly covered by the terms of the amendment now in question.28

So, too, an ordinary trust to partition a single parcel of real property into a certain number of parts, by metes and bounds, and then to convey the partitioned parts might be invalid,—at least in relation to the antecedent trust to partition,—a trust not provided for either by section 857 of the Civil Code as it now exists, or by the proposed amendment of Senate Bill No. 286.29 A trust to exchange real property would be similarly

27 In this same connection, it seems well to remember that all constructive trusts in real property are, during their continuance, essentially like passive trusts. Compare 3 Pom. Eq. Jurisp: 3d ed., sec. 1058. Yet an express passive trust is void in California. Carpenter v. Cook (1901) 132 Cal. 621, 64 Pac. 997; see also Wittfield v. Forster (1899) 124 Cal. 418, 57 Pac. 219.

28 Cooke v. Platt (1885) 98 N. Y. 35; compare Estate of Heywood (1905) 148 Cal. 184, 190, 82 Pac. 755.

29 See Younger v. Moore (1909) 155 Cal. 767, 771, 103 Pac. 221.
tainted by illegality. 30 No doubt, also, other trust purposes, lawful and desirable at common law, would still be unlawful under section 857, as amended by the proposed Bill No. 286.

Affirmatively considered, the language of the proposed senate bill amendment is not so clear and unambiguous as it might be made. Without going into full specifications of possible ambiguity and resultant probability of wasteful litigation to determine the exact meaning and scope of the subdivision, it may suffice to point out, merely by way of example, that one would necessarily have a genuine doubt whether the proposed subdivision 5, is, or is not, intended to validate ordinary passive trusts. The words, "to hold," considered by themselves, might suggest the validity of an ordinary passive trust; 31 but when construed in their context, considerable doubt as to this appears,—a doubt that could be resolved only by expensive future litigation.

So too, it is to be observed that the trust purposes of the proposed subdivision 5 are stated in the conjunctive, not in the disjunctive form:

"5. To take or receive the fee or any lesser estate in real property and to hold, manage, and convey the same in accordance with the instrument creating the trust subject to the limitations of the same title."

Questions would doubtless be raised whether any one of the specific purposes of subdivision 5 would be good without the others.

Finally, how about the income of a trust to be created under the proposed subdivision, just quoted? Does the authorization of a trust "to hold and manage" in "accordance with the instrument creating the trust" impliedly permit the power to make investments and likewise the power to pay over the income of the property as prescribed in the instrument? An affirmative conclusion would seem to represent the more natural interpretation of the provision,—as in some measure suggested by the reasoning pursued in Estate of Heywood. 32 But it would of course be better to have such ambiguity removed in advance.

30 Carpenter v. Cook (1901) 132 Cal. 621, 625, 64 Pac. 997.
31 See Carpenter v. Cook (1901) 132 Cal. 621, 624, 64 Pac. 997.
32 (1905) 148 Cal. 184, 188, 82 Pac. 755. This case raised a sort of "converse" problem, the decision being that Civ. Code, sec. 857 (3), relating to income trusts, impliedly authorized a "trust to manage" the trust property.
Before leaving Senate Bill, No. 286, a few words as to one of its possible purposes and effects may not be out of place. Operating in conjunction with Senate Bill, No. 767, proposing to permit suspension of the absolute power of alienation for a gross term of thirty years, the enlargement of the permissible kinds of trust purposes by the modified subdivision 1, and the additional subdivision 5 would seemingly make possible the organization of "quasi-corporate" trusts similar to those of Massachusetts. These quasi-corporate trusts, in addition to securing unity and continuity of operation, a measure of immunity from individual liability, and convenient transferability of the equitable shares,—all very analogous to the incidents of strict corporations,—would have, in California, two special and important advantages: (1) immunity from the federal corporation tax; and (2) immunity from the state corporate franchise and license taxes.  

Thus in Elliott v. Freeman it was decided that a quasi-corporate trust existing under the common law of Massachusetts was not subject to the federal tax; and it would seem that, apart from special additional legislation, a similar result would be reached in relation to the corporate franchise and license taxes of California. This matter will receive further attention under the heading immediately to follow.

3. Amendments proposed herein by the present writer.

In accordance with the suggestion and criticisms heretofore made, it is believed that, prima facie, a comprehensive amendment should be made to section 857 of the Civil Code so as to make it read substantially as follows:

"Sec. 857. Without limitation by anything contained in section seven hundred and three, but subject to all the other provisions of this division of the code, express trusts may be created for any purpose or purposes which, if embodied in a con-

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34 (1911) 220 U. S. 178.
tract, would not be against public policy as defined in sections one thousand six hundred and sixty-seven to one thousand six hundred and seventy-six of this code."

But such an amendment as this, precisely like that proposed in Senate Bill, No. 286, would make possible the formation of quasi-corporate trusts and resultant immunity from the federal corporation tax and the state corporate franchise and license taxes. This latter consequence, if deemed sufficiently far-reaching and serious in its possibilities, could be fully met by any one of the following three methods:

(1) By a direct proviso to be attached to the amended section 857, as last proposed. Such a restrictive proviso might, for example, be made to read, in substance, as follows:

Provided, however, that any trust shall be void in its creation if the purpose of the trustor is to establish a continuous, profit-sharing business organization analogous to that of a corporation.

Interpreted in connection with the corporation tax laws of the state, the scope of such a proviso might, perhaps, be thought sufficiently free from objections as to uncertainty or indefiniteness.

(2) By an amendment to the constitutional and statutory enactments governing taxation in this state. This method, however, would probably be deemed too cumbersome and difficult of accomplishment. For immediate purposes this second method may therefore be dismissed as impracticable.

