#69 12/28/67

Memorandum 68-10

Subject: Study 69 - Powers of Appointment

Attached to this memorandum is a considerable volume of material pertinent to this study:

(1) Research study by Professor Powell (gold cover)

(2) Supplementary material to research study prepared by Professor Powell (blue cover)

(3) Other background material provided by staff (pink cover)

For general background, you may wish to read pages 1806-2045 of Volume 3 of the Restatement of Property. A study of this portion of the Restatement is a good way to acquire the expert knowledge you will need to make policy decisions in this field of law.

In addition, for general background, we suggest that you read Professor Powell's research study (gold cover) and the law review article and note included in the first portion of the background material (pink cover) provided by the staff.

Authorization for publication of law review article by Professor Powell. The Commission has previously approved payment to Professor Powell for his research study. Professor Powell is revising the study with a view to preparing an article for publication in the California Law Review or some other law review and requests permission to publish the article based on his study. If the article is published, a note to the article will indicate that it was prepared for the Law Revision Commission and represents the views of its author and not the views of the Commission or its members. The study must be published in a law review not later than July 1968 if we are to reprint it in the pamphlet containing our recommendation to the 1969 Legislature.

BACKGROUND

Use of powers of appointment permits increased flexibility in estate planning and may result in tax savings. See study at pages 1-2.

The 1872 California Civil Code contained 62 sections (Civil Code Sections 878-940) on powers of appointment, but these sections were repealed in 1874. See Report of the Commissioners to Examine the Codes, 4 Appendix to Journals of Senate and Assembly, 20th Session, No. 1, p.5 (Oct. 11, 1873)("We have proposed to strike out the whole Chapter on Powers, as wholly unsuited both to the wants and habits of the people, retaining one or two sections by amendment of other portions of the Civil Code, in places where the provisions of those sections properly belong."). The repeal of these 62 sections created uncertainty as to whether powers of appointment existed in California; it was not until 1935 that the California Supreme Court held that the common law of powers of appointment is in force in California.

The California decisions on powers of appointment cover only a small portion of the law in this field. In many areas, the California law on powers of appointment is unclear.

California statutes deal with only a few narrow areas of the law: (1) the releasability of powers, (2) the efficacy of a will to exercise a power not mentioned in the will, and (3) the taxation of appointive assets. See also. Civil Code Section 781 ("A general or special power of appointment does not prevent the vesting of a future estate limited to take effect in case such power is not executed."). These statutes (except for the tax statutes) may need revision. Another pertinent section is Civil Code Section 860

("Where a power is vested in several persons, all must unite in its execution; but, in case any one or more of them is dead, the power may be executed by the survivor or survivors, unless otherwise prescribed by the terms of the power.").

The consultant recommends that:

> a statute be drafted incorporating those statutes heretofore adopted (with whatever modifications may be agreed upon), and incorporating into a logically organized whole, the positions heretofore taken by our courts on specific points (again with such modifications as may seem wise) plus a succinct statement of the further rules which are to be applied as the common law of California on powers of appointment. A catch-all section adopting the common law on all points not covered in the statute will narrow to a small compass the topics left to minute research.

He makes this recommendation because the codification of the common law on all of those points likely to be litigated with any frequency will save the courts and attorneys much time in research and litigation and will provide certainty in the law that will encourage the use of powers of appointment. Michigan, Wisconsin, and New York have recently enacted statutes which adopt the consultant's suggestion.

The legislation recommended by the consultant is intended to codify the common law and California decisions stating the common law with two exceptions:

(1) The recommended legislation would change the California rule of constructional preference for the non-exclusionary power. See study at page 9.

(2) The recommended legislation would permit creditors of a donee having a general power of appointment to reach the appointive assets for the satisfaction of their claims. See study at pages 9-10.

These two changes in the California law would conform our law to the modern view expressed in recently enacted statutes.

RECOMMENDED LEGISLATION

The legislation recommended by the consultant is set out on pages 12-22 of the study. Except for the two changes in California law previously noted, the recommended legislation is intended to codify the principles of common law that are most likely to be litigated. Assuming that the Commission determines that these common law principles should be codified, the primary question with respect to each section of the recommended legislation is whether the section is the best possible expression of the common law principle.

We have requested the consultant to be present at the meeting at which time we plan to go through the recommended legislation section by section. We include staff comments on each section below. We hope that the consultant will be available to supplement these comments and to explain further the purpose, effect, and policy questions presented by each section.

The background material prepared by the staff (pink cover) includes: (1) The 1943 Minnesota statute (referred to hereafter as "Minn. 1943"); (2) The New York Real Property Law sections enacted in 1964 (referred to hereafter as "N.Y. 1964"); (3) The 1965 Wisconsin statute (referred to heareafter as "Wis. 1965"); (4) The New York Estates, Powers, and Trust Law sections which superseded the 1964 New York statute (referred to hereafter as "E.P.T.L."); (5) The 1967 Michigan statute (referred to hereafter as "Mich. 1967"). Tabs are included to permit easy reference to the pertinent statutes

which are referred to in the comments that follow each section of the recommended legislation in the research study and in the staff comments in this memorandum.

The staff background materials also include a Columbia Law Review Note on the New York statute and a critical article on the Wisconsin statute. A study of these will provide you with information that will assist you in selecting appropriate language for the California statute. We note any comments in these two publications that are pertinent to a particular section of the proposed legislation.

The following are section by section comments on the legislation recommended by the consultant on pages 12-22 of the research study. Your attention is also directed in the following comments to additional provisions that might be included in legislation on this subject.

Chapter . Powers of Appointment -- page 12

Comment. This chapter does not codify all of the law relating to powers of appointment. It contains statutory provisions dealing with the problems most likely to be involved in litigation so that the bench and bar will have positive statutory rules concerning these problems. But many minor problems are not covered by this chapter or other statutes; these problems are left to court determination under the common law which remains in effect. See Section 1 and the Comment to that section.

Other states that have recently enacted legislation dealing with powers of appointment have adopted the same approach. They have codified the important common law principles and have left

minor problems to court determination. See MINN. STATS. §§ 502.62-502.78; WIS. STATS. §§ 232.01-232.21; N.Y. ESTATES, POWERS AND TRUST LAW §§ 10-1.1--10-9.2; MICH. STATS. §§ 26.155(101)-26.155(122).

> Note: The location of the statute in the Civil Code will be considered when a tentative recommendation is prepared.

Section 1 -- page 12

The staff suggests that this section read:

> Except as specifically modified by statute, the common law as to powers of appointment is the law in this state.

This language is based on Minn. 1943 § 502.62.

Comment. Section 1 codifies the holding in Estate of Sloan, 7 Cal. App.2d 319, 47 P.2d 1007 (1935), that the common law of powers is in effect in California. The introductory "except as specifically modified by statute" clause recognizes that in some cases the common law rules as to powers of appointment are changed by the provisions of this chapter (e.g., Sections 9-11) and other statutes (e.g., REV. & TAX. CODE §§ 13691-13697).

Section 1 makes clear that the common law remains in effect as to matters not covered by statute and also that the statutes state common law principles unless those principles are specifically modified by statute. The reference to "the common law" does not mean the common law as it existed in 1850 when the predecessor of what is now Civil Code Section 22.2 was enacted; rather it means the modern common law rule as developed by the courts exercising their powers for change to meet new situations. See, e.g., Fletcher v. Los Angeles Trust & Savings Bank, 182 Cal. 177, 187 Pac. 425 (1920).

In determining the modern common law rule, assistance may be obtained from 3 Restatement of the Law of Property, pages 1808-2045 (1940).

Section 1 is based on language taken from Minnesota Statutes Section 502.62. For other statutes that take the same approach as Section 1, see WIS. STATS. § 232.19, N.Y. ESTATES, POWERS AND TRUSTS LAW § 10-1.1; MICH. STATS. § 26.155(119).

> Note: The Wisconsin and Michigan statutes adopt a similar approach but include the following sentence: "This section is not intended to restrict in any manner the meaning of any provision of this chapter or any other applicable statute." The purpose of this additional sentence is explained by Professor Effland (blue law review article--page 589) as follows:
>
> > The last sentence of the section quoted should prevent any argument of strict construction of the new statutes on the grounds that they derogate from the common law. Only if there is no statutory provision should one resort to a common-law solution to the problem.
>
> There is considerable merit in the additional sentence. However, if it were added to the section, the staff suggests that it might be desirable to indicate in the comments to certain sections that the discussion of the subject matter of that section in the Restatement of the Law of Property is pertinent. Certainly, we would not want the addition of this sentence to make inapplicable the case law that applies a common law rule incorporated in the statute. Perhaps a good solution to this problem would be to delete the word "specifically" from the section and to add to the comment a statement that the provisions of the statute should not be given a strict interpretation on the ground that they are in derogation of the common law. See Mich. 1967 § 26.155(119) for another possible wording of Section 1 of the recommended statute.

Definitions Not Included in Recommended Legislation

The legislation recommended by the consultant does not contain definitions of "property," "power," "power of appointment," "donor," "donee," "appointee," "creating instrument," "gift in default," or "release." See MICH. STATS. § 26.155(102)(a)-(g), (j), (k). For comparable definitions, see WIS. STATS. § 232.01 (1)-(3), N.Y. ESTATES, POWERS AND TRUST LAW §§ 10-2.1, 10-2.2, and 10-3.1. Some of these definitions were not included in the 1964 New York statute but were added when EPTL 10-2.2 was enacted in 1967. A comment on this new section in the Brooklyn Law Review states:

> EPTL 10-2.2 is a new section which defines words commonly used in the law of powers and frequently used in the statutes. It might be noted that the word "appointee" is defined to include not only persons in whose favor a power is exercised, but also persons in whose favor such a power is exercisable. As used classically in the law of powers, that word relates to the person in whose favor a power is exercised. Persons in whose favor a power is exercisable are usually referred to as objects of the power. The broader definition was used solely for drafting convenience. [Footnotes omitted.]

Note that "object" or "non-object" of the power is used in Sections 12, 21, and 23 of the legislation recommended by the consultant, but these sections could be redrafted to avoid the use of these terms. Various sections in the recommended legislation use "permissible appointees" to refer to the objects of the power.

Section 2 -- page 12

Comment. Section 2 is based on the distinction between general and special powers found in the state and federal estate tax laws. See CAL. REV. & TAX. CODE § 13692; INT. REV. CODE § 2041(B)(1). Although this chapter generally follows the prevailing modern terminology as reflected in the Restatement of Property,

Section 2 departs from the common law as embodied in Section 322 of the Restatement and adopts instead the general professional usage which is in accord with the definition of the federal and state estate tax laws. Section 2 is the same as subdivision (b) of New York Estates, Powers and Trust Law Section 10-3.2 and is somewhat similar to Wisconsin Statutes Section 232.01(4)-(6) and Michigan Statutes Section 26.155(102)(h)(i)

The exceptions contained in the tax law definitions are omitted because those exceptions have an importance significant only in tax problems. The omission of these exceptions follows the example of New York, Wisconsin, and Michigan.

The language of Section 2 has the same meaning as the comparable language of the Internal Revenue Code defining a general power for purposes of the federal estate tax law. The power is general so long as it can be exercised in favor of any one of the following: the donee, his estate, his creditors, or the creditors of his estate. To be classified as general, the power does not have to give the donee a choice among all of this group. It is sufficient if the power enables him to appoint to any one of the group; otherwise no testamentary power could be general, since the testator cannot appoint to himself by his will. A special power, on the other hand, is one that permits the donee to appoint to a class that does not include himself, his estate, his creditors, or the creditors of his estate. If the class among whom the donee may appoint includes specified persons and also includes himself, his estate, his creditors, or the creditors of his estate, the power is general rather than special.

Note: Consideration should be given to the language used in the Wisconsin and Michigan statutes. See also the discussion of this part of the Wisconsin statute in Professor Effland's article (blue -- pages 591-594). The note from the Columbia Law Review (yellow -- pages 1292-1293) suggests that the definition contained in Section 2 of the recommended legislation is inadequate and recommends in effect the definitions contained in the Wisconsin and Michigan statutes.

Section 3 -- page 12

Comment. Section 3 differentiates among powers of appointment by focusing upon the time at which the power is to be exercised. Under this section, powers may be presently exercisable, testamentary, or "otherwise postponed." An example of a power which is "otherwise postponed" is one that cannot be exercised until the occurrence of a specific event, such as the donee's reaching majority.

Section 3 follows the common law embodied in the Restatement of the Law of Property, Section 321. For comparable sections in other recently enacted statutes, see MICH. STATS. § 26.155(102)(1) (defining a power of appointment that is "presently" exercisable); N.Y. ESTATES, POWERS AND TRUST LAW § 10-3.3. Section 3 is identical with New York Property Law Section 134 which was superseded by New York Estates, Powers and Trust Law Section 10-3.3.

Note: New York Estates, Powers and Trust Law Section 10-3.3 should be compared with recommended Section 3. The consultant states that Section 3 avoids the "muddy wording" of EPTL § 10-3.3.

Section 4 -- page 12

Comment. Section 4 provides a means for distinguishing those powers that the donee is under a legal duty to exercise and those that he is privileged to exercise or not as he chooses. Upon the

failure of the donee to exercise an imperative power, the assets are divided among the potential appointees rather than among the default takers. See Section 26.

