Legal Purposes of Trusts in California

To the constitution of every valid express trust it is essential that there should be a trustee, an estate conveyed to him, a beneficiary, a legal purpose, and a legal term. While equity will in certain instances make good the absence of the first requisite, if the second or third be lacking, or the fourth or fifth be illegal, the trust itself must fail.1

The object of this paper is to consider certain elements involved in the fourth requisite, the legality of the purpose of an express trust.

There is available a good means of presenting the problem to be discussed. There is a form book, which is widely used by lawyers in California, who are engaged in trust work, which contains a will setting out a trust. This will, which will be referred to hereafter as John Doe's will, after giving the residue of the estate to a trustee, provides:

"Said trustee may either maintain, continue, or operate, at the risk of the trust estate and not at the risk of said trustee, any business enterprise which it may receive from my estate, or it may sell, exchange, or otherwise dispose of the whole or any part thereof, on such terms and for such property as it may deem best; or it may, in its discretion, retain and hold, so long as it deems it desirable, any property which it may receive from my estate, whether or not the same may be permissible by law for investment for trust funds; or it may sell, convey, lease for terms within or extending beyond the duration of this trust, pledge, mortgage, partition, or subdivide any of the trust estate, and invest and re-invest, loan and re-loan, the whole or any part of the principal sums of money of the trust estate in any property, whether or not the same may be permissible by law for investment of trust funds."

It then states that the trustee shall pay the net income of the trust to Mary Doe; and that, upon her death, the trust estate shall go to Helen Roe, and shall be so conveyed by the trustee.

1 Estate of Walkerley (1895) 108 Cal. 627, 650, 41 Pac. 772.
There seems to be no better way of considering the subject of this paper than to consider whether the purposes of this trust, declared by the will of John Doe, are legal. If this trust be invalid, or if there be any reasonable doubt as to its validity, this paper requires no other justification.

For an orderly presentation it will first be necessary to touch upon some elementary propositions, the distinction between trusts in real estate and personal property, so far as legality of purpose is concerned, and the narrow limits placed by section 857 of the Civil Code upon the purposes for which an express trust in real property may be created. It will then be proper to proceed to a discussion of the principal points presented by this paper:—that there exists in California a distinction between trusts and powers, that, under our law, trusts in real property must be for a purpose authorized by law, while powers, except so-called powers in trust, may be given a trustee without limitation; that the main point of distinction is this—to constitute a trust in real property for a lawful purpose the duty imposed upon the trustee must be imperative, while if it be not imperative, but discretionary, it does not create a trust, but confers a power; and that if a trust in real property for a valid purpose is created, that is a trust imposing an imperative duty upon the trustee to perform an act authorized by section 857 of the Civil Code, there may, at the same time, be conferred upon the trustee discretionary powers, without restriction. Having discussed these points, we will then give an opinion, a cautious and hesitating opinion, as to the validity of the trust created by John Doe's will.

In the first place we should touch upon the distinction between trusts in personal property and trusts in real property, so far as legality of purpose is concerned. It is elementary that the former may be created generally for any purpose for which a contract may be made;2 while the latter can only be of the kinds permitted by section 857 of the Civil Code, which, for convenience, is printed in the margin.3 And, in this connection, it should be noted in passing,

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3 Estate of Fair (1901) 132 Cal. 523, 60 Pac. 442, 64 Pac. 1000. And see the following cases which follow Estate of Fair, namely, McCurdy v. Otto (1903) 140 Cal. 48, 73 Pac. 748; Hofzas v. Cummings (1904) 141 Cal. 525, 75 Pac. 110; Sacramento Bank v. Montgomery (1905) 146 Cal. 745, 81 Pac. 138; Campbell-Kawannakoa v. Campbell (1907) 152 Cal. 201, 92 Pac. 184. Cal. Civ. Code, § 857, provides:
"Express trusts may be created for any of the following purposes:
"1. To sell and convey real property and to hold or reinvest 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
that if a trust estate consists of both real and personal property, and the trust in the real property is invalid because of an illegal purpose, the trust in the personal property may fail likewise. The general rule is that "when there are valid and invalid clauses in a will, the question whether the valid clauses can stand depends upon whether on not the invalid ones are so interwoven with them that they cannot be eliminated without interfering with, and changing the main scheme of the testator." This rule, like many rules of like character, is very simple to formulate, but very difficult to apply. So far as the subject of this paper is concerned it is sufficient to remember that the illegality of a trust respecting its real estate, may invalidate, not only those provisions of it affecting its real estate, but also those affecting its personal property;—the entire trust may be destroyed.