(3) By substituting for the amended section 857, as last proposed, the following provisions:

857. Without limitation by anything contained in section seven hundred and three, but subject to all the other provisions of this division of the code, express trusts may be created for one or more purposes as specified in the following subdivisions:

1. To sell real property, and apply or dispose of the proceeds in accordance with the instrument creating the trust.
2. To mortgage or lease real property for the benefit of annuitants or other legatees, or for the purpose of satisfying any charge thereon.
3. To receive the rents and profits of real property, and pay them to or apply them to the use of any person, whether ascertained at the time of the creation of the trust or not, for himself or his family, (during the life of such person, or for any shorter term.)
4. To receive the rents and profits of real property, and to
accumulate the same for purposes and within the limits pre-
scribed in this division of the code.

5. To convey, exchange, partition, divide, distribute or allot
real property in accordance with the instrument creating the
trust.

6. In the case of any trust or trusts created by will,
but not otherwise, for any purpose or purposes which, if em-
bodyed in a contract, would not be against public policy as de-
finied in sections one thousand six hundred and sixty-seven to
one thousand six hundred and seventy-six of this code.

It will at once be observed that, under this last form of treat-
ment, the first four subdivisions are exactly like those now found
in section 857. Subdivisions 5 and 6, on the other hand, are
entirely new.

Subdivision 5, applying both to trusts created by deed and
to trusts created by will, is an amendment imperatively and
immediately required: otherwise the most ordinary and con-
venient property transactions incident to the needs of a
civilized society will continue to be obstructed, and many
deeds and wills be defeated in the future, precisely as in the
past. This subdivision, moreover, would have no efficacy by
way of legalizing quasi-corporate trusts.

35 In subdivision “3,” however, it would seem that the bracketed
words should be omitted, provided that the law relating to suspension
of the power of alienation were to be amended substantially as here-

36 Many striking limitations of the present system of trusts have
already been emphasized. One further instance may be noted. Suppose
that X, the owner of an estate consisting largely of realty, wished to
retain the substantial equivalent of ownership during his life, and, at
his death, to have his estate divided and conveyed among his five
children without the expenses and delays of probate proceedings and
partition actions. The natural method of accomplishing his purpose
would be the creation of a revocable trust. Suppose however that X
were to convey the property to T in trust to pay over the rents and
profits to X during his life, and at his death to divide or segregate the
property into five parts, and transfer one part to each of X’s five child-
ren,—a power to revoke any of the trusts being retained. The trust
to divide and the trusts to transfer would of course be void. The only
valid and feasible substitute provision would be a trust to sell at X’s
death and to distribute the proceeds. Nichols v. Emery (1895) 109 Cal.
323, 41 Pac. 1089; compare Bowdoin College v. Merritt (1896) 75 Fed.
Rep. 480 (revocable trust for charitable purposes, the charitable trust to
begin in enjoyment from the death of the grantor). But obviously, a
trust to sell would not suffice to accomplish the actual and legitimate
purpose of X.
Subdivision 6, while broad as to the purposes permitted, is expressly limited to trusts created by will. The possibility of quasi-corporate trusts formed with the idea of evading certain franchise taxes would therefore be reduced to a negligible quantity. It thus seems impossible to discover any good reason why subdivision 6 should not be enacted at once,—that is, in case it should be thought undesirable to enact the short and comprehensive provision heretofore suggested.\textsuperscript{37}

In this connection it must of course be remembered that, all trusts, whether created by deed or by will, would be subject to the rules against perpetuities, suspension of the power of alienation, etc.\textsuperscript{38}

II. SUGGESTED AMENDMENTS TO THE CIVIL CODE SECTIONS RELATING TO SUSPENSION OF THE POWER OF ALIENATION.

The discussion at this point branches naturally into three parts: 1. The defects of the present law; 2, the amendment proposed by Senate Bill, No. 767; 3, the amendments proposed herein by the present writer.

1. The Defects of the Present Law.

While our ill-conceived and narrow system of trusts as enacted by section 857 of the Civil Code has necessitated the rule of the Fair case and other unfortunate limitations and consequences, the Civil Code provisions relating to suspension of the power of alienation are, in the opinion of the present writer, equally open to condemnation. In this latter field, Es-

\textsuperscript{37} Supra.

\textsuperscript{38} It has not infrequently been assumed that the rule as to unlawful suspension of the power of alienation, as defined by Civ. Code, sec. 715 and related provisions, is the only rule against "perpetuities" now prevailing in California; and that, consequently, the "common law" rule against remoteness of vesting (Gray, Perp. secs. 118a, 268; Peters v. Lewes, (1881) 18 Ch. D. 429, 433) is not in force. There are even judicial dicta to this effect. Estate of Cavarly (1897) 119 Cal. 406, 409, 51 Pac. 629; Blakeman v. Miller (1902) 136 Cal. 138, 68 Pac. 587.

But in these cases the learned judges seem to have overlooked Art. XX, sec. 9 of the California Constitution, reading: "No perpetuities shall be allowed except for eleemosynary purposes." And, in the same connection, it may be remarked that various provisions of the Civil Code,—especially sec. 724 (2) and sec. 773—seem to recognize the rule as to remoteness of vesting.
tate of Walkerly is the leading case; but there are also later cases exemplifying the destructive force of the rule thereby established when applied to wills and deeds which could otherwise have been effectuated according to their authors' intentions.