Section 4 is the same in substance as New York Estates, Powers and Trust Law Section 10-3.4.

> Note: Only the New York statute has definitions of "imperative" and "discretionary" powers. The Restatement does not include similar definitions. Nevertheless, the definitions are useful in the drafting of the statute and should be included. See, for example, Section 12 which refers to an "imperative power."

Section 5 -- page 13

Comment. This definition of "exclusive" and "non-exclusive" powers has significance in connection with Section 18 which deals with the constructional preference for exclusive powers. See the Comment to Section 18.

Section 5 is similar to New York Estates, Powers and Trust Law Section 10-3.2.

> Note: Compare Section 5 with EPTL § 10-3.2 which was added to the New York statute when it was revised in 1967. The suggested wording seems better than the wording of the New York section. This section could be omitted; the defined terms are not used in the recommended legislation.

Section 6 -- page 13

Comment. Section 6 states the rules for the creation of a power of appointment. The section is the same in substance as New York Estates, Powers and Trust Law Section 10-4.1.

Subdivision (1) codifies existing California law. See Swart v. Security-First National Bank of Los Angeles, 48 Cal. App.2d 824, 120 P.2d 697 (1942). Subdivisions (2) and (3) likewise state existing California law. See Estate of Kuttler, 160 Cal. App.2d 332, 325 P.2d

624 (1958). Subdivision (4), which deals with a matter not considered by the California appellate courts, takes the same position taken by New York in New York Estates, Powers and Trust Law Section 10-4.1(4). Subdivision (4) is intended to prevent Treasury Regulations Sections 20.2056(b)-5(f)(7), which allow a marital deduction despite a spendthrift clause in the instrument creating the power, from nullifying the rights given creditors under Sections 8-11.

> Note: Compare the wording of the proposed section with the wording of the comparable section of New York Estates, Powers and Trust Law. The wording of the proposed section is the same as New York 1964 Section 136 which was superseded by Estates, Powers and Trust Law Section 10-4.1. The last sentence of the Comment is based on the comment to the comparable section of the New York law and corrects the last sentence of the comment contained in the research study.

Section 7 -- page 13

Comment. Section 7 embodies the common law rule of Restatement of the Law of Property, Section 324 and is substantially identical with New York Estates, Powers and Trust Law Section 10-5.1.

Section 8 -- pages 13-14

Comment. Section 8 codifies the common law rule that creditors of the donee are barred from reaching the property covered by a special power of appointment. The section is identical with New York, Estates, Powers and Trust Law Section 10-7.1.

> Note: The note in the Columbia Law Review (yellow -- pages 1292-1293) suggests that the definition of a special power of appointment when combined with this section permits the donee to avoid the claims of his creditors against the appointive assets while having a virtually unlimited choice of appointees. The note suggests that creditors be permitted to reach the assets unless the class of potential appointees is not "unreasonably large." Wis. 1965 Section 232.17(1) permits the donee's creditor's to reach the appointive assets

where the donee has either a general power or "an unclassified power which is unlimited as to permissible appointees except for exclusion of the donee, his estate, his creditors and the creditors of his estate, or a substantially similar exclusion." Under Wisconsin law, an unclassified power is one that is not a general or special power. A special power is a power excercisable only in favor of a class "so limited in size by description of the class that in the event of nonexercise of the power a court can make distribution to persons within the class if the donor has failed to provide for this contingency." The consultant believes that the Wisconsin provision is an unnecessary complication. See pages 605-609 Effland's law review article on the Wisconsin statute (blue pages).

Section 9 -- page 14

Comment. One of the most unsatisfactory aspects of the common law as to powers of appointment is the rule determining the rights of creditors of the donee. Under the common law, the "doctrine of equitable assets" allowed creditors of a donee to reach the appointive assets only when a general power of appointment had been exercised in favor of a person who was not a bona fide purchaser for value. This common law rule is not logical. Logically, the rights of the creditors should depend on the existence of the power, rather than upon its exercise. Modern legislation confirms the desirability of permitting creditors of a donee to reach for the satisfaction of their claims any appointive assets which the donee is able to appropriate to himself. See. N. Y. ESTATES, POWERS AND TRUST LAW § 10-7.2; WIS. STATS. § 232.17(1); MICH. STATS. § 26.155(113); MINN. STATS. § 502.70.

Where the power to appoint is both general and presently exercisable, the donee has, in substance, the equivalent of ownership as to the appointive assets. His creditors should be able to reach that which their debtor can appropriate to his own uses. The property thus made available can be either a present or a future interest.

The right of the creditor is, in no way, dependent upon the exercise of the power. Unlike the common law rule, the mere existence of the power is the operative fact essential to the right of the creditor.

Note: See also the consultant's comment to this section, discussion on pages 605-609 of Effland's article (blue), and discussion on pages 1297-1302 of the Columbia Law Review Note (yellow).

Section 10 -- page 14

Comment. Section 10 is, perhaps, unnecessary but it serves some precautionary purposes. It is substantially identical with New York Estates, Powers and Trust Law Section 10-7.3.

Section 11 -- pages 14-15

Comment. Under subdivision (1) of Section 11, creditors of the donee of a general power of appointment, which is in terms excercisable only at a future date (as for example by the will of the donee) can reach the appointive assets, prior to the arrival of the stipulated future date if the donee of the power was also its donor. Subdivision (1) codifies the common law rule. See Restatement of the Law of Property, Section 328.

Under subdivision (2), property covered by a general testamentary power of appointment which has become presently exercisable by the death of the donee can be reached by the donee's creditors. In such case, the appointive assets have come under the complete power of disposition by the debtor donee and hence are treated exactly the same as the other assets of the decedent. The principle expressed in subdivision (2) is the same as that expressed in Michigan Statutes Section 26.155(113)(4) and Wisconsin Statutes Section 232.17(3) and is a reasonable corollary of Section 9.

Note: Compare New York Estates, Powers and Trust Law Section 10-7.4 which does not apply to testamentary powers which have become presently exercisable by the death of the donee. For the reasons given in the Comment to Section 11, the staff prefers the rule recommended by the consultant and embodied in Section 11 of the recommended legislation. See also the criticism of the New York limitation at pages 1300-1301 of the Columbia Law Review Note (yellow). Note the last sentence of the consultant's comment to Section 9 and see Wisconsin Statutes Section 232.17(3).

Section 12 -- page 15

Comment. Section 12 is substantially the same in substance as former Civil Code Section 1060 (to be repealed in this recommendation). The words "in trust" have been omitted as unnecessary; the section applies to a power "other than a power which is imperative," and the definition of an "imperative" power in Section 4 makes it unnecessary to include the words "in trust." See the Special Note to Restatement of the Law of Property, Section 320, indicating that the use of the term "power in trust" in the sense of a mandatory power is potentially misleading.

The words "nor shall any release of a power be permissible when the result of the release is an inter vivos exercise of a solely testamentary power" have been added. California has taken the position that a power created, in terms, so as to be exercisable only by will, cannot be effectively exercised by inter vivos act. Childs v. Gross, 41 Cal. App.2d 680, 107 P.2d 424 (1940); Briggs v. Briggs, 122 Cal. App.2d 766, 265 P.2d 587 (1954). The Restatement of the Law of Property takes the same view in Section 346(a). The language added to Section 12 will preclude this otherwise accepted position to be nullified by use of a release. Such a release to all persons except a designated person permits the donee, by inter

vivos act, fully to exercise the power which the creator of the power intended to remain unexercised until the donee's death. The additional language will preclude the use of a release to defeat the donor's intent.

> Note: The additional language recommended by the consultant is in accord with the argument made in the Columbia Law Review Note under "Release and Contracts to Appoint" at pages 1294-1297 (yellow).

Section 13 -- pages 15-16

Comment. Section 13 states the common law rule. See the Restatement of the Law of Property, Section 339. The section is identical with New York Estates, Powers and Trust Law Section 10-5.2 and Michigan Statutes Section 26.155(110)(1).

Section 14 -- page 16

Comment. Section 14 states the common law rule. See Restatement of the Law of Property, Section 340. Cf. Briggs v. Briggs, 122 Cal. App.2d 766, 265 P.2d 587 (1954); Childs v. Gross, 41 Cal. App.2d 680, 107 P.2d 424 (1940). Section 14 is identical with New York Estates, Powers and Trust Law Section 10-5.3 and Michigan Statutes Section 26.155(110)(2).

Section 15 -- pages 16-17

Comment. Section 15 deals with the donee's capacity and the formalities required to be observed in exercising a power of appointment.

Subdivision (1). Under this subdivision, the normal rules for determining capacity govern the capacity of the donee to exercise a power of appointment. The subdivision states the common law rule

embodied in the Restatement of the Law of Property, Section 340 and is substantially identical with Michigan Statutes Section 26.155(105)(1), Minnesota Statutes Section 502.66, and Wisconsin Statutes Section 232.05(1).

Subdivision (2). This subdivision states the common law rule embodied in the Restatement of the Law of Property, Section 346 but adds an "except" clause similar to those included in Minnesota Statutes Section 502.64, New York Estates, Powers and Trust Law Section 10-6.2(3), and Michigan Statutes Section 26.155(105)(2). Few donors prescribe that a power of appointment can be exercised only by an inter vivos instrument. If and when such a prescription is encountered, it is reasonable to say that "all the purposes of substance which the donor could have had in mind are accomplished by a will of the donee" (see RESTATEMENT OF PROPERTY, § 347, Comment b).

> Note: Note that New York Estates, Powers and Trust Law Section 10-6.2(3) reads: "Where the donor has made the power exercisable only by deed, it is also exercisable by a written will unless exercise by will is expressly excluded". (emphasis added). Wisconsin considered and rejected adding an except clause. See Effland's article at page 600 (blue).

Subdivision (3). This subdivision permits the donor to dispense with normal formalities if he so wishes. Thus, for example, a donor could create a trust with a power and provide that the donee "may appoint by written instrument signed by him and delivered to the trustee." Subdivision (3) is substantially the same as Michigan Statutes Section 26.155(105)(3) and similar to New York Estates, Trusts and Powers Law Section 10-6.2(1).

Subdivision (4). In some cases, the donor may prescribe greater formalities for the donee's exercise of the power of appointment than those normally imposed by law. Subdivision (4) provides in substance that in such a case the power may be exercised by formality legally sufficient to dispose of the appointive property and the direction that additional formality be observed may be disregarded. The subdivision is designed to facilitate the exercise of a power of appointment without unnecessary formalities and avoids a possible trap that would exist if the formalities normally imposed by law were observed but the additional formality prescribed by the donor were inadvertently omitted.

Subdivision (4) adopts the same policy as Minnesota Statutes Section 502.65 and New York Estates, Powers and Trust Law Section 10-6.2. It is more liberal than the common law rule embodied in the Restatement of the Law of Property, Section 346.

> Note: The staff believes that subdivision (4), as recommended by the consultant, is not clear. We prefer subdivision (2) of New York Estates, Powers and Trust Law Section 10-6.2, which reads:
>
> > (2) Where the donor has directed any formality to be observed in its exercise, in addition to those which would be legally sufficient to dispose of the appointive property, such additional formality is not necessary to a valid exercise of such power.
>
> The Wisconsin statute rejects this subdivision. Under the Wisconsin statute, if the donor wishes to specify greater formalities than those normally imposed by law, he may do so under the statute; he can, for example, specify appointment by a will executed according to the law of another state or a deed witnessed and acknowledged (although in Wisconsin a deed is valid but not recordable even though not witnessed or acknowledged). See the discussion at pages 599-600 of the Effland article (blue). The Michigan statute (Section 26.155(105), (2), (3) is a good expression of the Wisconsin position on this matter.

Subdivision (5). The donor may require a specific reference to the power as a condition for its exercise. In fact, it is common practice in creating marital deduction trusts to make exercise of the power conditional on such express reference. The purpose of this is to preclude the use of form wills with "blanket" clauses exercising any powers of appointment. The use of these clauses may result in passing property without knowledge of the tax consequences, sometimes to unintended beneficiaries. Subdivision (5) permits the donor to require an express reference to the power in order to assure a deliberated exercise by the donee. The subdivison embodies the rule set out in Wisconsin Statutes Section 232.03(1) and Michigan Statutes Section 26.155(104)(last sentence). As to the effect of subdivision (5) on prior California law, see the Comment to Section 17(d).

Subdivision (6). This subdivision reflects the same policy as Civil Code Section 860. It embodies the rule stated in Minnesota Statutes Section 502.68, New York Estates, Powers and Trust Law Section 10-6.4, Wisconsin Statutes Section 232.05(3), and Michigan Statutes Section 26.155(105)(4).

Subdivision (7). This subdivision reflects the same policy as Civil Code Section 860. It embodies the rule stated in Minnesota Statutes Section 502.67, New York Estates, Powers and Trust Law Section 10-6.7, Wisconsin Statutes Section 232.05(4), and Michigan Statutes Section 26.155(105)(5).

Note: To conform to subdivision (7), Civil Code Section 860 should be amended to read:

> Where a power is vested in several persons, all must unite in its execution; but, in case any one or

more of them is dead or is legally incapable of exercising the power, the power may be executed by the ~~survivor or survivors~~ others, unless otherwise prescribed by the terms of the power.

In the Michigan statute an additional phrase is added "unless the creating instrument, construed with regard to surrounding circumstances, manifests a contrary intent."