The effect of section 857 of the Civil Code was brought most forcibly to the attention of the profession by Estate of Fair. Senator Fair's will gave the residue of his large estate to trustees, to hold in trust during the lives of his two daughters and one son, and the survivor of them, and, upon the death of the survivor "to transfer and convey" a one-fourth share to the issue of each of his daughters, and the remaining one-half to his brothers and sisters, and their children by right of representation. It was held that the will attempted to create a trust to convey, and that such a trust was void because not authorized by section 857.

The case was decided by a divided court, four of the justices against three; and a wealth of learning was displayed by both sides to this judicial controversy. The case is of great importance in the law of trusts and powers of this state, not because of the main proposition decided, but because of the points raised in the argument whose

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 2 of division 2 of part 1 of this code.

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 convey, partition, divide, distribute or allot real property in accordance with the instrument creating the trust, subject to the limitations of the same title."

Estate of Dixon (1904) 143 Cal. 511, 77 Pac. 412; Estate of Pichoir (1903) 139 Cal. 682, 73 Pac. 606; Estate of Fair (1902) 136 Cal. 79, 68 Pac. 306.

Supra, n. 3.

In 1913 section 857 of the Civil Code was amended to authorize trusts to convey; see supra, n. 3.
decision was necessary to a determination of the case. Consequently a careful review of the case should be made.

The main principle upon which the case was decided was stated by Justice Garoutte, speaking for the majority as follows:

"Our law upon the subject shows an intent to avoid the intricacies, frauds, and concealments which were possible under the old system of trusts and uses, whereby the title to real property was allowed to be in one person and the beneficial use in another, to such an extent that the confusion following was intolerable; and the purposes of the code provisions is clearly to confine trusts within very narrow limits, and to allow them only in a few instances where they might be specially used to subserve proper and necessary purposes. Section 847 of title IV of the Civil Code provides as follows: 'Uses and trusts in relation to real property are those only which are specified in this title'; and section 857, in the same title, is as follows: 'Express trusts may be created for any of the following purposes.' Then follow four subdivisions, providing the purposes for which express trusts may be created, and neither of them includes a trust to convey real property, except only as it may be an incident to the trust 'to sell real property, and apply or dispose of the proceeds in accordance with the instrument creating the trust.' And as a trust to convey real property to beneficiaries was one well recognized by the common law, it is quite clear that these provisions of the code were intended to abolish and do abolish, such a trust. Therefore the attempted declaration of trust, in the decedent's will, to 'transfer and convey,' so far as real property was intended to be affected thereby, was void (and real property, only, is involved in this case)."

The dissenting justices did not claim that this statement of the law was erroneous. They conceded that a trust to convey was void, but contended that the will could be sustained upon two principal theories: first, that it could be construed to vest an estate in the remaindermen by means of a direct devise, and not by a conveyance by the trustees; and, second, that, although it was void as a trust to convey, it could be held valid as a conveyance of only a life estate to the trustees, with an added power to convey the remainder.

The second theory, the theory advanced by Justice Temple, is of great importance here, because of the light it throws upon the subject of powers in the law of this state. Hence, in this discussion, it is proper to review by means of quotation and abridgment Justice Temple's opinion.

The Civil Code, as originally enacted, Justice Temple said, contained a title, consisting of sections 878-940, devoted exclusively to the subject of powers. This title was a restriction of the rights possessed to an unlimited extent by the owners of real property at
common law to create powers. In 1874, two years after the adoption of the Code, this title was repealed, two of its sections having been re-enacted as sections 860 and 858 of the Civil Code. "Section 860 provides for the event of the death of one of the several donees of a power. Section 858 provides for a power of sale in a mortgage. This is the only instance in the code, as it now exists, where any power is expressly authorized. . . . Other sections recognize the existence of powers but cannot be considered as authorizing them." Various sections of the code, such as section 1330 referring to a power to devise, assume the existence of powers. "These provisions existed when title V [the title on powers] was in the code, and should have gone with it, if the repeal of that section was to be deemed the abolition of powers. If, on the other hand, the repeal merely did away with a restriction upon the right to create powers, they are still properly in the code, and have their proper use."

And Justice Temple, by following this line of argument concluded that in California powers exist without restriction. He then held that the will should be construed as conveying a life estate to the trustees, and "that the direction to his trustees 'upon the death of such survivor to transfer and convey' was intended as a power in trust"; that powers in trust are distinct from express trusts, and are not governed by section 857 of the Civil Code; and that consequently the power in trust to convey created by the Fair will was valid.

Justice Harrison concurred in Justice Temple's opinion, and Chief Justice Beatty did likewise in a separate opinion.