The ratio decidendi of Estate of Walkerly—as interpreted and applied in later cases—can best be indicated by a concrete hypothetical case. Suppose, e.g., a testator devises Whiteacre to T and his successors in trust to pay over the rents and profits to A during his life; then in trust for A's children, living at his death, in fee simple in equal shares; that is to say, to pay over the rents and profits to the said children in equal shares until the expiration of twenty-five years from the testator's death, and then to sell the property and divide the proceeds among said children, their heirs or assigns, in equal shares. Suppose, further, that at A's death, he leaves two children, one of whom, X, was born before the testator's death and the other, Y, after the testator's death.

At common law this would be a perfectly valid and unobjectionable trust. A would at once take an equitable life interest; and the equitable interests of A's children, X and Y, would be vested in fee simple not later than at the expiration of a single life in being, that is, the life of A. The common law rule against remoteness of vesting would thus be more than satisfied; and the rule as to remoteness has come to be considered the only requirement of the common law in a case of this kind.

But, as a matter of fact, at common law, in addition to being vested not later than at the death of A, all interests involved would at that time be alienable. The beneficiaries, X and Y, could join with the trustee so as to convey an absolute fee simple in possession.

Yet under the peculiar California statutory system, as in-

Further than this, under statutory provisions substantially like those of California, it has recently been decided, after much conflict of judicial opinion, that the "common law" rule is in force in New York, along with the rules as to suspension of the power of alienation. In re Wilcox (1909) 194 N. Y. 288, 87 N. E. 497.

39 (1905) 108 Cal. 627, 41 Pac. 772.


41 See Peters v. Lewes, (1881) 18 Ch. D. 429, 434; Mathews v.
terpreted in Estate of Walkerly, this perfectly natural testamentary arrangement would fail as regards, at least, the intended interests of X and Y. Even from the moment of the testator's death, the limitation in favor of A's children would be void, such invalidity being determined ab initio by the mere possibility that some of such children, might be persons born after the decease of the testator.\[42\]

In this subject, as in that of trusts, we have a legislative legacy from the Revised Statutes of New York, although, it is believed, the broad rule enunciated in the Walkerly case was not a necessary consequence of the fragmentary part of that legacy which is still retained in our Civil Code. The Revised Statutes, which went into effect in 1830, contained, inter alia, the following two sections:

L. R. S. 730, sec. 63. No person beneficially interested in a trust for the receipt of the rents and profits of lands, can assign or in any manner dispose of such interest. . . .

L. R. S. 730 sec. 65. Where the trust shall be expressed in the instrument creating the estate, every sale, conveyance, or other act of the trustees, in contravention of the trust, shall be absolutely void. . . .

Now let us assume that the above hypothetical case had occurred in New York. By force of section 63, just quoted, the interests of both X and Y under the income trust would, until the expiration of the twenty-five year period, be inalienable; and there being, for that reason, no one empowered to authorize the trustee to convey, the latter's power to alienate the corpus of the trust estate would, under section 65, above quoted, be similarly suspended during the prescribed term. Even though X died before the expiration of the twenty-five years, the income trust would have to continue, during Y's life, until the appointed time; and since Y was not a person in being at the death of the testator, the suspension might, contrary to the statute, endure beyond lives in being.

In the light of those considerations, it is not surprising that the arrangement in question would be invalid, as regards X

Thompson, (1904) 186 Mass. 14, 18, 71 N. E. 93 and cases cited post, n. 49.

42 See Civil Code, secs. 716, 749; Estate of Walkerly (1895), 108 Cal. 627, 647, 41 Pac. 772; Estate of Steele (1899), 124 Cal. 533, 537, 57 Pac. 564.
and Y, under the New York decision construing and applying Revised Statutes, section 63 and 65, as above given.\textsuperscript{43}

But now let us return to the California law. In the Civil Code enacted in 1872, section 63 of the Revised Statutes was reproduced, in substance, by section 367; and section 65 of the New York compilation was paralleled by section 870. Had both of these sections—867 and 870—remained in our code, the broad rule of the Walkerly case would, of course, have been inevitable,—especially in view of the long line of New York precedents exactly in point. As a matter of fact, however, Civil Code section 867, depriving the beneficiary of an income trust of the power to alienate his beneficial interest was crucially modified in 1874; and that section has ever since read as follows:

867. The beneficiary of a trust for the receipt of the rents and profits of real property, or for the payment of an annuity out of such rents and profits, may be restrained from disposing of his interest in such trust during his life or for a term of years, by the instrument creating the trust.

It follows directly from the terms of this amended provision that the interest of a beneficiary under an income trust is now subject to his power of alienation, that is, when the latter is not affirmatively limited by the creating instrument.\textsuperscript{44} This being so, it is believed that the broad and strict rule laid down in the Walkerly case was not an altogether necessary result of the law as it then existed; and in the hypothetical case above put, it may well be thought that the entire trust should be held to involve no unlawful suspension—since X and Y from and after the year 1874, would have the power, immediately at the death of A, to alienate their entire beneficial interests, it would seem that they would likewise have the power to authorize the trustee to join in the conveyance so as to transfer an absolute, unencumbered fee simple estate. But, before pursuing this point further, let us have the exact reasoning of the Walkerly case before us:

\textsuperscript{43} Caster v. Lorillard (1835), 14 Wend. 265; Hawley v. James (1836), 16 Wend. 61; Herzog v. Title Guarantee, etc. Co., (1903), 177 N. Y. 86, 69 N. E., 283 For many other cases, see 30 Cyc. 1503.