Subdivision (8). This subdivision is included to make clear that Section 15 does not limit the power of a court under Section 26. Section 15 is the same in substance as the introductory clause of New York Estates, Powers and Trust Law Section 10-6.2.

Note: See the consultant's comment to subdivision (8).

Section 16 -- page 17

Comment. Section 16 codifies the rule of California Trust Co. v. Ott, 59 Cal. App.2d 715, 140 P.2d 79 (1943), which applied the rule of the Restatement of the Law of Property, Section 344.

Section 17 -- pages 17-18

Comment. Subdivisions (a), (b), and (c) are accepted common law. See RESTATEMENT OF PROPERTY §§ 342, 343; Reed v. Hollister, 44 Cal. App. 533, 187 Pac. 167 (1919); Childs v. Gross, 41 Cal. App.2d 680, 107 P.2d 424 (1940). The substance of these subdivisions is embodied in New York Estates, Powers and Trust Law Section 10-6.1(1), (2), (3); Wisconsin Statutes Section 232.03(2); and Michigan Statutes Section 26.155(104).

Subdivision (d) changes the rule developed by case law interpreting Probate Code Section 125. Estate of Carter, 47 Cal.2d 200, 302 P.2d 201 (1956), interpreted the section to require a holding that

a residuary clause,which did not mention a general testamentary power with gifts in default,exercised the power despite the donee's specific intent not to exercise the power. See also Childs v. Gross, 41 Cal. App.2d 680, 107 P.2d 424 (1940), construing Probate Code Section 125 to apply both to land and personalty. Subdivision (d) establishes a rule that represents a substantial return to the common law rule. Under this subdivision, a residuary clause exercises the power only under the circumstances stated. The subdivision does not apply where the creating instrument makes a gift in default or where the creating instrument requires, as is frequently the case, that the donee make a specific reference to the power or where the donee manifests an interest not to exercise the power. Subdivision (d) will eliminate the trap for the unwary that defeated the donee's clearly provable intent in Estate of Carter, supra. The subdivision embodies the rule of Wisconsin Statutes Section 232.03(2).

Note: Subdivisions (a) and (b) refer to a deed or will. The other statutes all refer to an instrument. Is the limitation to a deed or will desirable? It seems undesirable in subdivision (a) since a power may be exercised by an instrument other than a deed or will. The Restatement refers to deed or will rather than to instrument.

The consultant identifies various alternatives to subdivision (d) in his comment to that subdivision.

For an excellent discussion of the problems dealt with in Section 17, see pages 594-599 of Effland's article on the Wisconsin statute (blue). You should read this discussion.

Section 18 -- page 18

Comment. Section 18 deals with the problem whether the donnee of a special power can appoint all of the property to one appointee and exclude others. For example, if the donee is given power "to appoint to his children," must some share be given to each child,

and if so, what is the minimum share? If the power is "exclusive" the donee may appoint to one or more of the permissible appointees and exclude others. If the power is "nonexclusive," he must appoint a minimum share or amount specified in the creating instrument to each member of the class of permissible appointees. Section 18 provides that all powers are construed to be exclusive except to the extent that the donor has specified a minimum or maximum amount. It embodies the common law constructional preference for exclusive powers as embodied in the Restatement of the Law of Property, Section 360.

Section 18 changes California law. See Estate of Sloan, 7 Cal. App.2d 319, 47 P.2d 1007 (1935), which is contrary to a large body of contra common law holdings collected in 69 A.L.R.2d 1285 (1960).

Section 18 is phrased like Wisconsin Statutes Section 232.07. See also New York Estates, Powers and Trust Law Section 10-5.1 and Michigan Statutes Section 26.155(107) which also express the modern preference for exclusive powers.

Note: See discussion of this problem in Effland's article at pages 601-602 (blue pages).

Section 19 -- page 19

Comment. Section 19--which embodies the common law rules found in the Restatement of the Law of Property, Sections 256, 357--makes clear that, under a general power to appoint, the donee has exactly the same freedom of disposition as he has with respect to his owned assets.

Section 20 -- page 19

Comment. See consultant's comment to this section.

Section 21 -- page 19

Comment. See consultant's comment to this section.

Section 22 -- page 20

Comment. See consultant's comment to this section.

Section 23 -- page 20

Comment. See consultant's comment to this section.

Sections 24 and 25 -- pages 20-21

Comment. See the consultant's comment to these sections.

Sections 26-29 -- pages 21-22

Comment. See the consultant's comments to these sections. (We will insert appropriate language for "committee of his person.")

Additional section

Consideration should be given to the desirability of including the substance of Wisconsin Statutes Section 232.15 in the recommended legislation. See the discussion in Effland's article at pages 604-605 (blue).

Section 30 -- page 22

Comment. Section 30 embodies the common law rule of Restatement of the Law of Property, Section 366. Section 30 is worded exactly the same as Michigan Statutes Section 26.155(109), is substantially identical with New York Estates, Powers and Trust Law Section 10-9.1, and is very like Wisconsin Statutes Section 232.11.

Section 31 -- page 22

Comment. Section 31 makes one body of law--this chapter--applicable where a release is executed, a power exercised, or a right asserted after the effective date of this chapter. The section applies not only to powers but also as to the rule against perpetuities, and the rule as to lapse.

Note: The staff believes that Section 31 is an improvement over the other statutes cited in the consultant's comment to Section 31. With respect to the problem covered by Section 31, see Effland's article at pages 586 (last two lines) - 583 (blue) and Columbia Law Review Note at 1291-1929 (yellow).

Section 32 -- page 22

Note: We see no harm in including a severability clause. While such a clause should not be included unless there is some chance that it will be needed, we believe that it should be included because of Section 31.

Additional provisions that might be included in statute

Michigan statute: Section 26.155(111). See also Wisconsin Statutes Section 232.13.

New York statute: Section 10-5.4.

Respectfully submitted,

John H. DeMoully
Executive Secretary

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POWERS OF APPOINTMENT

Consultant's Study

(Including Recommended Legislation)

by

Richard R. Powell*

* This study was prepared for the California Law Revision Commission by Professor Richard R. Powell, Hastings School of Law. No part of this study may be published without prior written consent of the Commission.

The Commission assumes no responsibility for any statement made in this study and no statement in this study is to be attributed to the Commission. The Commission's action will be reflected in its own recommendation which will be separate and distinct from this study. The Commission should not be considered as having made a recommendation on a particular subject until the final recommendation of the Commission on that subject has been submitted to the Legislature.

Copies of this study are furnished to interested persons solely for the purpose of giving the Commission the benefit of the views of such persons and the study should not be used for any other purpose at this time.

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Powers of Appointment in California

A. Introduction:

Powers of appointment were constantly employed tools in English conveyancing, as is evidenced by the voluminous two-volume treatise concerning them (1234 pages) published by Snyden in 1823. The great English Chief Justice, Lord Mansfield who died in 1793 thus expressed in his will his reason for inserting a power of appointment:

> "Those who are nearest and dearest to me best know how to manage and improve, and ultimately in their turn to divide and subdivide, the good things of this world which I commit to their care, according to events and contingencies which it is impossible for me to foresee, or trace through all the mazy labyrinths of time and chance" (quoted in Bank of California Estate Planning Studies, Fall 1966).

They found the climate of the New World originally unsuitable to their use. Substantial accumulations of wealth were slow to grow and complex dispositions were unneeded. Perhaps, too, American conveyancers lacked the experience and finesse of their English predecessors. The decisions on powers of appointment reported from American courts down to 1900 were extremely few in number. An 1895 decision is the only judicial reference to powers of appointment found (by this researcher) in a California Report prior to 1900.[1]

In any state where wealth accumulations have developed, the absence of frequent use of powers of appointment is unfortunate. Their great utility lies in the flexibility of disposition which they make possible. A has succeeded in his lifetime in accumulating both money and descendants. Any disposition of his wealth made by A must be made with knowledge of only the facts occurring before A dies. By that time, perhaps, A can know considerable about his children but his real knowledge about the potentialities, peculiarities and reliability of his grandchildren is frequently close to zero. By creating a trust and conferring on his spouse or on his children or other person younger than himself a power to distribute the assets with the benefit of from 20 to 50 years more knowledge of events, still future when A dies, the ultimate disposition of the assets has a flexibility not otherwise obtainable.

During the past half century, income, death and gift taxes have grown like poppies on a mountain hillside of this state. It is still true that the most effective devices for minimizing these tax-bites is the power of appointment. This value may be ephemeral. The history of the law of taxation is full of races between lawyers to find existing loopholes and the lawmakers to plug the loopholes so found. So long as the loophole provided by powers of appointment exists (and it is nearly fifty years old already), lawyers owe to their clients resort to this device.[2]

Despite the indisputable advantages of increased flexibility and tax savings, California lawyers have been most hesitant in using powers of appointment. This attitude was wholly understandable while it remained uncertain whether California allowed powers of appointment.[3] That uncertainty ended more than thirty years ago.[4] The hesitance has nevertheless continued

with only a slight abatement. It is suggested that the reason for this continuance is a continued uncertainty and a continuing unwillingness to risk what may be found to be the common law - and hence the California law - as to powers of appointment.

The purpose of this study is to remove the reason for such continued hesitance, so that persons of wealth in California may have both the flexibility of disposition and the minimizing of taxation which powers of appointment so abundantly provide. To this end, this report contains (subsequent to this Introduction) six parts.

A. An exposition of those positions as to powers of appointment heretofore taken by the Courts of California;[5]
B. An exposition of the statutory ingredient in the California law as to powers of appointment;
   a. With suggested changes in Civil Code 1060;[6]
   b. With a return, in part, to the position of the common law as a substitute for Probate Code 125;[7]
   c. With a recommendation that no changes be made in the statutes dealing with taxation of appointive assets.[8]
C. An exposition of the need in California for a reasonably comprehensive statute covering those points concerning powers of appointment likely to arise with frequency in litigation[9]
D. The desirability of reviewing the soundness of the California position preferring non exclusive powers, purportedly made pursuant to an acceptance of the common law, but actually deviating therefrom[10]
E. The desirability of reviewing the soundness of the common law rules restricting the rights of the executors of the donee of a general power[10a]
F. The text of a proposed new Statute designed to embody the recommendations made in Points A-E above.[10b]

B. Exposition of the positions heretofore taken by the courts, of California as to powers of appointment.

The early statute of 1850, adopting, in general, the common law, went into the Political Code §4468, and is now present with no change of substance in California Civil Code §22.2.[11] This statute has been claimed to establish for California the common law as to powers of appointment for the period of 1850-1872; and to furnish the background for the controversy as to the consequences of its legislation in 1872 and 1874.

In 1872, as a part of the general following in California of the New York Field Code, California adopted a statute containing 62 sections on powers of appointment modelled on the New York Revised Statutes of 1830.[12] The complexity of these sixty-two sections, plus a lack of awareness of any needs served by these provisions, caused the Legislature in 1874, as a part of its clean-up of the "excesses of 1872", to repeal the entire Title on powers of appointment.[13] This generated a very basic question. Did the adoption of the New York statutory system of powers in 1872, followed by the complete

repeal of the sections in 1874, leave California with its prior common law as to powers of appointment or leave California with no law whatever as to powers of appointment? Estate of Fair, in 1901,[14] went very far in the second direction namely that California had no powers of appointment. During the next thirty-four years, California Courts manifested great hesitance in accepting the common law on the topic. In Estate of Dunphy, 1905,[15] the Supreme Court escaped passing on the point by holding the remainders limited in default of exercise governed the contested question, since the alleged testamentary power had never been exercised. In dictum, this court said that powers of appointment were valid in California. In Gray v. Union Trust Co., 1915,[16] remainders found vested prevented the desired termination of a trust, and the case's sole contribution to our present inquiry as a dictum that a power of appointment reserved to the creator of the trust was probably valid. In Estate of Murphy, 1920,[17] the Supreme Court happily announced that the same result would be reached either by finding no valid power to have been created, or by finding an effective exercise of a validity created forever. Thus again the basic question was left unsettled. In Estate of McCurdy, 1925,[18] the death of the named donee before the death of the testator-donor, made it unnecessary for the Supreme Court to pass on the permissibility of powers. At page 286 in the official opinion of this case the court said:

> "We are not concerned with the question whether or not powers of appointment are valid in this state since the repeal of the legislature in 1874 of the title in the Civil Code relating to powers."

These repeated evidences of the hesitance of the State Supreme Court to take a position favorable even to the existence of powers of appointment in the law of California, led naturally to a hesitance on the part of informed lawyers, to subject their clients to possible litigation by using powers in dispositive instruments. The explicit statement in the dissenting opinion of Temple J. in Estate of Fair, 1901,[19] (concurred in by Harrison J. and Beatty C.J.) that the 1874 repeal only eliminated the New York restrictions on powers, but left in force the common law of England as to powers of appointment was not enough to change the proper caution of practicing lawyers. Prior to 1935, the only California decision basing its result on the effective exercise of a general testamentary power, is the lower court opinion in Reed v. Hollister, 1919.[20]

Estate of Sloan, 1935 [21] adopted the position embodied in the dissents by Temple J, Harrison J and Beatty C.J, in Estate of Fair, 1901.[22] From that time (1935), it has been the settled law of California that we have the common law on powers of appointment, except as this has been modified by statutes.[23]

Unfortunately, this does not settle as much as it sounds as if it did. What is this "common law" on powers of appointment, which since 1935, has been judicially declared to be California law?