The answer of the majority to this argument was based upon a distinction between powers, and powers in trust. It can be given best by quoting an excerpt from the opinion. The court said:

"A mere naked power can be exercised or not, at the will of the holder; but if the exercise of it be imperative, it is a trust. In Sugden on Powers, the author, having said that it is the very nature of a power to be 'left to the free will and election of the party to execute it or not, for which reason equity will not say he shall execute it,' proceeds as follows: 'But in laying down this broad rule we must be careful to distinguish between mere powers and powers in the nature of trusts. The distinction between a power and a trust is marked and obvious. 'Powers,' as Lord Chief Justice Wilmot has said, 'are never imperative.' They leave acts to be done at the will of the party to whom they are given. Trusts are always imperative, and are obligatory upon the conscience of the party intrusted. But sometimes trusts and powers are blended; a man may be intrusted with a trust to be effective by the execution of a power given to him, which is in that case imperative; and if he refuses to execute it,
or die without having executed it, equity, on the general rule that the trust is in the land, will carry the trust into execution.' (2 Sugden on Powers, 158.) Upon the same subject in Perry on Trusts, the author, having said that 'mere powers are purely discretionary with the donee,' says as follows: 'It is different with powers coupled with a trust, or powers which imply a trust .... There are mere powers and mere trusts. There are also powers which the party to whom they are given is intrusted with and required to execute. Courts consider this last kind of power to partake so much of the character of a trust to be executed, that they will not allow it to fail by the failure of the donee to execute it, but will execute it in the place of the donee. Lord Hardwicke observed that such powers ought rather to be called trusts than powers. In all cases, these powers or trusts must be construed according to the intention of the parties, to be gathered from the whole instrument.' (1 Perry on Trusts, par. 248.) It is clear, therefore, that a 'power in trust to convey is a trust to convey, within the meaning of said article IV, and that, not being within any category of valid trusts within this article, it is by said article forbidden. Under this view we do not think it necessary to notice any of the other views taken of this subject by either respondents or appellants.'

Justice Henshaw, who concurred with the majority in a separate opinion, concluded that the will could not be sustained as a power in trust for several reasons. The first of these was that "the testator's plain and obvious intent ... was to create, not a power, but an explicit trust." Assuming, however, that the direction to the trustee to convey could be construed as a power in trust, he agreed with the judges with whom he concurred that a power in trust is a trust, within the meaning of section 857. But he went even further, and held that the effect of the repeal in 1874 of the title of the Civil Code on powers had not been to restore common law powers in California, but to abolish all powers except those expressly authorized by the Code.

What then was the effect of the decision upon the law of trusts and powers in California? According to the minority there is in this state a distinction of importance between trusts, on the one hand, and powers, and powers in trust, on the other; the former can be created only for the purposes authorized by section 857, while the latter can be created for any purpose without restriction. The majority, with the exception of Justice Henshaw, did not approve, nor dissent from, this proposition, except to hold that not only trusts, but also powers in trust, must be authorized by section 857 of the Civil Code. Ignoring for the moment Justice Henshaw's dictum that powers do not exist in this state, except where expressly author-
ized by the Code, it appears possible to deduce this proposition from
the reasoning of the various judges who took part in the decision of
this case:—trusts, and powers in trust, in real property, are valid
only when for a legal purpose as defined by section 857, while powers,
when conferred upon a trustee of a valid trust, are valid for any
lawful purpose.

It cannot be said definitely that this proposition is the law. On
the contrary it must be said that the rules of law respecting these
elementary propositions are still in a state of uncertainty. This
surprising condition may be traced largely to Justice Henshaw's
dictum, made without the concurrence of any other judge, that com-
mon law powers, except those which are authorized by the Code,
do not exist in this state. When one considers the abounding
wealth, and resources of California, it becomes difficult to agree
with the statement of this judge that a system of property law
without powers, except those few authorized by the Code, is more
"suitable to the simpler wants and habits of the people of this state."
And yet this dictum has had sufficient influence to keep the law of
California in uncertainty. As late as 1920 the Supreme Court in
the Estate of Murphy,7 referring particularly to a power of appoint-
ment, stated that it had "not stopped to consider what, or to what
extent, powers may be validly exercised in this state." But we do
not propose to enter into an extended discussion as to whether
Justice Henshaw's dictum can be discarded as unsound. The sub-
ject, with powers of appointment particularly in view, has been ably
considered by Mr. Arthur B. Dunne of the San Francisco Bar in
another paper.8 He adopts the opinion of Justice Temple that the
repeal of the title on powers in the Civil Code, operated to revive,
and not to abolish, common law powers in this state. It is true that
in Estate of Dunphy9 the court refused to decide the question
whether a power of appointment is valid, but it did say that section
781 of the Civil Code, and other sections, "seem to contemplate
the validity of such a power." Other cases have assumed a power of