\textsuperscript{44} See Fatjo v. Swasey (1896), 111 Cal. 528, 44 Pac. 225; Blackburn v. Webb (1901), 133 Cal. 420, 65 Pac. 952.
"But, if we understand the position of respondents, it is contended that the nephews and nieces take a future estate, which future estate is vested and alienable. . . . . Following this argument, and for this purpose treating the interest of the beneficiaries as a future interest or estate within the contemplation of the Code (Civil Code, sec. 716), it may be first suggested that all expectant estates, whether vested in interest, or contingent with a vested right, or entirely contingent, pass by succession, will, and transfer, like present estates and interests. (Civil Code, sec. 699).

"Conceding that the future interest of the beneficiaries is vested in the sense in which remainders are spoken of as vesting and that the interest would thus be alienable, it still is not such an interest as would by transfer carry an absolute interest in possession . . . . To convey this absolute interest in possession the beneficiaries would be compelled to unite with their conveyance that of the trustees, in whom the fee is vested. But the trustees cannot convey until the expiration of twenty-five years. An attempt by them to convey before that time would contravene the trust, and be a void act (Civil Code, sec. 870), and so even by this method of progression our path leads to that barrier of perpetuity which cannot be surmounted." 46

It is thus seen that Civil Code section 870 is made to bear the burden of defeating the Walkerly will and similar subsequent instruments. But, conceding that such a construction of that code provision was a plausible one, it is respectfully submitted that a contrary conclusion might very possibly have been reached, and that, in any event, the rule enunciated in the Walkerly case should now be abrogated by an appropriate statute. 47

45 (1895) 108 Cal. 627, 649, 41 Pac. 772.

46 The exact facts of Estate of Walkerly are long and complicated; and, within the limits of space available for the suggestions here made, it would not be possible to give those facts in full.

One special provision of the will, however, seems deserving of special attention as affording possible support to the actual decision reached. After setting forth the primary provisions of the trust, the testator continued: "Provided, that no final sale or distribution of the trust estate be made during the lifetime of my wife, Blanche M. Walkerly, but only after the expiration of twenty-five years from the date of my death, and after her death. Upon the distribution of the
Throughout the case, the California court relies on numerous New York decisions; but all of these were distinguishable because, as we have seen, they rested primarily on that section of the Revised Statutes which deprives the beneficiary of an income trust of the power to "assign or in any manner dispose of such interest." If, therefore, our hypothetical case had occurred in New York, neither X nor Y would have had the power either to assign his beneficial interests directly or to authorize the trustee to alienate the legal estate. And, of course, without such authorization from persons duly empowered, a conveyance by the trustee would be "in contravention" of the trust, "and therefore void under section 65 of the Revised Statutes."

But in California the situation is different. At common law it is, apart from special restraints not now involved, the duty of a trustee to convey as requested by his beneficiaries when the latter have the full beneficial interest. In such a case proceeds of the trust estate among the parties entitled, then this trust shall cease and determine."

It is agreeable, however, that on the court's concession that all the beneficial interests would necessarily be vested within lives in being, the proviso of the testator might have been regarded as void without affecting the main gift. See, as to this, the reasoning in an earlier part of the court's opinion, 108 Cal. p. 645 (also Estate of Cavarly (1897), 119 Cal. 406, 51 Pac. 629; Saunders v. Vautier (1841) 4 Beav. 115; Gray, Restraints on Alienation, 2d ed., secs., 105-124n; and compare Civil Code, sec. 71. Here again, it would appear that the New York authorities cannot be regarded as in point. See Gray, Restraints on Alienation, 2d ed., sec. 116.

Apart from the foregoing suggestion, it is to be noted that the reasoning in Estate of Walkerly seems to proceed on the theory that the mere designation of a period of duration not measured by lives in being suffices to make the trust unlawful, even though all beneficial interests in the trust must be both vested and alienable within lives in being; and it is this broad rule that has been recognized and applied in later cases: Crew v. Pratt (1897), 119 Cal. 139, 51 Pac. 38 (seven years); Campbell (1908) 152 Cal. 201, 204, 92 Pac. 184 (thirty years); Estate of Heberle (1908), 153 Cal. 275, 95 Pac. 41 (five years); Estate of Fay, (1907) 5 Cal. App. 188, 190, 89 Pac. 1065 (twenty-five years).

It is therefore this comprehensive proposition, (rather than the precise decision on the special facts) that is discussed and doubted, in this article, as the "broad rule of the Walkerly case." For the reasons already given it would seem to serve no useful purpose to debate the question whether, under the more or less ambiguous language of the Walkerly will, all beneficial interests must have become vested within lives in being at the death of the testator.

It is true that in Hawley v. James, (1836) 16 Wend. 61, at pp. 121-122, the court said, by way of mere dictum: "Even if we should concede the trust to pay annuities came within the 2d subdivision, so as to be unaffected by the 63d section, and therefore the interest assignable, still, in my judgment, the term would be inalienable. The trustees being unable to alien under the prohibition of the 65th section, the legal estate must remain in them during the trust."
the conveyance by the trustee being made pursuant to his duty, it could hardly be said to be "in contravention of the trust." Moreover, these well-settled common law doctrines must, of course, be deemed applicable unless excluded by the code. All this being so, now that the beneficiaries are no longer subjected to any special disabilities by section 867, why shouldn't they be deemed to have the same rights and powers of authorizing the trustee to convey that existed at common law? This reasoning is based directly upon settled common law doctrines and upon a natural interpretation of the relevant provisions now in the Civil Code.

But considerations of policy seem to lead to the same conclusion. If under section 867, as amended, X and Y (in the above hypothetical case) could immediately alienate their beneficial interest under the income trust to a total stranger unthought of by the author of the trust, what possible policy or purpose could be subserved by preventing the trustee from joining in the conveyance so as to transfer the unencumbered legal estate to such stranger? Or suppose that X and Y, at A's death, should convey (that is, release) their beneficial interests to the trustee. Would it be seriously argued that the trustee, though now free from the encumbrance of the trust, would have no power to alienate the legal estate? These considerations, it is submitted, must be weighed in endeavoring to place a sensible and harmonious interpretation on the entire system which the legislature intended to bring about by the far-reaching amendments of 1874.