The Preface to the proposed Civil Code, written by the Commissioners on October 2, 1871,[24] speaking of the California statute of 1850, adopting the "common law", said:

> "[The] American common law [is] the Common Law of England as modified by the respective states. There are as many authoritative modifications as there are States in the Union. Rules upon the same subjects differ much in different States. When they so differ, or when they need modifications to suit our conditions, the Court, not the Legislature establishes the law"

Thus the settlement of the basic question that California has the common law, leaves the important questions wide open - what is the common law on the question in litigation? On this, concerning many points there is a babbel of voices, conceivably England plus a chorus of disharmony with fifty voices.

It thus becomes of importance for lawyers and judges to begin with a close examination of the points on which California courts have taken definite position in this field. On this there are, at least, sixteen cases.

Reed v. Hollister, 1919, laid the sound foundation for holdings that exercise of a power can be proved by circumstantial evidence.[25]

Estate of Sloan, 1935, in addition to holding that California had the common law of powers, held that a testamentary special power could not be exercised effectively in favor of one of the three permissible appointees. This accepted the older common law rule favoring the finding of non-exclusionary powers.[26]

Estate of Davis, 1936, found valid a discretionary power to fix the shares in a described group.[27]

Estate of Elston, 1939, found valid a special power presently exercisable and held these appointive assets property taxed separately from an outright gift to the donee under the California inheritance tax.[28]

Childs v. Gross, 1940, found that the circumstantial proof of a power's exercise had been strengthened by Probate Code §125 (Item 85), but more importantly held that an inter vivos agreement could not operate as an exercise of a testamentary power.[29]

Security-First National Bank v. Ogilvie, 1942, reached the clearly sound result that the creation of a power can be spelled out by inference from separate facts.[30]

California Trust Co. v. Ott, 1943, found a power created in 1930, effectively exercised by a will executed in 1929.[31]

Henderson v. Rogan, 1947, found that a general power presently exercisable, created in an inter vivos trust of 1931 was properly exercised by the donee's will so as to cause the appointive assets to be included in the donee's gross estate for purposes of the Federal Estate Tax.[32]

Horne v. Title Insurance & Trust Co., 1948, was a Federal case in the Southern District of California, decided on the basis of California law. It seems to make the quite important decision that the donee of a special power who attempts to divert some of the appointive assets to a person outside the list of permissable appointees commits a "fraud on the power" which invalidates the unlawful diversion.[33]

Estate of Parker, 1950, sustained the power of the donee, to determine the person liable for the death tax on the appointive assets, despite Probate Code §970 establishing the generally applicable rule of proration.[34]

Estate of Baird, 1953, 1955, held that is the extent a power had been ineffectively exercised, the appointive assets passed to the persons named by the donor as the takers in default. This greatly lessened the costs in the settlement of the donee's estate.[35]

Briggs v. Briggs, 1954, takes the traditionally sound position that a testamentary power is not exercisable by an inter vivos instrument.[36]

Estate of Smythe, 1955, expresses the obvious position that an estate for life plus a special testamentary power do not, together, equal ownership.[37]

Estate of Huntington, 1957, was a New York case finding the California law governing; declaring that the California law on powers of appointment was the common law; and holding that under the common law an invalidity of the exercise as to one-eighth of the appointive assets made the entire exercise invalid when the result as to the other seven-eighths was the same with, or without an exercise of the power, and the total invalidity saved the costs of passing assets through the estate of the donee.[38]

Estate of Kuttler, 1958, applies the common law rule that the creation of a power of appointment by inference from the aggregate of several separate facts is readily found.[39]

Estate of Bird, 1964, is a most important case since it holds (a) that the validity under the Rule against Perpetuities, of the exercise of a testamentary general power of appointment is to be determined by applying the permissible period from the creation of the power; and (b) that such determination is made in the light of the circumstances existent when the power is exercised.[40] The first of these holdings is traditional common law;[41] the second of these holdings is good common law, which did not begin, however, until the Massachusetts 1918 decision of Minot v. Paine.[42] This decision shows that the common law is a constantly growing body of rules, meeting new problems as they arise.

It is worthy of note that no one of these sixteen California decisions is contrary to the common law, purportedly stated in the Restatement of the Law of Property, except one, namely the California presumption favoring the finding of non-exclusionary powers.[43] On the affirmative side, nine of the sixteen take exactly the position which the Restatement of the Law of Property says is the sound common law.[44] Another fact demands attention. If one contrasts the total aggregate holdings of these sixteen California cases with the multiplicity of problems heretofore covered by common law decisions and embodied in the fifty-two sections on the common law of powers of appointment, which constitute Chapter 25 of the Restatement of the Law of Property (Item N. C1), it becomes apparent that lawyers and judges of California still have ahead of them many weary months of research, if they are to determine correctly the common law as to powers of appointment as a distillation of the decisions of England and our sister states. It is here that this project for a statutory formulation of the common law on the points most likely to be litigated concerning powers of appointment establishes its pressing present importance as a service to the profession.

Before this exposition departs from the areas in which judicial wisdom provides help in the task at hand, it will be wise to explore the useful analogies provided by California decisions on similar problems (not involving a power of appointment). These cases establish (a) equity's willingness to correct a defective exercise of a trustee's power to mortgage[45] or of a power of attorney[46]; (b) the non-delegability of a discretionary power to sell;[47] (c) a judicial astuteness in making constructions which effectuate a donor's purposes;[48] the ending of a power to convey conferred on two

persons, when one of the two has died; [49] (d) a probability that an attempted exercise of a power of appointment in favor of the takers in default is a nullity;[50] (e) the inability to have a power (to amend a trust) exercised after the person having such power becomes incompetent;[51] (f) the inability of one trustee to exercise a power conferred on this one plus another.[52]

C. Exposition of the statutory ingredient in the California law as to powers of appointment.

Thus far we have fully explored the authorities in California establishing in this state the common law concerning powers of appointment (except in so far as local statutes deviate therefrom),[53] and have discovered that the coverage of what constitutes that accepted common law, either by decision or analogy is very incomplete.[54] It now becomes our task to explore the California statutory ingredient in this topic.

These statutory ingredients concern (a) the releasability of powers;[55] the exercise of a power by a general disposition in a decedent's will;[56] and taxation of powers, both under the State's inheritance tax[57] and under the Federal Estate Tax.[58]

The provision of Civil Code §1060 making powers of appointment broadly releasable[59] was the fortunate product of a nation-wide situation. The Internal Revenue Code of 1942 had changed the Federal rule as to the taxing of appointive assets in the gross estate of the donee. Many persons, having powers of appointment wished to curtail the broadness of their powers so as to exclude the appointive assets from their estates on death. The American law as to the releasability of powers of appointments, especially as to the releasability of part only of the power, was in a high state of uncertainty. In the years 1943 and shortly thereafter a large number of American states met this problem by a statute establishing broad releasability. Civil Code §1060 was enacted by California Laws of 1945, c. 318. There are two matters concerning this statute which deserve consideration by the Law Revision Commission. One is purely a matter of words. The statute excludes from an otherwise broad releasability any "power in trust which is imperative". The idea of this exclusion is sound. I suggest no change in substance would be made if the words "in trust" were omitted. This change appears in the Proposed Statute.[60] The second matter is more substantial. California has correctly taken the position that a power created, in terms, so as to be exercisable only by will, cannot be effectively exercised by inter vivos act.[61] The provisions of Civil Code §1060, as they presently exist, permit this otherwise accepted position to be nullified. Suppose that A creates a trust for the benefit of his wife B for life and also confers on B a general testamentary power. B (under Civil Code §1060) can release this power as to all persons except X and can expressly specify on the release that her residual power shall be imperative. B has, by inter vivos act, fully exercised the power which the creator of the power intended to remain unexercised until B's death. This possibility of using the statute on releasability to nullify the donor's intent can be prevented if there were added at the end of the second paragraph of the statute the words "nor shall any release of a power be permissible when the result of the release is an inter vivos exercise of a solely testamentary power". These words have been

inserted in the Proposed Statute.[62] With these two changes, one verbal, the other precautionary, I would recommend the retention of Civil Code §1060, as an integral unit in the Proposed New Statute.

Probate Code §125 dates back to California Statutes of 1850, c. 72, §22. It was probably derived from the similar provision of New York which was still retained in the 1965 Revision of the law in New York, despite this Researcher's queries as to its wisdom.[63] When the donee of a power, by his will, has made a gift of the residue of his estate or otherwise has manifested an intent to pass all his property but has failed to mention his power, or the property covered thereby, the common law inference was that he had failed to exercise the power.[64] The Restatement of the Law of Property embodies this view of the common law.[65] A considerable number of states have the rule of Probate Code §125 applicable only to general powers. Wisconsin, in its 1964 revision of its statutes greatly qualified its prior acceptance of the New York-California position. The California statute led to a complete frustration of the clearly provable intent of the donee, in Estate of Carter, 1956.[66] The existing statute provides an undesirable pitfall for the unwary. It is recommended that the new statute for California embody the provisions on this topic, which were adopted in Wisconsin, in 1965, as a single section in the Proposed Statute.[67]

With respect to taxation, the provisions of the Federal Estate Tax are not subject to modification by state legislation. There is, nevertheless, one provision of the Internal Revenue Code which has substantial relevance, namely its definition of the term "general power". In Internal Revenue Code §2041 (b)(1) a "general power" is defined as a "power which is exercisable in favor of the decedent, his estate, his creditors or the creditors of his estate," with certain stated exceptions. This definition has been borrowed, without its tax exceptions, in the recent statutory revisions of New York[68] and Wisconsin[69] and, more importantly, in the 1965 revision of the California Inheritance Tax Law.[70] The utilization of the same definition in this Proposed Statute would simplify the law in California, since it would have the same semantic base for the application of the Federal Estate Tax, the California Inheritance Tax and the rights of creditors of a donee. Under the present law, it is generally true that if a donee has a general power (as thus defined), the appointive assets are treated as passing from the donee (rather than the donor) for purposes of both Federal[72] and California death taxation.

The treatment of appointive assets under the California Inheritance Tax has been substantially different in five chronological periods, namely, 1905-1913, 1913-1917, 1917-1935, 1935-1965 and 1965 to the present.[73] Some litigation has centered on whether outright gifts to the donee and the appointive assets should be aggregated for taxation purposes.[74] It is not regarded by this Researcher that this study should consider changes in the 1965 Revision of this part of the state's tax system. The present form of that statute was reached after experience with other forms and, presumably represents a segment of the law not deserving reconsideration at this time. Consequently the tax provisions of California[75] will not be included in the Proposed Statute produced by this study.

D. Need for a Reasonably Comprehensive Statutory Coverage of the "California Common Law" on Powers of Appointment.

The materials thus far presented in this study
(a) deal with the evolution of judicial thought which culminated in a 1935 acceptance of the "common law of powers of appointment";[76]
(b) presents the decisions which have declared what constitutes the common law of powers of appointment in California on a series of topics which in the aggregate constitute only a small fragment of the whole subject;[77]
(c) cover the slight areas of this body of law covered by California statutes on the releasability of powers, the efficacy of a will to exercise a power not mentioned and the taxation of appointive assets.[78]

The trouble and hard work imposed on lawyers, and ultimately on our judges, to ascertain what says the common law on a litigated point is the basis which brought into being the American Law Institute to "restate" the common law on Contracts, on Torts, on Agency, on Trusts and on Property. England and each State of the Union may have spoken with inconsistent voices on each separate question. The Institute undertook to gather a group of specialists in each field, to put into words what these experts concluded was the best reasoned answer to be found in the myriads of decisions from many jurisdictions. It is now accepted California doctrine that cases concerning powers of appointment should be decided by the "common law"; except in the very few areas in which relevant statutes have been enacted. As the opinion in Estate of Sloan wisely said

> "the whole question is solved whenever it is determined what the common law rule is."[79]

In the effort to solve this elusive question, California courts have debated whether the common law is confined to the lex non scripta or has a statutory ingredient;[80] and they have searched and cited decisions from England, from the Federal Courts and from the state decisions of at least sixteen states.[81] Does not the multiplicity of data as to what is the common law, make it useful, or perhaps even necessary, to put into succinct form what constitutes the common law on all those points likely to be litigated with any frequency? Thus untold efforts of lawyers and of judges to find common law decisions in other states and, when found, to weigh their wisdom and to reconcile their inconsistencies could be minimized very greatly. It is, therefore, the strong recommendation of this Researcher that a statute be drafted incorporating those statutes heretofore adopted (with whatever modifications may be agreed upon), and incorporating into a logically organized whole, the positions heretofore taken by our courts on specific points (again with such modifications as may seem wise) plus a succinct statement of the further rules which are to be applied as the common law of California on powers of appointment. A catch-all section adopting the common law on all points not covered in the statute will narrow to a small compass the topics left for minute research.