7 (1920) 182 Cal. 740, 190 Pac. 46. See also Estate of McCurdy (1925)
197 Cal. 276, 240 Pac. 498, in which the court also refused to decide whether
or not a common law power of appointment could exist in this state, saying:
"We are not concerned with the question whether or not powers of appoint-
ment are valid in this state (21 Cal. Jur. 426 et seq.), since the repeal by the
legislature in 1874 of the title in the Civil Code relating to powers inasmuch
as the power created in the instant case failed upon the death of the donee,
as above pointed out, and there was no one remaining to exercise it."
8 13 California L. Rev., 1 (1924).
9 (1905) 147 Cal. 95, 81 Pac. 315.
appointment to be valid. Certainly the inheritance tax act makes this assumption. And a power of revocation, whose existence is recognized, but not authorized by the Code, has been regarded as valid. But what is of more importance here is that powers of sale to effectuate the purposes of trusts have been considered valid, although there is no express statutory recognition of such a power.

The cases holding this should be reviewed because they unquestionably support the proposition for which we contend, that powers may be created for any lawful purpose, while trusts, and powers in trust, are limited to the purposes specified in section 857.

The first of them is Morffew v. S. F. & S. R. Co. In this case there had been created a testamentary trust in real property to collect the rents, and apply them as provided by the will, and, upon the death of the testator’s widow, to divide the estate equally among the testator’s surviving heirs. The will provided that the trustee might, in his discretion, sell the trust estate. The court held that the trustee did not take the fee, but a life estate, an estate adequate to the execution of the trust, that the will created a trust for the collection and disbursement of income, but that there was no trust for the purposes of a sale, “for trusts are always imperative, and here the power to sell is, by the terms of the will, left wholly discretionary”; and that, consequently, the trustee had a life estate, with a “naked power to sell the remainder.” It decided that a deed executed by the trustee in the exercise of this power was sufficient to convey title.

In the Estate of Aldersley it appeared that John Aldersley had conveyed two parcels, and James A. Aldersley one parcel of real property, to trustees, upon the same trust, first, to receive the rents, and apply them to the support of James A. Aldersley during his life; second, after his death, to convey the property to the trustees or their survivor, and third, if the trustees deemed it advisable, to sell the property. After the death of one of the trustees, the surviving

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10 Estate of Bowditch (1922) 189 Cal. 377, 208 Pac. 282; Gray v. Union Trust Company (1915) 171 Cal. 637, 154 Pac. 306.
11 Cal. Stats. 1921, c. 821, § 2 (6) p. 1500.
15 Supra, n. 14.
16 Supra, n. 14.
trustees and James joined in a conveyance to Julia McCloud. There-
after James died. The deeds to the trustees were executed prior
to the amendment of 1913 to section 857 of the Civil Code, which
authorized a trust to convey. It was held that the trust to receive
and apply the rents during the life of James was valid, although the
trust to convey upon his death, was, under the rule of the Fair case,
void; and, that, therefore, the trust estate, when James died, de-
scended to the heirs of the respective trustors, James and John
Aldersley. In other words, as in the Morffew case, a trust to collect
and disburse income had been created, conveying to the trustees a
life estate only. The question arose, in the administration of James' 
estate, what interest, if any, his estate had in the proceeds of the
sale to Julia McCloud. Thus finally arose the question whether the
trustees, under that provision of the trust, giving them a discretionary
power to sell, could convey title to the trust estate. The court held
that they could. It said that even if this provision of the trust "be
merely regarded as a power of sale, the validity of the sale cannot
be questioned." But it went on to point out that it was only con-
cerned with the validity of the sale so far as it affected the interest
of James, and that this interest had certainly been conveyed because
James had joined in the trustee's deed.

The same facts were before the court in Aldersley v. McCloud.17
In this case the plaintiff, to whom one of the sons of John Aldersley
had conveyed his interest in the real property which was the subject
of the trust, brought an action of partition against Miss McCloud,
claiming that she had not acquired the interest of his grantor by
virtue of the deed executed by the trustees and James Aldersley. It
was again held that the trustees, by the exercise of the power of sale
conferred upon them by the deeds, had conveyed title to Miss
McCloud. A hearing was subsequently denied by the Supreme
Court.