In support of these conclusions may be cited the case of

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Compare also the dicta of Bronson, J., 16 Wend. 61, at pp. 164-165. But, for the reasons to be given in the text of the present article, it is believed that these dicta are unwarranted as a matter of statutory interpretation. More than this, they seem inconsistent with the reasoning and the decision in Wells v. Squires, (1909) 117 N. Y. App. Div. 502; affirmed 191 N. Y. 529, 84 N. E. 1122.


49 See Eakle v. Ingram (1904) 142 Cal. 15, 17, 75 Pac. 566.

50 See Gray, Restraints on Alienation, 2d ed., 124m-124n.

51 Compare Beardsley v. Hotchkiss (1884) 96 N. Y. 201; Mills v. Mills (1900) 50 N. Y. App. Div. 221, 63 N. Y. S. 771.
Wells v. Squires—a case, to be sure, decided many years later than Estate of Walkerly. In the Wells case the trust provided for annuities payable to the beneficiaries out of either income or corpus of certain personalty. The interest of such a beneficiary as distinguished from the beneficiary of a mere income trust, would be alienable under the New York law. That being so, if all such beneficiaries joined in a conveyance along with the trustee, the latter's act could not fairly be said to be "in contravention of the trust;" and so the New York Court of Appeals decided. The following language from the opinion by the New York Appellate Division—subsequently affirmed—is instructive:

"The plaintiff asserts that the article and codicil are invalid and void because they unlawfully suspend the absolute ownership of personal property, of which alone the estate consists. It is observable that the direction for the payment of the annuities is not limited to their payment out of the income. Indeed, the words "income" or "rents and profits" are not to be found in either article, except where the wife's annuity is made a first charge upon the principal and income. A gross sum is given to the trustee, and out of that sum, not alone out of its income, are the annuities to be paid. In other words, if necessary, the principal is to be used, and it appears that it will be necessary to use it. It is perfectly well settled that there can be no suspension of absolute ownership when there are persons in being who can convey an absolute title. The mere creation of a trust does not, ipso facto, suspend the power of alienation. Robert v. Corning, 89 N. Y. 225; Williams v. Montgomery, 148 N. Y. 519, 43 N. E. 57.

"If, then, there are persons in being who can unitedly give a perfect title, there is no suspension of alienation. The plaintiff's contention is that the title cannot be transferred because the annuitants could not lawfully transfer their interests. This contention cannot be sustained. The prohibition against the assignment by a beneficiary of the right to enforce the performance of a trust of personal property is limited to cases where the trust is one to receive the income and apply it to the use of any person. The statute expressly provides that 'the right and interest of the beneficiary of any other trust in personal property may be transferred.' Personal Property Law, Laws 1897, p. 508, c. 417, sec 3. The trust in the present case is distinctly not a trust to receive the income and apply it to any person, and cannot be construed as such by any known rule of construc-
tion. Consequently the interests of the beneficiaries are alienable, and do not suspend the absolute ownership of the fund. Kane v. Gott, 7 Paige, 521; Id., 24 Wend. 641, 35 Am. Dec. 641. The annuitants, acting in conjunction with the trustee, could convey the estate to the remainderman, or they, with the remainderman, could convey to a third person. And, if the annuitants and the remainderman united in an assignment, the trustee would be obliged to convey to the assignee.\(^5\)

Before leaving this branch of the discussion, it remains to cite some of the more important cases following or recognizing the strict rule enunciated in the above quoted passage from Estate of Walkerly.\(^6\)

2. The amendment proposed by Senate Bill, No. 767.

This bill reads as follows:

715. Except in the single case mentioned in section seven hundred seventy-two, the absolute power of alienation cannot be suspended, by any limitation or condition whatever, for a longer period than as follows:

1. During the continuance of lives of persons in being at the creation of the limitation or condition; or

2. For a period not to exceed thirty years from the time of the creation of the suspension.

\(^5\)The doctrine of Wells v. Squires was approved in In re Trumble (1910) 199 N. Y. 454, 464-465, 92 N. E. 1073. Compare also Beardsley v. Hotchkiss (1884) 96 N. Y. 201; Mills v. Mills (1900) 50 N. Y. App. Div. 221; 63 N. Y. S. 771; Robert v. Corning (1882) 89 N. Y. 225; Estate of Heberle (1909) 155 Cal. 723, 102 Pac. 935.

In New York, under concurrent operation of Rev. Stats. secs. 63 and 65, quoted ante, it has been held that as regards an income trust, not even the court is empowered to order or authorize a conveyance of the trust property by act of the trustees and the beneficiaries so as to terminate the trust. Douglas v. Cruger, (1880) 80 N. Y. 15, 18-19, cited in the Walkerly case; Cuthbert v. Chauvet, (1893) 136 N. Y. App. Div. 330-331, 32 N. E. 1088.

If the reasoning of the Walkerly case be sound in proceeding exclusively on Civil Code, sec. 870, it would seem to involve the full consequences suggested by the New York cases last cited, and thus prevent even the Superior Court from decreeing the termination or extinguishment of an income trust. Yet—without any reference either to Estate of Walkerly or to Civil Code, sec. 870, precisely that sort of extinguishment has been sustained by the Supreme Court. Eakle v. Ingram (1904) 142 Cal. 15, 18, 75 Pac. 566. Compare Estate of Washburn (1909) 11 Cal. App. 735, 737, 742, 106 Pac. 415.