The above described process was followed in the New York restoration of the common law in 1964[82] and by the Wisconsin restoration of the common law in 1965.[83] In the drafting of the proposed new statute for New York, the Restatement of the Law of Property furnished useful guidance. Its utility for the similar task in California is evidenced by almost unanimous concurrence of its positions and of the decisions heretofore reached by the California courts.[84]

E. Exclusive or Non-Exclusive Powers

There is one problem on which the California decision,[85] purportedly based on the Court's understanding of the common law, deviates so markedly from today's general understanding of the common law, that this proposed statute should provide a remedy. This problem concerns only special powers. Matter of Sloan[86] held that where, by will, a father provided that if his son died before reaching the age of 30, "the property should go to the heirs of the son as the son's will directed"; the son could not lawfully exercise the power by giving all the assets to one maternal aunt, to the exclusion of two paternal aunts, all three being "heirs" of the son at his death. This embodies a constructional preference for the non-exclusionary power. It may, perhaps, once have been good common law. The now long accepted common law view is the direct opposite. Restatement of the Law of Property §360 is entitled "whether a power is exclusive or non-exclusive". Its text is as follows:

> "The donee of a special power may, by an otherwise effective appointment, exclude one or more objects of the power from distribution of the property covered thereby unless the donor manifests a contrary intent."

It will be noted that this reverses the constructional preference stated in Matter of Sloan,[87] and creates a constructional preference in favor of the donee's full liberty of choice among the permissible appointees. If the donor wishes, he can, by appropriate additional language, lessen the donee's full liberty of choice. The many authorities on this problem are cited and discussed in Powell on Real Property ¶ 398.[88] This same constructional preference for "exclusive" powers is embodied in the recently drafted statutes of New York[89] and Wisconsin[90].

It is recommended that the Proposed New Statute include a section bringing the California law into conformity with the modern understanding of the common law on this point.[91]

F. Rights of Creditors of the Donee of a General Power

Historically, and traditionally, the appointee took directly from the donor, and not from the donee. Chief Justice Gibson, in a Pennsylvania case of 1849[92] expressed this historical view thus:

> "There is such flagrant injustice in applying the bounty of a testator to the benefit of those for whom it was not intended [the creditors of the donee], that the mind revolts from it. An appointee derives title immediately from the donor of the power, by the instrument in which it was created; and consequently not under but paramount to the appointor, by whom it was executed; by reason of which it is impossible to conceive that the appointor's creditors have an equity. A man who is employed to manage the conduit pipe of another's munificence, is authorized by a general power of disposal to turn the stream of it to any person or point within the compass of his discretion and his creditors have no right in justice or reason to control him performing his function because it was not assigned to him as their trustee. It is the bounty of the testator, and not the property of his steward, that is to be dispensed."

Despite the historical accuracy of Gibson's position, realities prevailed over theory. The English chancellors developed what came to be known as the "doctrine of equitable assets." This is reputed to have been an effort "to foster credit" in a society where creditors were of strong influence. Under this doctrine, if a debtor was donee of a general power, and he exercised it in favor of a volunteer, his creditors could reach the appointive assets, in priority to his appointees, provided the debtor lacked other assets to pay the creditor.[93] This doctrine is embodied in the Restatement of the Law of Property as sound common law doctrine.[94] This is the doctrine which Mr. Justice Traynor used as the basis for an analogy in 1940.[95] It was an adequate, but not a necessary, basis for the decision in Estate of Masson, 1956.[96]

It has been recognized, however, that the doctrine of equitable assets fails to recognize that the donee of a general power (before its exercise) has substantially the equivalent of full ownership. The Federal Estate Tax since 1942 has required that a donee having a general power to appoint, include the appointive assets in his gross estate.[97] The California Revenue and Taxation Code was amended in 1965 so that an inheritance from the donee occurs whenever a person takes either by the exercise or non-exercise of a general power.[98] Thus, on death, both the Federal and the California statute treats a general power of appointment as the equivalent of complete ownership. If this is true as to taxes why should it not also be true as to creditors? The Federal Bankruptcy Act has taken this position as to all general powers of the bankrupt, presently exercisable at the moment of bankruptcy.[99] The three state statutes enacted in the past twenty-five years have extended this same rule to all creditors of the donee of a general power.[100]

It is recommended that the new California statute permit creditors of a donee having a general power of appointment to reach the appointive assets for the satisfaction of their claims; and that, on this point, the statute employ the form adopted in New York in 1964. This is a particular in which California's adopted common law needs modification to bring it abreast of the policies embodied in the tax statutes both Federal and California, in the Federal Bankruptcy Act and in the recent statutory revisions of Minnesota, New York and Wisconsin.

The Proposed Statute

[It is perhaps, premature, to discuss the most desirable location for the new material in the state's large quantity of statutes. Two places would seem to be equally appropriate. In the Civil Code, Part 4 deals with the "acquisition of property."There could be a new chapter on Powers of Appointment inserted as Chapter 3A (§§1154 and following) or as Chapter 9 (§§1424-1426 abcd etc.)]

2. The Proposed Statute

Chapter Powers of Appointment

Section 1. Common law of powers of appointment established, with exceptions
2. Classification of powers of appointment- General and special,
3. Classification of powers of appointment as to time of exercise; presently exercisable, testamentary and otherwise postponed.
4. Classification of powers of appointment - Imperative and discretionary.
5. Classification of powers of appointment - Exclusive and non-exclusive.
6. Creation of a power of appointment.
7. Scope of the authority of the donee.
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Chapter , Powers of Appointment

Section 1. Common law of powers of appointment established, with exceptions.

The common law as to powers of appointment is the law of California, both as to topics dealt with in this Chapter and as to topics left uncovered thereby, except as specifically modified by provisions in the sections of this Chapter and of the Revenue and Taxation Code of this state.

(This is substantially identical with New York Real Property Law §130, adopted by Laws 1964, c. 864; with Wis. Laws, §232.19, adopted by Laws 1965, c. 52, and with Mich. Powers of Appointment Act of 1967, §19. It avoids the loose and ambiguous language of New York Estates, Powers and Trust Law §10-1.1.

These four statutes are hereafter referred to as "N.Y. 1964", "Wis. 1965", "Mich. 1967", and "E.P.T.L.")

Section 2. Classification of powers of appointment - General and special.

1. A power of appointment is general to the extent that it is exercisable wholly in favor of the donee, his estate, his creditors or creditors of his estate.

2. All other powers of appointment are special.

(This is identical with N.Y. 1964, §133; and is very similar both to Wis. 1965, §2702.01 (4) and to Mich. 1967, §2(H). It departs from the common law, as embodied in the Restatement of the Law of Property §320, by employing the definitional language of the Federal Estate Tax Law - Int. Rev. Code §2041 (B)(1) -; which, in 1965, was incorporated into the California Revenue and Taxation Code §13692. The exceptions stated in these two tax statutes have an importance significant only in tax problems. The omission of these exceptions from this draft follows the example of N.Y. 1964 and of Wis. 1965 and Mich. 1967.

See Report at n. 71.

Section 3. Classification of powers of appointment as to time of exercise: presently exercisable, testamentary and otherwise postponed.

1. A power of appointment is presently exercisable whenever the donor has not manifested an intent that its exercise is postponed.

2. A power of appointment is testamentary whenever the donor has manifested an intent that it is to be exercised only by a will of the donee.

3. A power of appointment which is neither presently exercisable nor testamentary is a postponed power.

(This is identical with N.Y. 1964, §134. It is similar to Mich.1967 §2 (L). It avoids the muddy wording of E.P.T.L.§10-33. It follows the common law as embodied in Restatement §321.)

Section 4. Classification of powers of appointment - Imperative and discretionary.

1. A power of appointment is imperative when the donor has manifested an intent that the donee has a duty to exercise it. Such a duty can exist even though the donee has the privilege of selecting some and excluding others of the designated permissible appointees.

2. A power of appointment is discretionary when it is not imperative within the terms of Subsection 1 of this Section. The donee of a discretionary power is privileged to exercise, or not to exercise the power as he chooses.

(This is substantially similar to N.Y. 1964, §135, and to E.P.T.L. §10-3.4. It follows the suggestion in Restatement, Special Note to §320, namely that the term "power in trust" has too many different meanings to make it a useful term. As to the consequences which flow from a power being "mandatory", see Section 26 infra.)

See Report at footnote 60.

Section 5. Classification of powers of appointment - Exclusive and non-exclusive.

1. A power of appointment is exclusive if it is a special power and if it may be exercised in favor of one or more of the permissible appointees to the exclusion of the others.

2. A power of appointment is non-exclusive when it is not exclusive within the terms of Subsection 1 of this Section.

(This is roughly similar to E.P.T.L. §10-3.2 (2)(d) and (e). This definition is important as a basis for the later section 18 in this statute dealing with the constructional preferance for exclusive powers, which embodies the common law of Restatement §360.

Section 6. Creation of a power of appointment.

The donor of a power of appointment

1. must be a person capable of transferring the interest in property as to which the power relates; and

2. must have executed the instrument claimed to create the power in the manner required by law for such an instrument; and

3. must manifest an intent to confer the power on a person capable of holding the interest in property as to which the power relates; and

4. cannot nullify or alter the rights of creditors of the donee, as defined in the succeeding sections of this chapter, by any language in the instrument creating the power, purporting to give to the interest of such donee a spendthrift character.

(This is identical with N.Y. 1964, §136. Subsections 1-2 are substantially like Mich. 1967, §3. Subsections 1-3 are clearly present law both in California and at common law. See Report at footnotes 30 and 39. See also Restatement §323. Subdivision 4 is a point not heretofore considered in California. The position it takes was taken in New York 1964, §136 and in E.P.T.L. §10-4.1 (4). It prevents a spread of the spendthrift trust idea and is necessary to prevent Regs. 20.2056 (b)-(f) from applying.)

Section 7. Scope of the authority of the donee.

The scope of the authority of the donee to determine appointees and to select the time and manner of the appointment or appointments is unlimited except as the donor effectively manifests a contrary intention.

(This embodies the common law rule of Restatement §324 and is substantially identical with N.Y. 1964, §137 and E.P.T.L. §10-5.1.)

Section 8. Creditors of the donee - Special power.

Property covered by a special power of appointment cannot be subjected to payment of the claims of creditors of the donee, or of his estate or to the expenses of the administration of his estate.

(This is sound common law. See Restatement §§326. Since, by definition of a special power, supra §2 (1), the donee of such a power has nothing comparable to ownership of the appointive assets, it is reasonable to bar his creditors from reaching the appointive assets. This section as proposed is identical with N.Y. 1964, §138, and with E.P.T.L. §10-7.1. The Wis. 1965, §232.17 (1) goes farther in giving creditors of a donee

power to reach the appointive assets, whenever "the power is unlimited as to permissible appointees except for exclusion of the donee, his estate, his creditors or the creditors of his estate, or a substantially similar exclusion". This extension of the rights of creditors of the donee, in the case of some special powers is not believed to be worth the complexity thereby introduced into the law. Furthermore limitations within the proposed extension are not likely of occurrence.)

Section 9. Creditors of the donee - General power, presently exercisable.

Property covered by a general power of appointment which is, or has become presently exercisable, is subject to the payment of the claims of creditors of the donee, his estate and the expenses of administering his estate. It is immaterial whether the power was created in the donee by himself, or by some other person. It is also immaterial whether the donee has, or has not purported to exercise the power.

(This is substantially identical with N.Y. 1964, §§139, and with E.P.T.L. §10-7.2, with Wis. 1965 §232.17 (1) and with Mich. 1967, §13. It is largely identical with the provision in Minn. Laws, 1943, c. 322, enacting Minn. Stat. §502.70. See Report at footnotes, 97-100.

This is a departure from the common law as embodied in Restatement §§327-330. When a power to appoint is both general and presently exercisable, the donee has, in substance, the equivalent of ownership as to the appointive assets. Neither the traditional rule that the "appointee takes from the donor" nor the English doctrine of equitable assets should prevent the creditors of such a donee from reaching the appointive assets for the satisfaction of their established claims. Neither is there any justification for retaining the anachronistic remnant of the common law (as Michigan, Minnesota and Wisconsin) that the appointive assets can be reached "only to the extent that other property available for the payment of his claim is insufficient for such payment". (See Report in footnote 100).

Section 10. Creditors of the donee - Power subject to a condition.

A general power of appointment may be created subject to a condition precedent. Until such condition is fulfilled, the rule stated in Section 9 is inapplicable.

(This is substantially identical with N. Y. 1964, §140, and with E.P.T.L. §10-7.3. It is, perhaps, unnecessary but serves some precautionary purposes.)

Section 11. Creditors of the donee - General power not presently exercisable.

Property covered by a general power of appointment, which, by the terms of its creation was made not presently exercisable, can be subjected to the payment of the claims of creditors of the donee, or of his estate, or to the expenses of the administration of his estate

1. if the power was created by the donee in favor of himself; or
2. if the power has become presently exercisable in accordance with the terms of the creating instrument.

(This is substantially identical with N.Y. 1964, §141, and with E.P.T.L. §10-7.4, except that the New York statutes do not apply to testamentary powers which have become presently exercisable by

the death of the donee. This Researcher opposed the exclusion of testamentary powers which had become presently exercisable, on the ground that the appointive assets have come under the complete power of disposition by the debtor donee and hence should be treated exactly the same as are the other assets of such decedent. This is the sound position taken in Wis. 1965, §232.17 (3), and in Mich. 1967, §13 (3).

The provision in Subsection 1 is good common law.—See Restatement §328. The provision in Subsection 2 is a reasonable corollary of Section 9, supra.