It should now be recalled that the distinction between a trust and
a power is that the former is imperative, the latter discretionary.
This was stated in the excerpt from the opinion of the majority in
Estate of Fair which is quoted above; and also in the Morffew case.
It is generally recognized that this is a sound distinction.18

17 Supra, n. 14.
18 39 Cyc. 22; 26 R. C. L. 1169. In this connection we should cite a line
of California cases bearing upon this same principle; Estate of Sanford
(1902) 136 Cal. 97, 68 Pac. 494; Estate of Reith (1904) 144 Cal. 314, 77 Pac.
942; Hornung v. Sedgwick (1913) 164 Cal. 629, 130 Pac. 212. In the San-
ford case the will devised real property to trustees to receive the rents, and
apply the net income "to such extent, and at such time or times as in their
Now in both the Morffew and Aldersley cases it should be noticed, first, that the trustee did not have the fee, but a life estate; second, that there was a valid trust to collect and disburse income falling within subdivision three of section 857; and, third, that the direction to sell was discretionary, and hence, no trust was created, but a power was conferred. Therefore, it is safe to conclude that where there is a valid trust imposing a duty upon the trustee to perform an act authorized by section 857, there may also be conferred upon him common law powers. But in both the Morffew and Aldersley cases the power given the trustee was a power to sell, one of the purposes for which a trust in real property may be created. Therefore they do not directly support the proposition which we have deduced from the discussion in Estate of Fair, that trusts and powers in trust are governed by section 857, while powers are not; and that consequently a trustor, when he creates a valid trust in real property, can confer upon his trustee powers to perform acts not authorized by section 857, such, for instance, as a power to exchange real property. But in holding that a trustee of a trust, which is valid under section 857, may exercise a common law power they do lend it strong support. In this connection, we should recall what was said by the majority in Estate of Fair, in the excerpt which has been quoted, regarding the reason underlying section 857 of the Civil Code;—that the purpose of this statute is to prevent the separation of the legal and beneficial interest in land except in the specific cases provided for in the statute. If this be so, the creation of a valid trust, at the same time conferring upon the trustee any common law powers which may appear desirable to effectuate the purposes of the trust, does not frustrate the purpose of the law;—there
is a separation of the legal and equitable title, but only for an authorized purpose. And finally our conclusion respecting this point is supported by certain sections of the Civil Code, section 2267, providing that a trustee is a general agent for the trust property, having such authority as is conferred upon him by the declaration of trust and the law, and section 2269 providing that a discretionary power conferred upon a trustee is presumed not to be left to his arbitrary discretion. These sections certainly provide in effect that a trustee may be made the agent of the trust estate for the exercise of whatever discretionary powers may be conferred upon him.\textsuperscript{19}

Now that we have dealt with the first problem we proposed to consider, let us proceed to the discussion of the next proposition, that to constitute a trust in real property for a lawful purpose there must be imposed upon the trustee an imperative duty to perform an act authorized by section 857.

In this connection we should first refer to the law of New York. Section 857 of the Civil Code was copied almost verbatim from section 55 of the Revised Statutes of New York which became the law in that state in 1830.\textsuperscript{20} This state not only adopted this provision of the New York Statutes, but also the construction placed upon it by the courts of that state. Shortly after the enactment of the Code in New York it was established there, as it was later here, that the effect of their law was to abolish all express trusts in land except those enumerated in the section; and that any trust in land created for any other purpose than one authorized thereby was void as a trust.\textsuperscript{21} But section 58 of the New York Revised Statutes provided:

\textsuperscript{19} In this connection we should call special attention to Estate of Lux, supra, n. 14. In this case the trust estate was devised to trustees to manage and control, and to pay its net income to the son of the testator. The trust provided that the trustees should have the power to sell, lease and mortgage. The court held that "the trust created by this will was fully within the provisions of section 857 of the Civil Code." It was within the third subdivision of that section, a trust to receive rents and apply them to the use of the beneficiary. The instrument did not impose an imperative duty to lease or mortgage, hence no trust was created, but a power conferred. If the powers to lease or mortgage had been regarded as trusts they would not have been valid under section 857, because they were conferred without limitation, while the second subdivision of that section provides that a trust to lease or mortgage real property may be created only for the benefit of beneficiaries, or to satisfy any charge thereon. Although the point was not discussed, still this case holds, in effect, that, where a valid trust is created, discretionary powers, not falling within section 857, may be conferred upon the trustee.

\textsuperscript{20} Estate of Hinckley (1881) 58 Cal. 457, 478.