\(^6\)Crew v. Pratt (1897) 119 Cal. 139, 146-147, 51 Pac., 38, 44; Estate of Fay (1907) 5 Cal. App. 188, 89 Pac. 1065; Campbell v. Campbell, (1907) 152 Cal. 201, 92 Pac. 184; Estate of Heberle (1908) 153 Cal. 275, 276, 95 Pac. 41 (testamentary trust held invalid by the rule of the Walkerly case, and—also by the rule of the Fair case). Compare Estate of Cavarly (1897), 119 Cal. 406, 409, 51 Pac. 629 (distinguishable from "the Walkerly rule" for the reason that not all of the trust beneficiaries would necessarily come into being before the expiration of lives existing at the death of the testator).
It is the second subdivision that would modify the law as it now exists. At present, the measure of the permissible suspension must be exclusively the life or lives of persons in being at the time of the creation of the interest involved. It may well be, however, that some term in gross should be permitted, either by way of addition, or by way of alternative, as proposed in the bill before us. Thus, as is well known, the common law term permitted in relation to remoteness of vesting consists of a period of lives in being, twenty-one years additional, and, in some cases, also a superadded period of gestation.

Such a question as this should be considered on its merits; and the present writer has no positive view in the matter. It may not be amiss to add, however, that Senate Bill, No. 767, in conjunction with Bill No. 286, relating to trusts, may be designed to make possible the formation and duration of quasi-corporate trusts for a fixed term of years,—that is, thirty years.

In any event, this amendment would not be adequate to meet the defects heretofore considered in discussing the rule of the Walkerly case.55

3. Amendments proposed herein by the present writer.

Since the rule enunciated in the Walkerly case is based exclusively on section 870 of the Civil Code, that section, it is submitted, should be qualified so as to read substantially as follows:

Sec. 870. Where a trust in relation to real property is expressed in the instrument creating the estate every transfer or other act of the trustees, in contravention of the trust, is absolutely void.

But, notwithstanding anything contained in this section or in section seven hundred and seventy-one, whenever all persons presently or contingently interested in any trust created from and after the-----------day of----------, one thousand nine hundred and thirteen, are in being, and all of such beneficial rights or interests are alienable either by the respective beneficiaries or owners thereof or, in the case of minors and in-

55 In Estate of Hendy (1897) 118 Cal. 656, 50 Pac. 753, the rule of the Walkerly case was held inapplicable. See also Toland v. Toland (1898) 123 Cal. 140, 55 Pac. 681; Estate of Steele (1899) 124 Cal. 533, 57 Pac. 564; Estate of Herberle (1909), 155 Cal. 723 and compare Estate of Pforr (1904), 144 Cal. 121, 126, 77 Pac. 825; Estate of Campbell (1906) 149 Cal. 712, 720, 87 Pac. 573.
competents, by duly appointed guardian appointed and acting as provided by sections one thousand seven hundred and forty-seven to one thousand eight hundred and ten of the Code of Civil Procedure, the trustee and all such beneficiaries and guardians, the latter acting as provided in said Code of Civil Procedure, shall have the power to join in a conveyance effective to transfer, free from the trust, such estate or interest as is held in trust.

With this proposed amendment before us, let us see how it would affect the hypothetical case heretofore considered. X and Y being ascertained, at the death of A, as the exclusive beneficiaries of the trust, and no disability as to alienating their beneficial interests having been imposed by the creating instrument, they would, if of age, have the power to join with T, the trustee, or his successor, so as to convey the absolute fee to a stranger. Even if the one born after the decease of the testator were a minor, probably no unlawful suspension would be deemed to arise,—quite independently of the possibility of appointing guardians. 50 But, to remove all doubt on that point, the proposed amendment expressly recognizes the power of a duly appointed guardian to act in relation to beneficial trust interests precisely as in the case of any other property interests owned by the ward. 57

But, despite this comprehensive addition to section 870, difficulty and litigation might arise, in many cases, from the possibility of posthumous children. Thus, in the hypothetical case hitherto used for illustration, if, as is necessary, we survey the possibilities as from the death of the testator, it might be that one of A's children would not be born until approximately nine months after A's death; and, so too, the other children of A might all have been born, after the testator's own death. There is thus the possibility of a suspension as to the entire trust estate—including the proportional interests of the other children of A as well as that of the posthumous child—during a period exceeding the duration of lives in being at the testator's death. No doubt such a suspension would be allow-

50 See Chaplin, Suspension of Power of Alienation, sec. 116; Estate of Pforr (1904), 144 Cal. 121, 127, 77 Pac. 825; Estate of Campbell (1906), 149 Cal. 712, 718, 87 Pac. 573; Estate of Heberle (1909), 155 Cal. 723, 726, 102 Pac. 935.

57 See Code Civil Procedure, sec. 1778; Estate of Hamilton (1898) 120, Cal. 421, 52 Pac. 708.
able as regards the interest of the posthumous child, if it could be considered alone. But it might be questioned whether the suspension would be deemed lawful as regards the other children's interests, which are necessarily enveloped and suspended in a single trust along with the interest of the posthumous child.

To meet any question on this score, it is suggested that an addition might well be made to section 715, so that it would thereafter read as follows:

715. The absolute power of alienation cannot be suspended, by any limitation or condition whatever, for a longer period than during the continuance of the lives of persons in being at the creation of the limitation or condition, except in a single case mentioned in section seven hundred and seventy-two.