Section 12. Release of a power of appointment.

1. Any power, which is exercisable by deed, by will, by deed or will, or otherwise, whether general or special, other than a power* which is imperative, is releasable, either with or without consideration, by written instrument signed by the donee and delivered as hereinafter provided unless the instrument creating the power provides otherwise.

2. A power which is releasable may be released with respect to the whole or any part of the property subject to such power and may also be released in such manner as to reduce or limit the persons or objects, or classes of persons or objects, in whose favor such power would otherwise be exercisable. No release of a power shall be deemed to make imperative a power which was not imperative prior to such release, unless the instrument of release expressly so provides; nor shall any release of a power be permissible when the result of the release is an inter-vivos exercise of a solely testamentary power.

3. Such release may be delivered to any of the following:

(a) any person specified for such purpose in the instrument creating the power;

(b) any trustee of the property to which the power relates;

(c) any person, other than the donee, who could be adversely affected by an exercise of the power;

(d) the county recorder of the county in which the donee resides, or has a place of business, or in which the deed, will or other instrument creating the power is filed, and from the time of filing the same for record, notice is imparted to all persons of the content thereof.

4. All releases heretofore made which substantially comply with the foregoing requirements are hereby validated. The enactment of this section shall not impair, nor be construed to impair, the validity of any release heretofore made.

(This section is identical with present Civil Code §1060, enacted by the Laws of 1945, c. 318 except in two particulars:

x. At the point marked with an asterisk the words "in trust" have been omitted, on the ground that they are fully covered by the phrase "which is mandatory". (See Report at footnote 60).

y. The underlined last twenty-five words of Subsection 2 have been inserted for reasons set forth in the Report at footnotes 61 and 62. It is believed that these words are necessary to effect the common law rule embodied in Restatement §346 (a) and used as the basis for the results in Childs v. Gross, 1940, Item No. 18 and in Briggs v. Briggs, 1954, Item No. 28.

Section 13. Contract to appoint - Power presently exercisable.

The donee of a power to appoint presently exercisable, whether general or special, can effectively contract to make an appointment, if neither the contract, nor the promised appointment, confers a benefit upon a person who is not a per-

missible appointee under the power.

(This is accepted common law - see Restatement of Property §339. It is identical with N.Y. 1964, §145; with E.P.T.L. §10-5.2; and with Mich. 1967, §10 (1).

Section 14. Contract to appoint - Power not presently exercisable.

The donee of a power to appoint which is not presently exercisable cannot effectively contract to make an appointment. If the promise to make an appointment is not performed, the promisee cannot obtain either specific performance or damages, but he can obtain restitution of the value given by him for the promise.

(This is accepted common law - see Restatement of Property §340. It is identical with N.Y. 1964, §146 (1), with E.P.T.L. §10-5.3 and with Mich. 1967, §10 (2). It intentionally omits N.Y. 1964, §146 (2) in order to conform to California decisions; see note appended to Section 12 supra, as to the twenty-five words proposed for insertion in Section 2 of present C.C. 1060.)

Section 15. Exercise of a power - Prerequisite formalities.

1. An effective exercise of a power of appointment can be made only by a donee capable of transferring the interest in property to which the power relates.

(This is accepted common law - see Restatement of Property, §345. It is substantially identical with Mich. 1967, §5 (1), with Minn. 1943, §502.66 and with Wis. 1965, §232.05 (1).

2. An effective exercise of a power of appointment can be made only by a written instrument which complies with the requirements, if any, of the creating instrument as to the manner, time and conditions of the exercise of the power, except that a power stated to be exercisable only by deed is also exercisable by a written will executed as required by law.

(Down to the "except" clause, this is accepted common law - see Restatement of Property, §346. Without the "except" clause, this is substantially identical with Wis. 1965, §232.05 (2). The rule embodied in the "except" clause appeared first in the Minn. statute of 1943, §502.64, which has been law in that state for 24 years. A similar "except" clause appears in N.Y. 1964, §148 (3) and in Mich. 1967, §5 (2). Few conveyors prescribe that a power of appointment can be exercised only by an inter vivos instrument. If and when such a prescription is encountered, it is reasonable to say that "all purposes of substance which the donor could have had in mind are accomplished by a will of the donee". The Restatement of Property §347, Com. b comes very close to adopting the "except" clause as sound common law.

3. An effective exercise of a power of appointment can be made by an instrument conforming to the requirements of Subsection 2, when the donor has authorized the power to be exercised by an instrument not sufficient in law to pass the appointive assets, and such clause does not invalidate the power.

(This is substantially identical with Mich. 1967, §5 (3) and with N.Y. 1964, §148 (1).

4. An effective exercise of a power of appointment can be made by an instrument conforming to the requirements of Subsection 2, without observance of additional formalities directed by the donor to be observed in its exercise.

(This is substantially identical with Minn. 1943, §502.65, with N.Y. 1964, §148 (2), with E.P.T.L. §10-6.2 (2). It is more liberal than the common law rule embodied in Restatement of Property, §346.

5. An effective exercise of a power of appointment can only be made by an instrument which contains a specific reference to the power or to the instrument creating the power, if the instrument creating the power has so explicitly directed.

(This Subsection is a part of the proposed modification of Probate Code §125, set forth infra in Section 17 (d). It embodies the provision of Wis. 1965, §232.03 (1) and of the last sentence in Mich. 1967, §4.

6. An effective exercise of a power of appointment, which, by the terms of its creating instrument requires the consent of the donor, or of some other person, can only be made when the required consent is contained in the instrument of exercise or in a separate written instrument, signed, in each case by the person or persons whose consents are required. If any person whose consent is required dies or becomes legally incapable of consenting, the power may be exercised by the donee, without the consent of that person, unless the creating instrument explicitly forbids.

(This embodies the rule first stated in Minn. 1943, §502.68. It was also adopted in N.Y. 1964, §150; in E.P.T.L. §10-6.4; in Wis. 1965, §232.05 (3); and in Mich. 1967, §5 (4).

7. An effective exercise of a power of appointment created in favor of two or more donees, can only be made when all of the donees unite in its exercise; but if one or more of the donees dies, becomes legally incapable of exercising the power, or releases the power, the power may be exercised by the others, unless the creating instrument explicitly forbids.

(This embodies the rule first stated in Minn. 1943, §502.67. It was also adopted in N.Y. 1964, §166; in E.P.T.L. §10-6.7; in Wis. 1965, §232.05 (4); and in Mich. 1967, §5 (5).

8. None of the provisions in the Subsections of this Section shall be construed in any way to modify the power of a court of competent jurisdiction to remedy a defective exercise of an imperative power of appointment.

(This is a precautionary provision suggested by the first sentence in N.Y. 1964, §148, which is retained in E.P.T.L. §10-6.2. The Researcher believes it to be a desirable provision. Perhaps it should be broadened by omitting the word "imperative". With that omission it would be closer to the rule of the common law as expressed in Restatement of Property §347.)

Section 16. Exercise of a power - Instrument executed before the power was created.

A power existing at the donee's death, but created after the execution of his will is effectively exercised thereby if the will is an otherwise effective appointment, unless

(a) the donor manifests an intent that the power may not be exercised by a will previously executed, or

(b) the donee manifests an intent not to exercise a power subsequently acquired.

(This is the accepted common law - see Restatement of Property §344. It is also required by the decision in California Trust Co. v. Ott, 1943, Item No. 22).

Section 17. Exercise of a power - What constitutes.

An effective exercise of a power of appointment by its donee requires a manifestation of the donee's intent to exercise such power. Such a manifestation exists when

(a) the donee, in a deed or will, declares, in substance, that he

exercises this specific power, or all powers that he has; or

(b) the donee, sufficiently identifying property covered by the power, executes a deed, or leaves a will, purporting to convey such property; or

(c) the donee includes in his will, pecuniary gifts or a residuary gift or both which, when read with reference to the property which he owned and the circumstances existing at the time of the formulation of the will, justifies a finding that the donee understood that he was disposing of the appointive assets, or

(The first three clauses of this Section 17 are both accepted common law - see Restatement of Property §§342, 343; and are required by California decisions - see Item No. 10, 1919; Item No. 18, 1940. These rules are embodied in N.Y. 1964, §147 (1) (2) and (3); in E.P.T.L. §10-6.1 (1) (2) and (3); Wis. 1965, §232.03 (2); Mich. 1967. §4).

(d) the donee has a general power exercisable by will, with no gift in default in the creating instrument and with no requirement in the instrument creating the power that the donee make a specific reference to the power as required in Section 15 (5) of this Chapter, and the donee includes in his will a residuary clause, or other general language purporting to dispose of all the donee's property of the kind covered by the power, and no interest is manifested, either expressly or by necessary inference, not to exercise the power.

(This fourth clause is the Proposed substitute for Probate Code §125. It embodies the rule of Wis. 1965, §232.03 (2). See Text of Report at footnotes 63-67. The complete reversal of the rule stated in Probate Code §125, involving a return to the common law rule, would be accomplished by the complete omission of Clause (d). Intermediate positions would omit the words "with no gift in default in the creating instrument", as is done in Mich. 1967, §4, or by omitting both the above quoted phrase and also the word "general", as is done in N.Y. 1964, §147 (4). If it is decided generally to retain the rule of Probate Code §125, unchanged, Clause (d) will require redrafting, with or without the reference to Section 15 (5) of this statute. This Researcher recommends the substantial return to the common law rule, which is accomplished by the submitted wording of this Clause (d).)

Section 18. Exercise of a power - Two or more permissible appointees.

The donee of any special power of appointment may appoint the whole or any part of the appointive assets to anyone or more of the permissible appointees and exclude others; except to the extent that the donor specifies either a minimum share or amount, or a maximum share or amount, to be appointed to one or more of the permissible appointees, in which cases the exercise of the power must conform to such specifications.

(This section embodies the common law constructional preference for exclusive powers as embodied in Restatement of Property §360; and is contrary to the erroneous finding of Estate of Sloan, 1935, Item No. 15, as to what was the common law rule. It is phrased like Wis. 1965, §232.07 and is more exact in its coverage than either N.Y. 1964, §151, or Mich. 1967, §7, although the modern preference for exclusive powers is expressed in both of these statutes.

See Report at footnotes 85-90.

Section 19. Exercise of a power - Permissible types of appointment under a general power.

The donee of a general power of appointment can effectively

(a) appoint at one time or make several partial appointments at different times, where the power is exercisable inter vivos;
(b) appoint present or future interests or both;
(c) make appointments subject to conditions or charges;
(d) make appointments subject to otherwise lawful restraints on the alienation of the appointed interest;
(e) make appointments in trust;
(f) make an appointment by creating a new power of appointment.

(This section embodies the rules of the common law as found in Restatement of Property §§356, 357. No comparable section is found in the statutes of other states, namely N.Y. 1964, Wis. 1965 and Mich. 1967. The section merely makes it clear that, under a general power to appoint, the donee has exactly the same freedom of disposition as he has with respect to his owned assets.)

Section 20. Exercise of a power - Permissible types of appointment under a special power.

The donee of a special power of appointment can effectively make any one or more of the types of appointment permissible for the donee of a general power, under the rule stated in the next preceding section, provided only that the persons benefitted by any such appointment are exclusively persons who are permissible appointees under the terms of the special power.

(This section embodies the rules of the common law as found in Restatement of Property §§358 and 359, except that it authorizes the donee of a special power to exercise the power by creating a general power of appointment in a permissible object. Since the donee is empowered to appoint outright to one of the permissible objects of the special power, it is irrational to refuse to allow him to give such a person a general power to appoint. In so far as the Restatement of Property hesitated to take this position - in §359 (3), its irrationality is corrected in this section for California. See Powell on Real Property ¶398 at footnote 76.)

Section 21. Exercise of a power - Fraud on special power.

If the donee of a special power exercises his power in favor of a permissible object, but, directly or indirectly, such appointment was intended to benefit a non-object, to any extent, the exercise of the power is ineffective.

(This section is a corollary of the rule stated in Section 20. It is an aspect of the common law which was treated at length in Restatement of Property, §§352-355. Attempts by a donee of a special power to frustrate the desire of the donor that the appointive assets shall be devoted exclusively to the class of objects designated, or else pass to the takers in default, deserves protection. The decision in Horne v. Title Insurance and Trust Co., 1948, Item No. 24, requires recognition of this rule in this statute. The leading case on the topic is Matter of Carroll, 153 Misc. 649, 275 N.Y.S. 911, modified 247 App. Div. 11, 286 N.Y.S. 307, reversed 274 N.Y. 288, 8 N.E. 2, 864, 1937.)

Section 22. Exercise of a power - Void as to excess only.

An exercise of a power of appointment is not void solely because it was more extensive than was authorized by the power. Interests created by such an exercise are valid, so far as is permitted by the terms of the power.

(This Section embodies the desirable salvaging rule of N.Y. 1964, §§152; E.P.T.L. §10-6.6 (1). No comparable rule is found in the Restatement of Property or in Wis. 1965 or Mich. 1967.)

Section 23. Exercise of a power - Lapse.

If an attempted exercise of a power is ineffective because of the death of an appointee prior to the effective date of the exercise, the appointment is to be effectuated, if possible, by applying the provisions of Probate Code §92, as though the appointive assets were property of the appointor, except that the statute shall in no case pass property to a non-object of a special power.