"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."\textsuperscript{22}

And 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."\textsuperscript{23}

And it was held repeatedly, under these sections, that if a trust was void as such because for an illegal purpose, it could be given effect as a power in trust.\textsuperscript{24} The California Code, as originally adopted, contained a section in its title on powers, corresponding to section 58 of the New York Revised Statutes. But it will be recalled that the title on powers in the California Code was repealed shortly after its adoption. As appeared from the discussion of the decision in Estate of Fair this fact has led to an important difference between the law of trusts of this state and that of New York. The California law of trusts is much more circumscribed than the law of New York. In this state, if a trust be created for an illegal purpose it is void, and cannot be given effect as a power in trust.

Despite this difference the New York cases are excellent authorities respecting the problem now under discussion; and one of the most instructive of these is Cooke v. Platt.\textsuperscript{25} In this case a testator devised his estate to trustees, in trust to partition it among his children after the payment of his debts. The trustees were given the power, in their discretion, to sell the trust estate. The court held that, under section 55 of the Revised Statutes of New York, no valid express trust in land had been created. The trust to partition was void because not authorized by the section, but it could be given effect as a power in trust. Furthermore the trust could not be sustained upon the theory that it created a power to sell for the benefit of legatees, a legal purpose, because, in the language of the

\textsuperscript{22} Revised Statutes of New York, part II, c. 1, tit. 2, § 58. This section, and section 59 of the Revised Statutes of New York, were, with slight immaterial changes, re-enacted as section 99 of the Laws of 1909, c. 52; see 7 Cumming and Gilbert's Consolidated Laws of New York, 2 ed., 7351.

\textsuperscript{23} Supra, n. 22.

\textsuperscript{24} Townshend v. Frommer (1891) 125 N. Y. 446, 26 N. E. 805; Cook v. Platt (1885) 98 N. Y. 35; Manice v. Manice (1871) 43 N. Y. 303; Crittenden v. Fairchild (1869) 41 N. Y. 289.

\textsuperscript{25} Supra, n. 21.
court, it is essential to the creation of a valid trust to sell “that the power of sale conferred upon the trustees must be absolute and imperative, without discretion, except as to the time and manner of performing the duty imposed, and that it is not sufficient to invest the trustee with a merely discretionary power of sale, which he may or may not exercise at his option, and which does not operate as a conversion. The sale or other disposition mentioned in the statute must be the direct and express purpose of the trust. Any other construction would open the door to an evasion of the manifest intention of the legislature to prevent the separation of the legal title and beneficial interest in lands through the medium of a trust, except in the specific cases and for the precise purposes enumerated in the statute.” The conclusion was that title did not vest in the trustees, but in the heirs of the testator, subject to the execution of the powers to partition and sell.

This case of Cooke v. Platt has been followed in New York where it has been held in several cases that a valid trust to sell cannot be created unless the duty to sell is imperative. The principle of these cases is certainly sound. In the first place the statute of both New York and California which prescribes the purposes for which trusts may be created applies to trusts, and not powers. Consequently when a power is conferred upon a trustee it cannot be regarded as a trust within the statute. Furthermore, if a power could be so regarded, evasion of the purpose of the law would be simple, as pointed out in Cooke v. Platt. If there be no imperative duty upon a trustee to perform an act authorized by the statute, if mere powers are conferred upon him, which he may perform or not in his discretion, there is a passive trust, a separation of the legal and equitable estate for a purpose not authorized by the law.

The important point now to be determined is whether the rule of Cooke v. Platt prevails in California.

The case of Carpenter v. Cook definitely decides that it does. This case was an action by trustees to quiet title to land which was the subject of a trust declaring that the trustees, during the trustor’s life, should hold the land, and its rents for his use, and whenever directed by him, should sell, or transfer the property, and hold the proceeds of such sale or property received in exchange therefor, to his use. The court held that it was a “trust, primarily, ‘to hold’ the

27 (1901) 132 Cal. 621, 64 Pac. 997.
property, and its rents and income, 'to the sole use and behoof of
the settlor.' . . . a mere passive trust," not for any purpose author-
ized by section 857, and, therefore, void. The trust could not be
sustained as a trust to receive, and apply rents, under the third sub-
division of that section, because the trustees are not directed to
apply the rents to the use of the trustor, but to hold them to his use,
and consequently the trustor may direct the trustees to dispose of
the rents in any manner he may desire. Nor could it be sustained
as a trust to sell, and apply the proceeds of the sale, under the first
subdivision of that section, because, in the language of the court, in
such a trust "it is essential . . . that the duty upon the trustees to
sell should be imperative," and no such duty was imposed. The
case of Cooke v. Platt was cited in support of this statement.

This case of Carpenter v. Cook has been cited with tacit ap-
proval, but its principle, that a trust in real property, to be valid
under section 857 of the Civil Code, must be imperative, has never
been directly affirmed. It remains to inquire whether it has been
disapproved.