For the purpose of this section and section seven hundred and sixteen, however, a child conceived but not born before the expiration of the lives of persons in being at the creation of such limitation or condition shall be deemed a life in being, provided that such a child, if born, would be presently or contingently interested in the property in question or in some trust relating thereto; and no unlawful suspension shall be deemed to result from the possibility that the birth of such child might occur after the expiration of lives of persons in being at the creation of the limitation or condition in question.

In concluding the present discussion, a word may be ventured concerning legislation in general. No one even moderately familiar with the enormous volume of litigation and its underlying causes can fail to observe the unfortunate effect of unskillfully framed constitutional and legislative enactments. Even if the ultimate purposes of a given enactment be well conceived, faulty draftsmanship may not only perpetuate or produce many instances of hardship and injustice, but also cause, as its proximate consequence, that considerable economic and social waste which is necessarily involved in any increase of litigation. A single ambiguity in an important constitutional legislative enactment may involve not only the conspicuous and repeated defeat of civil or criminal justice, but also the otherwise unnecessary expenditure of tens or hundreds of thousands of dollars to pay for the time and services of the many trial and appellate judges, the lawyers, the witnesses, and the numerous

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68 Civil Code, secs. 29, 1339; Harrison J., in Estate of Fair (1901) 132 Cal. 523, 580, 60 Pac. 442, 64 Pac. 1000.
69 Compare Estate of Walkerly (1895) 108 Cal. 627, 658, 41 Pac. 772.
minor court officials, required for every litigious proceeding; and, in this connection, it should not be forgotten that similar unfortunate consequences are bound to result from ambiguous, conflicting or otherwise faulty judicial opinions.

It would thus seem to be time to recognize and reckon the enormous sum total of the social waste involved in litigation and to consider those causes that may be wholly or partially remedied,—more especially unskilful legislative draftsmanship. In this connection, a recent utterance of Thomas Nixon Carver, the economist, is deserving of consideration:

"We have often been told of the enormous waste of war, and the cost of supporting European armaments. The withdrawal from production of so many men as are required for the standing armies of those militant nations, can easily be understood as a factor in the high cost of living.

"But we are not as ready to consider the enormous cost of litigation in the country, and the enormous waste in the withdrawal of so many of the most capable men of the world from productive work in order that they may fight our private battles for us.

"Here is a cost comparable with that of European armaments."

It is hardly necessary to suggest that the most natural step toward immediate betterment consists in the inauguration of an adequate Legislative Reference and Drafting Bureau, to be operated by juristic talent at least as efficient and high-priced as that which is commonly employed to defeat constitutional and legislative enactments after they have been placed upon the books. Even a very large expenditure for that purpose would seem to be almost insignificant and irrelevant in relation to the beneficial results to be achieved.

Equally important and far-reaching—though less direct and immediate—should be the fostering of the science of jurisprudence on a scale commensurate with the attention now paid to agriculture, engineering, and other materialistic branches of human activity, and the gradual development of a large body of jurists comparable to those whose work of decades made possible the great German Civil Code that went into force in 1900,—a code said by the greatest of English historians and jurists to be "the most carefully considered statement of a nation's law

60 Quoted in 25 Green Bag. 7.
that the world has ever seen." It is difficult to estimate the enormous good to be derived, in course of time, from the historical, analytical, and comparative study of foreign systems of law and legislation. Matters of law and justice have in recent years become national and state issues; yet our American universities have been singularly backward in promoting this type of learning and activity, and thus furnishing to their constituencies one of the greatest agencies for fundamental and permanent betterment of our legal institutions.

WESLEY N. HOHFELD.

Stanford University, California.

Supplemental Note on the Case of Lauricella v. Lauricella.

Some interesting problems are suggested by Lauricella v. Lauricella. These may best be raised by considering the case according to each of two possible hypotheses:

(1) Does a constructive trust obligation arise at the time of the supposed conveyance by the husband to the wife?

Assuming as we must, in the absence of finding to the contrary, that at the time of making her promise the wife had the intention of fulfilling it, there was at that moment no fraud or misrepresentation whatever. As said in Brison v. Brison (1888) 75 Cal. 525, 527, 17 Pac. 689, "The essence of fraud is the existence of an intent at the time of the promise not to perform it." See also Feeney v. Howard (1889) 79 Cal. 525, 528, 21 Pac. 984; and compare Civ. Code, sec. 1572. There would therefore be no basis whatever for the creation of a constructive trust in favor of the parents at the time the defendant made the oral promise to her husband.

Indeed, such an argument would seem to prove too much; for, if the supposed view had any merit, it would seem necessary to conclude that even a written promise by the wife, at the time of the conveyance, would give rise to a constructive trust, with its special incidents, rather than an express trust of the very kind declared by the promise.

All this being so, the first hypothesis may be dismissed as untenable. This conclusion accords with the views expressed by the court.

(2) Does a constructive trust obligation arise at the time of the wife's refusal to convey the legal title (supposedly vested in her) according to the tenor of her former promise?

Mr. Justice Shaw, consistently with his earlier opinion in Cooney v. Glynn (1910) 157 Cal. 583, 587, 108 Pac. 506, argues that, "the violation of the express [oral] promise to convey constitutes the foundation of..."
the constructive trust. But no intimation is given as to the legal relations of the wife and the intended beneficiaries during the interval prior to the refusal to convey as formerly promised; and it is here that interesting difficulties seem to arise.