(This Section embodies the ideas of the Restatement of Property, §§349 and 350, broadened to cover special powers, by employing the language of Mich. 1967, §20. It is recommended that the subject of lapse be dealt with in this statute in the broadened form proposed.)

Section 24. Rule against perpetuities - Time at which permissible period begins.

The permissible period under the applicable rule against perpetuities begins

(a) in the case of an instrument exercising a general power of appointment presently exercisable on the effective date of the instrument of exercise; and

(b) in all other situations, at the time of the creation of the power. The rule of this clause applies to the exercise of a general testamentary power.

(This Section embodies the common law rule as embodied in Restatement of Property §§391 and 392. It is substantially identical with N.Y. 1964, §154; and with E.P.T.L. §10-8.1 (a); and with Mich. 1967, §14. As to general testamentary powers it follows the widely accepted American rule as distinguished from the English rule, recently accepted in Rhode Island, Item No. 37, 1966. See collection of cases in Powell on Real Property, §788.

The rule concerning the time at which the permissible period begins to run when the creator of a trust has reserved an unqualified power to revoke (N.Y. 1964, §155) is omitted because it is outside the field of powers of appointment.

Section 25. Rule against perpetuities - Facts to be considered.

When the permissible period under the applicable rule against perpetuities begins at the time of the creation of a power of appointment with respect to interests sought to be created by an exercise of the power, facts and circumstances existing at the effective date of the instrument exercising the power shall be taken into account in determining the validity of interests created by the instrument exercising the power.

(This is an accepted rule of the common law - see Restatement of Property §392 (a) - which began with Minot v. Paine, 230 Mass. 514, 120 N.E. 167, 1918, and has gained acceptance in many common law states, including Delaware, Georgia, Kentucky, Missouri, New Jersey and Pennsylvania. The section is substantially identical with N.Y. 1964, §157; with E.P.T.L. §10-8.3; and with Mich. 1967, §17. It is also the rule heretofore

applied in California, see Estate of Bird, 1964, Item No. 35. See Report at footnotes 40-42.)

Section 26. Imperative Power - Effectuation.

Where an imperative power of appointment

(a) confers on its donee a right of selection, and the donee dies without having exercised the power, its exercise must be adjudged for the benefit equally of all the persons designated as permissible appointees;

(b) has been exercised defectively, either wholly or in part by the donee, its proper execution may be adjudged in favor of the person or persons purportedly benefited by the defective exercise;

(c) has been so created as to confer on a person a right to compel the exercise of the power in his favor, its proper exercise may be adjudged in favor of such person, his assigns, his creditors and the committee of his person.

(This section undertakes to encompass the general consequences flowing from the imperative (or trust) character of the power. It is modelled on N.Y. 1964, §153; and is materially less complex than E.P.T.L. §10-6.8. It is, nevertheless, believed to be adequate for the purposes of this statute.)

Section 27. Appointment to a trustee on a trust which fails - Capture.

When the donee of a general power of appointment appoints to a trustee upon a trust which fails, there is a resulting trust in favor of the donee or of his estate, unless either the donor or the donee manifests an inconsistent intent.

(This section embodies the common law rule of "capture". See Restatement of Property §365 (2). The authorities supporting this rule from England, Illinois and Massachusetts are collected in Powell on Real Property, ¶400, n. 35. There are no holdings on this problem outside of the three jurisdictions named. No mention of the problem is found in the recent statutes of Michigan, New York and Wisconsin.)

Section 28. Appointment assuming control of the appointive assets for all purposes - Capture.

When the donee of a general power of appointment makes an ineffective appointment not within the rule of §27, but which manifests the intent of the donee to assume control of the affected appointive assets, for all purposes and not only for the limited purpose of giving effect to the expressed appointment, there is a resulting trust in favor of the donee or of his estate, unless the donor manifests a contrary intent.

[This section embodies the second branch of the common law rule of "capture". See Restatement of Property §365 (3). The authorities supporting this rule from England, Illinois, Maryland and Massachusetts are collected in Powell on Real Property §400, ns. 36, 37, 38 and 39. There are no holdings on this problem outside of the four jurisdictions named. No mention of the problem is found in the recent statutes of Michigan, New York and Wisconsin.]

Section 29. Ineffective appointment - Effect of.

Where the donee of a discretionary power of appointment releases the entire power, or, ineffectively makes an appointment which is not within the rules of Section 27 or Section 28, the appointive assets pass to the person or persons, if any, named by the donor as takers in default, and if there are none such revert to the donor.

(This is accepted common law - see Restatement of Property §365 (1). It is also the rule adopted in California by Estate of Baird, 1953, 1955, Items No. 27 and 30, with the desirable result of minimizing the expenditure for taxes, fiduciary fees and lawyer's fees by the estate of the donee.)

Section 30. Irrevocability - Creation, exercise or release of a power.

The creation, exercise or release of a power of appointment is irrevocable unless the power to revoke is reserved in the instrument creating, exercising or releasing the power.

(This section is substantially identical with N.Y. 1964, §§144; with E.P.T.L. §10-9.1, and is worded exactly the same as Mich. 1967, §9, and is very like Wis. 1965, §232.11. It embodies the part of the common law embodied in Restatement of Property §366.)

Section 31. Applicable law.

To whatever extent the law existing at the time of the creation of a power and the law existing at the time of the release or exercise of a power or at the time of the assertion of a right embodied in a provision of this chapter shall differ, the law of the State of California existing at the time of such release, exercise or assertion of a right shall control.

(This section keeps the law of powers abrest of current statutes not only as to powers but also as to the rule against perpetuities, the rule as to accumulations and the rule as to lapse. It performs the same functions as are partially performed by N.Y. 1964, §§156, 158; by E.P.T.L. §§10-8.2, 10-8.4; by Wis. 1965, §232.21; and by Mich. 1967, §22.

Section 32. Constitutionality - Severability clause.

(A severability clause is always desirable. It is not presented here in draft form, as its form should be identical with that heretofore used by the Law Revision Commission.)

POWERS OF APPOINTMENT

Supplementary Material to Study

CONTENTS

POWERS OF APPOINTMENT

Supplementary material to research study by Professor Powell

This supplementary material was
prepared by Professor Powell

TABLE OF CONTENTS

FOOTNOTES

[In these footnotes, the references to "Item No. 5" and similar references, are to the digests of the cases given in the Appendix. There are three Appendices, A giving case digests, B giving the text of California statutes and C giving the tables of contents (on powers) of the Restatement of the Law of Property, of the New York Statute recently adopted and of the Wisconsin statute of 1965.]

1. Item No. 5.

2. A having $500,000 of assets wills them to B Trust Co. to pay the income to A's widow C for life; thereafter to pay the income in equal shares to A's children D, E and F for their several lives, conveying corpus of each child's share on his death to such relatives of the life tenant child by blood or by marriage or to such charities as the life tenant child shall appoint by will.

An estate tax has to be paid on A's death; but the non-general character of the power of appointment conferred on D, E and F excludes the appointive assets from their estates. One generation is thus skipped for Federal Tax purposes. Like results can be obtained under the California inheritance tax if the power of appointment was created after 1935.

3. See infra at notes 14 - 20.

4. Item No. 15.

5. See infra notes 11-54

6. See infra notes 55, 59 - 62.

7. See infra notes 56, 63 - 67.

8. See infra notes 57, 68 - 75.

9. See infra notes 79 - 84.

10. See infra notes 85 - 91

10a. See infra notes 92 - 100

10b. See infra pages 11 ff.

11. The text of C.C. §22.2 is given in Item B2. Its basic importance as to powers of appointment is set forth in Item No. 15, 1935.

12. Civ. Code, 1872, Div. II, Pt. II, Tit. VI §§878-940.

13. Item No. B3.

14. Item No. 6.

15. Item No. 7.

16. Item No. 9.

17. Item No. 11.

18. Item No. 13.

19. Item No. 6.

20. Item No. 10.

21. Item No. 15.

22. Item No. 6.

23. For the general statement that California has the common law on powers of appointment, see Item No. 7, 1939 and Item No. 34, 1958.

Recognizing this see the New York decision in Item No. 33, 1957.

24. Item B1, 1871.

25. Item No. 10, 1919. This is consistent with, and a part of the material covered by Restatement of the Law of Property, (Item C1) §§342-343.

See Proposed Statute §§ 17.

26. Item No. 15, 1935. This is contrary to Restatement of the Law of Property

(Item C1) §360 and to the present weight of authority in common law states, see infra ns 85 - 91.

27. Item No. 16, 1936.

28. Item No. 17, 1939.

29. Item No. 18, 1940. This is the rule embodied in Restatement of the Law of Property (Item C1) §340.

See Proposed Statute § 14.

30. Item No. 20, 1941. This is the rule spelled-out in Restatement of the Law of Property. (Item C1) §323.

See Proposed Statute § 6.

31. Item No. 22, 1943. This is the rule embodied in Restatement of the Law of Property (Item C1) §344.

See Proposed Statute § 16.

32. Item No. 23, 1947. This is a result which would occur under the present provisions of the Internal Revenue Code.

33. Item No. 24, 1948. This is the rule embodied in Restatement of the Law of Property (Item C1) §353.

See Proposed Statute § 21.

34. Item No. 25, 1950.

35. Items No. 27 and 30, 1953, 1955. This is a small part of the rule stated in Restatement of the Law of Property (Item C1), §365.

See Proposed Statute § 29.

36. Item No. 28, 1954. Compare the similar result in Item No. 18, 1940. This is the rule embodied in Restatement of the Law of Property (Item C1) §346(a).

See Proposed Statute § 14.

37. Item No. 29, 1955.

38. Item No. 33, 1957.

39. Item No. 34, 1958. This is a part of the topic dealt with in Restatement of the Law of Property (Item C1) §323, and is consistent therewith.

See Proposed Statute § 6.

40. Item No. 35, 1964.

41. An occasional recent case, like the Rhode Island decision of 1966, Item No. 37, follows the English rule (which is the minority rule in the United States), namely that the permissable period does not begin to run until the exercise of the power.

42. Minot v. Paine, 230 Mass. 214, 120 N.E. 167, 1918. Citing subsequent similar common law decisions from the Fourth Federal Circuit, from Delaware, Georgia, Kentucky, Massachusetts, Missouri, New Jersey, and Pennsylvania, see Powell on Real Property, ¶ 788.

This rule is embodied in Restatement of the Law of Property, §392.

See Proposed Statute § 25.

43. See supra n. 26 and infra ns 85-91.

44. See supra ns 25, 29, 30, 31, 33, 35, 36, 39 and 42.

45. Beatty v. Clark, Item No. 1, 1862.

46. Gerdes v. Moody, Item No. 3, 1871.

As to the cases in ns 45 and 46, compare Restatement of the Law of Property §347 (Item C1).

47. Saunders v. Webber, 1870, Item No. 2. Compare Restatement of the Law of Property §357, Comment b (Item C1).

48. Elmer v. Gray, 1887, Item No. 4.

49. Burnett v. Piercy, 1906, Item No. 8. Compare Wisconsin Statute §232.05 (4) Item No. C3.

50. Estate of Murphy, 1920, Item No. 11. Compare restatement of the Law of Property (Item C1) §369.

51. Swart v. Sec-First Natl. Bank 1942, Item No. 21. Compare Restatement of the Law of Property (Item C1) §345.

52. Briggs v. Briggs, 1954, Item No. 28. Compare supra n. 49 as to the similar position taken in the Wisconsin statute concerning powers of appointment.

53. Supra ns 11-23.

54. Supra ns 24-52.

55. Infra ns. 59-62.

56. Infra ns 63-67.

57. Infra ns 68-73.

58. State legislation cannot change the Federal Tax statutes.

59. Item B4.

60. See Proposed Statute § 12.

61. Items No. 18, 1940, and No. 28, 1954. discussed supra at n. 36. This is the position embodied in Restatement of the Law of Property (Item C1) §346(a).

62. See Proposed Statute § 12.

63. N. Y. Estate, Powers and Trust Law (Item C2) §10-6.1 (4).

64. Powell on Real Property, §397 n. 31, citing cases from the Fifth Federal Circuit, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois Iowa, Maryland, Missouri, New Hampshire, New Jersey, Ohio, Pennsylvania, Rhode Island, South Carolina and Texas.

65. Restatement of the Law of Property §343 (Item 1C).

66. Item No. 32, Estate of Kalt, 1940, Item No. 19 increased the undesirability of Probate Code §125 by holding it applicable to personalty as well as to land.

67. Item C.3, §232.03 (1) and (2).
See Proposed New Statute § 17 (4)

68. N. Y. Estate, Powers and Trust Law §10-3.2(b).

69. Wis. Stat. §232.01 (4); enacted by Laws 1965, c. 52.

70. Item B6, Rev. & Tax Code §13692, enacted by Cal. Laws 1965, c. 1070.

71. See Proposed Statute § 2.

72. Compare Item No. 23, 1947, applying an earlier form of the Internal Revenue Code, under which the appointive assets under a general power were included in the gross estate of the donee, only when the general power had been exercised by the donee.

73. Item No. 26, 1950, at 35 Cal. 2, 831, traces this history. This case overruled Item No. 12, 1922, as to the operation of the statute.

74. Item No. 17, 1939, refused the aggregation. Item No. 36, 1965, reached the opposite result on differing facts. They cover only 14 of 38 topics.