It might be contended that the authority of Carpenter v. Cook
has been impaired by the recent case of In re Wellings' Estate; and
consequently the latter case deserves careful consideration. In this
case the will provided that the trustee should hold property in trust
for the following purposes:—"to care for, manage, and control the
same, to bargain, sell and convert into money," and to invest and
reinvest. It was contended that the trust was invalid; first, because
it was a trust to bargain, that is, to exchange real property, an
illegal purpose; and, second, that a trust to sell must be imperative,
and not discretionary. The court sustained the trust. Assuming,
but not deciding, that a trust to exchange real property is invalid,
it held that the word "bargain" was used in the sense of selling, and
did not mean exchange. And it decided that the second contention,
in which we are now particularly interested, was answered "not only
by the language of the will itself with reference to the power of sale,
but as well by the indicated rulings of this court in Estate of Hey-
wood, 148 Cal. 184, 82 Pac. 755; Estate of Aldersley, 174 Cal. 366,
1153." But, as we have seen, the last two cited cases are not in
point;—in those cases the question, whether to constitute a trust to
sell the direction to the trustee must be imperative, did not arise,

28 Estate of Duffill (1919) 180 Cal. 748, 759, 183 Pac. 337, 341; Hofsas v.
Cummings (1904) 141 Cal. 525, 529, 75 Pac. 110, 111.
29 (1925) 197 Cal. 189, 240 Pac. 21.
but it was held that where a trust was created for a valid purpose, there might be conferred upon the trustee a discretionary power of sale. This question did not arise in Estate of Heywood either, and so we can dismiss this case with the same remark, that it is not in point.\(^3^0\) Therefore, it can be said that none of the cases cited in Re Wellings' Estate are in conflict with the rule of Cook v. Carpenter. And in this connection it is interesting to note that neither Cook v. Carpenter, nor the New York cases, were cited in the decision in Re Wellings' Estate, or in the briefs. Furthermore, the language of the will in the latter case is certainly capable of being construed as imposing an imperative duty upon the trustee to sell, and consequently it should have been so construed, under the rule that a will should be construed, whenever possible, to sustain rather than destroy a trust. This was stated, in effect by the court. Hence the decision of the point, whether a trust to sell must be imperative in order to be valid under section 857, was not necessary. The conclusion is that In re Wellings' Estate does not impair the authority of Carpenter v. Cook.

There is, however, another case, decided by the Circuit Court of Appeals of the Ninth Circuit, which might be construed to be a decision directly in conflict with Carpenter v. Cook. In Roberts v. Taylor\(^3^1\) property had been conveyed to the defendant under an agreement by which he had agreed to manage it, to pay one-half of

\(^{30}\) Although not in point this case (Estate of Heywood) has an interesting bearing upon the general subject under discussion. In that case the trust was to "manage" property, to collect its income, and to pay certain portions thereof to the testator's wife and daughter. It also provided that upon the wife's death one-half of the trust estate was to vest in the daughter, and one-half in the testator's brothers and sisters, or if the daughter should die before the wife, the whole thereof was "to be divided" among the latter relatives. It was contended that the trust was void because created for two alleged illegal purposes, namely, "to manage," and "to divide" the trust estate. The court held that, under the third subdivision of section 857, the trust was a valid trust to receive, and disburse the income of real property, that the trustee would have had the implied power to manage the property, if this power had not been expressly conferred upon him; and that the will did not create a trust "to divide," but that these words should be construed as a direct devise. The will also directed the trustee to apply any excess income after the payment of the annuities to the improvement of the real property. It was contended that this clause invalidated the will because for an illegal purpose. The court refused to decide the point because, to paraphrase its language, the primary trust declared by the will was valid, the provision in question was entirely separable from it, and, therefore, even if invalid, it would not affect the decision of the one point the court was called upon to decide, the validity of the primary trust. It is true that the will did give the trustees a discretionary power to sell, but no attack, based on this clause, was made upon the will and the question whether a trust to sell, as distinguished from a power, must be imperative was not even mentioned by the court.