The wife's mere "physical" promise, as such, was not a continuing phenomenon. It had spent its force as soon as it was uttered. The real question is, therefore, whether it had any legal effect by way of creating an obligation or liability of any kind. Suppose, instead of an attempted trust to convey, the wife had received the legal title subject to an oral promise to hold in trust to sell the property, at the death of the husband, and to pay the proceeds to the parents. What, if any, would be the legal effect? In this case, the trust purpose being lawful, it is well settled that a trust obligation and corresponding rights would arise at once. Civil Code, sec. 852 ("created or declared"); Browne, Stat. Frauds, sec. 97; Jamison v. Miller (1876) 27 N. J. Eq. 586, 592; Garnsey v. Gothard (1891) 90 Cal. 603, 608, 27 Pac. 516; Baker v. Baker (1892) 96 Cal. XVII, 31 Pac. Rep. 355, 357; but see Feeney v. Howard (1889) 79 Cal. 525, 535, 21 Pac. 984.

It is true that the trustee may have the power, by reliance on the statute of frauds, to defeat a vindicatory proceeding brought by the beneficiary to secure a (new) judgment or decree obligation requiring the fulfillment of the trust; but neither this power nor any other power of "decisive repudiation" by the trustee is inconsistent with the existence of the trust obligation until the exercise of such power. Several classes of authorities recognize the existence of the beneficiary's "unenforceable" rights. Thus, even an insolvent trustee may, without power of his creditors to interfere, perform the "oral trust" according to the tenor of his original promise. As said by Cooley, J., in Patton v. Chamberlain (1890) 44 Mich. 5, 6, 5 N. W. 1037: "It is immaterial that the trust was a verbal one; it could not have been enforced against him, but it was nevertheless his duty to recognize and execute it, and when he did recognize it his creditors could not complain." There are many equally cogent types of such recognition. See Ames, Lead. Cases on Trusts, 2nd ed., 181, n. 1. But the most significant judicial recognition of the actually existing trust obligation created by the oral transaction is manifested by the trustee's power to acknowledge the trust by a subsequently executed document and thus render it "enforceable." As said in Jamison v. Miller (1876) 27 N. J. Eq. 586, 592: "The writings are but evidence; the trust is anterior and independent; and the rights which the court regards are those that spring from the creation, not the mere proof of the trust." See also Garnsey v. Gothard (1891) 90 Cal. 603, 27 Pac. 516; Baker v. Baker (1892) 96 Cal. XVII, 31 Pac. Rep. 355, 357.

If then, in the case of the lawful "oral trust" to sell above supposed, the wife were to refuse to perform the already existing (though "unenforceable") obligation, it would not be illogical for the law to create (and substitute) a constructive trust obligation in order to avoid unjust enrichment. Either such constructive trust should arise in favor of the original grantor or his heirs by way of restitution,—possibly the more defensible doctrine in view of the policy of the statute of frauds (McKinney v. Burns (1860) 31 Ga. 295, 300; Peacock v. Nelson, (1872) 50 Mo. 256, 261); or else, as in California and some other jurisdictions, the constructive trust should be created in favor of the original beneficiary. Cooney v. Glynn (1910) 157 Cal. 584, 588, and cases cited; Stahl v. Stahl (1905) 214 Ill. 131, 140, 73 N. E. 319. Hilt v. Simpson (1907) 230 Ill. 170, 82 N. E. 588; compare Ahrens v. Jones (1902) 169 N. Y. 155, 6 N. E. 666.

All of the foregoing seems clear enough when the purpose of the "oral trust" is valid. But in Lauricella v. Lauricella both of the trust purposes were illegal. Hence, it would seem, the immediate legal effect of the wife's oral promise could not be the creation of genuine, though
“unenforceable” trust obligations as against the wife. Even if the legal title passed to her at all, she would immediately hold on a constructive (sometimes called “resulting”) trust for the grantor. Compare McFarland, J., in Wittfield v. Forster (1899) 124 Cal. 418, 420, 57 Pac. 219. But did the legal title pass to her? Civil Code, sec. 866 reads: “Where an express trust is created in relation to real property, every estate not embraced in the trust, and not otherwise disposed of, is left in the author of the trust or his successors.” Under the concurrent operation of this provision and Civil Code, secs. 871 and 2279, it has uniformly been held that in the case of an unlawful and void trust sought to be created in writing, the legal title fails to pass to the intended trustee. Carpenter v. Cook (1901) 132 Cal. 621, 626, 64 Pac. 997; Estate of Pichoir (1901) 139 Cal. 682, 685, 73 Pac. 606; Sacramento Bank v. Montgomery (1905) 146 Cal. 745, 749, 81 Pac. 138; see Morffew v. S. F. & S. F. R. R. Co. (1895) 107 Cal. 587, 595, 40 Pac. 810. It seems difficult to suggest any reason why such paramount illegality and invalidity should not be equally operative to prevent the legal title from passing to an intended “oral trustee.” The intended trust failing entirely, he needs no estate whatever. That being so, it would seem that, in Lauricella v. Lauricella, the title remained in the husband, and that it was, of course, impossible for her subsequent refusal to convert her into a constructive trustee as to property which she didn't own.

The same conclusion seems to be reached by another line of thought. Suppose, merely tentatively, that the legal title to the real property did pass to the wife at the time of her oral promise to hold on a trust to convey. Are we not then led to a reductio ad absurdum? Suppose that instead of refusing at any time to convey, the wife subsequently executed a memorandum fully acknowledging the “unlawful trust” on which she took the property. What is the resultant status? No constructive trust has yet arisen on Mr. Justice Shaw's theory, for there has been no repudiation; and the express trust, now prima facie enforceable, is unlawful. Compare Wittfield v. Forster (1899) 124 Cal. 418, 421-422, 57 Pac. 219. Doesn't this dilemma tend to show that there is something anomalous about Lauricella v. Lauricella?