\(^{31}\) (1924) 300 Fed. 257.
its net income to the grantor during her lifetime, and, within one year after her death, to pay $5,000, out of the net proceeds of the property, to each of the persons represented by the plaintiffs in the action. The agreement provided that the absolute title to the property should be deemed to have vested in the defendant, and that no duty imposed upon him thereunder should affect or impair this title. It also stated that the defendant, as owner, could sell any of the property upon such terms as he should deem fit. After this agreement had been made the grantor and the defendant made another agreement cancelling the terms of the former in plaintiffs' favor. The defendant, in the appellate court, contended that this agreement created no trust for several reasons. Only one of these is important here. We quote from the opinion:

"It is contended that section 857 of the Civil Code includes provision for all permissible trusts in the state of California, and that the agreement in this case comes within none of them unless it be subdivision 1, which recognizes an express trust to sell and convey real property and to hold or reinvest the proceeds; but it is said that, in order to comply with that provision, the power to sell must be imperative, and that here it is not imperative. . . . The Supreme Court of the state does not so construe the section, nor does it hold that, to bring a trust within the provision of subdivision 1 of section 857, the power to sell must be imperative. In Estate of Aldersley, 174 Cal. 366, 163 Pac. 206, the court upheld a trust in which the power to sell was given, if deemed advisable, or if it became necessary. A similar view of the section was taken in Aldersley v. McCloud, 35 Cal. App. 17, 24, 168 Pac. 1153."

The conclusion of the court was that a trust had been created in plaintiffs' favor, which had not been revoked by the later agreement, in which they had not joined.

Is this decision in conflict with Carpenter v. Cook, which, it should be noted, was not cited in the opinion? We do not think so. The court did not agree with the claim that the trust could only be considered valid as a trust to sell falling within subdivision one of section 857, because, while discussing another point, it pointed out that the effect of the agreement was to create a trust to collect rents and apply them to the use of beneficiaries, falling within subdivision three of section 857. In other words the case was the same as the Morffew and Aldersley cases,—there was a trust for a valid purpose, and, in addition, a common law power of sale. Hence a ruling on the question, whether a trust to sell must be imperative to fall within the statute, was not necessary to a decision of the case. Therefore the statement of the court respecting this point can be regarded as a dictum, which is not supported by the cases cited.
This paper can very properly be brought to a conclusion with a review of Roberts v. Taylor. This case serves to illustrate that our law respecting fundamental rules of property is in a deplorable state of confusion and uncertainty. This condition, in our opinion, is due to the failure on the part of the courts to hold that common law powers do exist in this state, and that they are not governed by section 857 of the Civil Code. When these propositions are established the rule, which, as we have pointed out, is deducible from the discussion in Estate of Fair, and is supported, at least indirectly by our cases, will be recognized as the law; it will then be settled that when a trustor creates a valid trust in real property by imposing an imperative duty upon his trustee to perform one or more of the acts authorized by section 857, he can also confer upon him common law powers without restriction to effectuate the purpose of the trust. At the same time there will be no doubt as to the principle of Carpenter v. Cook, which, as we have already pointed out, is necessarily and logically a part of our law of trusts;—under our system the legal and equitable ownership of land can only be separated for the authorized purposes, and, therefore, to allow a trustee a discretion as to whether he will perform the purpose of the trust is to countenance an evasion of the primary purpose of the law, to permit the creation of passive trusts.

We can now give our hesitating and diffident opinion concerning the validity of the trust declared in John Doe's will. To our mind the crucial point is this;—can the trust be regarded as a trust to receive rents and pay them to beneficiaries falling within the third subdivision of section 857? Although the instrument does not use literally the terms of this subdivision, it does not convey real estate to the trustee "to receive the rents and profits, and pay them to" the beneficiary; yet, under the liberal construction which the instrument should receive to maintain the trust, it can be construed as creating a valid trust under this subdivision. If then we assume that our conclusions respecting the law are correct, that where a valid trust in land is created the declaration of trust may give the trustee any common law powers desirable to effectuate the purpose of the trust, it follows that the trustee of John Doe's will may exercise, at his discretion, any of the powers conferred upon him; it may, for instance, exchange the real property in the trust estate, or mortgage or lease it for any purpose it may have in mind. But the significant fact is that, in the present state of the law, plausible arguments could be advanced against the validity of the will. For instance it might be contended that the power to mortgage, not for the benefit of
beneficiaries, or to satisfy a charge on the real property, as authorized by section 857, but for any purpose, and the power to exchange, must be regarded as trust purposes, invalidating the trust because unauthorized, and not as powers, conferred upon a trustee of a trust created for a legal purpose. Or it might be contended, on the other hand, that the instrument gives the trustee a discretion to perform certain acts, but imposes no imperative duty on the trustee to perform an act authorized by section 857; and hence, under the rule of Carpenter v. Cook, it creates a passive trust which is void. Whether the trust be valid or invalid, the very important point is that plausible arguments against its validity may be advanced. Is it not clear that measures should be immediately concerted to rid this branch of the law of these uncertainties and confusion?

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