75. Item B6.

76. Supra ns 11-26.

77. Supra ns 27-52.

The fragmentary content of the thus established law is seen by projecting the decisions in ns 27-52, against the comprehensive coverage of the Restatement of the Law of Property Item C1.

78. Supra ns 53-75.

79. Item No. 15, 1935, at page 332.

80. Item No. 6, 1901.

81. The states cited in ten California cases seeking to search out the common law on powers (i.e. Item 5, 1895; Item 11, 1920; Item 12, 1922; Item 13, 1925; Item 15, 1935; Item 16, 1936; Item 24, 1948; Item 27, 1953; Item 32, 1956; Item 34, 1958) included Arizona, Iowa, Kentucky, Maine, Massachusetts, Minnesota, Mississippi, New Jersey, New York, Rhode Island, Tennessee, Utah, Virginia, Washington, West Virginia and Wisconsin.

82. Item C-2.

83. Item C-3.

84. See supra ns 25, 29, 30, 31, 33, 35, 36, 39, 42, 46, 47, 50, 51 and 61 for areas in which the position of the Restatement and the position of the California courts are completely consistent.

The one area of disagreement is found supra n. 26. This problem is discussed infra at ns 85-91.

85. Item No. 15, 1935. The dissent of York, J., is the law now thought to be sound common law in most states.

86. Item No. 15, 1935.

87. Item No. 15, 1935.

88. Powell on Real Property ¶398...."A special power can be either "exclusive" or "non-exclusive". This means that the donee, under the authority conferred upon him by the donor, may be authorized either to give the appointive assets wholly to one or more of the objects, excluding others of the objects (in which case the power is said to be "exclusive") or to give the appointive assets in shares to be determined by the donee, but to some extent giving something to every one of the permissible appointees (in which case the power is said to be "non-exclusive"). The constructional preference is for the finding of exclusive powers (citing decisions from Kentucky, Maine, New Jersey, New York and Pennsylvania)".

89. New York Estate Powers and Trust Law, (Item C2), §10-6.5.

90. Wisconsin Statute (Item C3) §232.07.

91. See Proposed New Statute § 18 , modelled on Wis. State. §232.07 (quoted in Item C3).

92. Commonwealth v. Duffield, 12 Pa. 277, 1849.

93. Powell on Real Property, ¶ 389.

94. Restatement of the Law of Property, (Item C1), §§329, 330.

95. Estate of Kalt, 1940, Item No. 19.

96. Item No. 31, 1956.

97. Internal Revenue Code, 1942, U.S. Stat. at L. 942, §403, continued, on this point in Internal Revenue Code, 1954, §2041.

98. Item B6, §13696.

99. U.S. Code Ann. Tit. 11 §110 (a)(3), originally enacted in 1938.
See also Restatement of the Law of Property, §331.

100. Minn. Laws 1943, c. 322 enacted §502.70, which provides: "When a donee is authorized to appoint to himself all or part of the property covered by any power of appointment, a creditor of the donee may subject to his claim all property which the donee could then appoint to himself, only to the extent that other property available for the payment of his claim is insufficient for such payment."

New York Laws 1964, c. 864, enacted the provision which now appears in New York Estate, Powers and Trust Law, §10-7.2. In an earlier section this statute used the language of the Internal Revenue Code, defining a general power as one exercisable wholly in favor of the donee, his estate, his creditors or creditors of his estate.

It then provides: "Property covered by a general power of appointment which is presently exercisable or of a postponed power which has become exercisable is subject to the payment of the claims of creditors of the donee, his estate and the expenses of administering his estate. It is immaterial whether the power was created in the donee by himself or by some other person, or whether the donee has, or has not, purported to exercise the power." It will be noted that this statute is somewhat more favorable to creditors than the Minnesota statute.

Wisconsin Laws of 1965, c. 52, uses the Internal Revenue Code definition of a general power (§232.01 (4) Item C3) and then provides a still broader ability of creditors to reach the appointive assets (§232.17, Item C3).

Appendix A.

California law on powers of appointment - Cases

Item No. 1. Beatty v. Clark, 20 Cal. 11, 1862.
2. Saunders v. Webber, 39 Cal. 287, 1870.
3. Gerdes v. Moody, 41 Cal. 335, 1871.
4. Elmer v. Gray, 73 Cal. 283, 14 Pac. 862, 1887.
5. Morffew v. S.F. & S.R.R.R. Co., 107 Cal. 587, 40 Pac. 810, 1895.
6. Est. of Fair, 132 Cal. 523, 64 Pac. 1000, 1901.
7. Est. of Dunphy, 147 Cal. 95, 81 Pac. 315, 1905.
8. Burnett v. Percy, 149 Cal. 178, 86 Pac. 603, 1906.
9. Gray v. Union Tr. Co., 171 Cal. 637, 154 Pac. 306, 1915.
10. Reed v. Hollister, 44 Cal. App. 533, 187 Pac. 167, 1919.
11. Est. of Murphy, 182 Cal. 740, 190 Pac. 46, 1920.
12. Est. of Bowditch, 189 Cal. 377, 208 Pac. 282, 1922.
13. Est. of McCurdy, 197 Cal. 276, 240 Pac. 498, 1925.
14. O'Neil v. Ross, 98 Cal. App. 306, 277 Pac. 123, 1929.
15. Est. of Sloan, 7 C.A. 2, 319, 47 P. 2, 1007, 1935.
16. Est. of Davis, 13 C.A. 2, 64, 56 P. 2, 584, 1936.
17. Est. of Elston, 32 C.A. 2, 652, 90 P. 2, 608, 1939.
18. Childs v. Gross, 41 C.A. 2, 680, 107 P. 2, 424, 1940.
19. Est. of Kalt, 16 Cal. 2, 807, 108 P. 2, 401, 1940.
20. Sec. First Natl. Bank v. Ogilvie, 47 C.A. 2, 787, 119 P. 225, 194
21. Swart v. Sec. First Natl. Bk., 48 C.A. 2, 824, 120 P. 2, 697, 194
22. Cal. Tr. Co. v. Ott, 59 C.A. 2, 715, 140 P. 2, 79, 1943.
23. Henderson v. Rogan, 159 F. 2, 855, C.C.A. 9, 1947.
24. Horne v. Tit. Ins. & Tr. Co., 79 Supp. 91, S.D. Cal., 1948.
25. Est. of Parker, 98 C.A. 2, 393, 220 P. 2, 580, 1950.
26. Est. of Newton, 35 Cal. 2, 830, 221 P. 2, 952, 1950.
27. Est. of Baird, 120 C.A. 2, 219, 260 P. 2, 1052, 1953.
28. Briggs v. Briggs, 122 C.A. 2, 766, 265 P. 2, 587, 1954.
29. Est. of Smythe, 132 C.A. 2, 343, 282 P. 2, 141, 1955.
30. Est. of Baird, 135 C.A. 2, 333, 287 P. 2, 365, 1955.
31. Est. of Masson 142 C.A. 2, 510, 298 P. 2, 619, 1956.
32. Est. of Carter 47 Cal. 2, 200, 302 P. 2, 301, 1956.
33. Est. of Huntington, 10 Misc. 2, 932, 170 N.Y.S. 2, 452, 1957.
34. Est. of Kuttler, 160 C.A. 2, 332, 325 P. 2, 624, 1958.
35. Est. of Bird, 37 Cal. Repr. 288, 1964.
36. Est. of Keeble, 234 C.A. 2, 295, 44 Cal. Repr. 395, 1965.
37. Indus. Natl. Bk. v. Barrett, 220 A. 2, 517, R.I., 1966.

Appendix B.

California law on power of appointment - Statutes

Item B 1. Preface to Civil Code, October 2, 1871.
2. Civil Code, §222 (laws 1850, 219).
3. Cal. Laws 1873-1874, Amend. to Civil Code §123.
4. Civil Code §1060 (laws 1945, c. 318).
5. Prob. Code 125.
6. Rev. & Tax Code, §§13691-13697 (laws 1965, c. 1070).

Appendix C.

Other relevant material

Item C 1. Restatement of the Law of Property:-Topics covered in Sections 318-369.

C 2. New York Estate, Powers and Trust Law:- Topics covered in Article 10, Powers.

C 3. Wisconsin Statutes, Sections 232.01, 232.03, 232.05, 232.07, 232.15, 232.17, 232.19. (Laws 1965, c. 52).

Item No. 1

Beatty v. Clark, 20 Cal. 11, 1862

This case is only valuable by analogy. It deals with equity's willingness to correct a defective execution of a power (here a power in a trustee to mortgage) so as to keep the notes secured by a mortgage given in execution of a power within the authorized period of 2-1/2 years.

Item No. 2

Saunders v. Webber, 39 Cal. 287, 1870.

This case is of importance only by analogy, holding that a discretionary power (in a trustee to sell) cannot be delegated to an agent by means of a power of attorney.

Item No. 3

Gerdes v. Moody, 41 Cal. 335, 1871

This case is of importance solely by analogy, holding that a defective exercise of a power of attorney will be corrected by equity. This was accomplished by considering an 1847 document by the agent, a conveyance of the equitable title and by holding that a later instrument executed by the agent was a release of his legal title made in accordance with the terms of the power.

Item No. 4

Elmer v. Gray, 73 Cal. 283, 14 Pac. 862, 1887

A power to encroach, to meet the needs of a life tenant was held to continue subsequent to distribution of the estate although the power was in terms given to "executor" and the distribution turned the executors into guardians of minor residual takers whose interests would be diminished by the exercise by the power to encroach.

The power's duration was construed liberally to accomplish the purposes of the donor.

Item No. 5

Morffew v. San Francisco & San Rafael Railroad Co.
107 Cal. 587, 40 Pac. 810, 1895

A power to sell Blackacre was conferred by a holographic will on the testator's wife as trustee. The widow gave a deed not referring to this power. Whether this deed should be found to be an exercise of the power depended upon a finding of intent which could be made from the circumstances of the transaction. In this case the circumstances relied on included the absoluteness of language, the advanced age of the wife, the intended land use, the amount paid for the deed, and the fact that the Railroad had already begun condemnation proceedings. An exercise of the power was found despite the fact that the widow also owned one-half outright and a life estate in the other half.

The court reached its result on the analogy to English and American cases on powers of appointment. This is the earliest case found by this researcher utilizing the law of powers of appointment.

Item No. 6

Estate of Fair, 132 Cal. 523
64 Pac. 1000, 1901

The will of Senator Fair gave property to his executors to hold in trust for the lives of two daughters and one son, paying them income and directing that on the death of the survivor the trustees should "transfer and convey one-half of the property to children of the daughters and one-half to the testator's brothers and sisters or their issues.

The Senator's three children claimed intestacy on the ground that the trust failed after the life interests.

The trial court found the language subsequent to the life estates a "trust for the purpose of a conveyance" and so not dependent upon the initial trust as to cause the whole disposition to fail.

The decision stressed the likeness of the California statutes to those of New York in allowing only four types of trusts of land. At page 534 the court said that the California acceptance of the common law meant the lex non scripta, and, therefore, included no statutes, and, therefore, excluded the statute of uses.

At page 537 the court commented on the California adoption in 1872 of statutes based on the New York statutes concerning powers in trusts and powers of appointment. It then said that the repeal of 1874 of the California statutes dealing with powers of appointment left California with no powers in trusts.

Temple, J. dissented holding that powers in trusts were valid in California and that the 1874 repeal only eliminated the New York restrictions on powers but did not eliminate powers. He, therefore, believed that the 1874 repeal left in force the common law of England as to powers of appointment. This dissent of Temple, J. was concurred in by Harrison, J. and Beatty, C.J.

There had been two opinions in the case. In the first the lineup was four to three for the validity of powers in trusts. In the second it was four to three against the validity. The shifting judge was Henshaw, J.

Item No. 7

Estate of Dunphy, 147 Cal. 95
81 Pac. 315, 1905

The opinion in this case was written by McFarland, J., one of the four who found the trust to convey invalid in Estate of Fair.

The will was held effective to create as to fifths of the corpus, (1) a testamentary power in the wife; (2) a testamentary power in son, James; (3) a testamentary power in daughter, Jenny; in each case there were explicit takers in default.

It was held that the named takers in default took as remaindermen, maybe subject to the power, but since it was not exercised there was no need to pass on this point. The court called attention to the California statute declaring gifts vested despite the remaindermen taking only on default of a powers exercise. It said by way of dictum that powers of appointment are permissible.

Loring, J. and Henshaw concurred. A hearing in banc was denied.

Item No. 8

Burnett v. Piercy, 149 Cal. 178,
86 Pac. 603, 1906

In this case an 1867 conveyance, operative prior to the 1872 legislation, created a valid trust to convey. This power to convey was in terms exercisable only by two persons jointly. When one of these two died in 1885 the power became thereafter unexercisable. Consequently, a deed given by the survivor of the two was ineffective.

Item No. 9

Gray v. Union Trust Company, 171 Cal. 637,
154 Pac. 306, 1915

A created a trust for the benefit of himself (A) for life with a testamentary power to appoint in the settlor, with a gift in default to the heirs of the settlor ascertained under the law as it existed when the trust was set up. A is now seeking to terminate the trust. The court found that a valid remainder had been created (subject to defeat by the exercise of the power) and the trust could not be terminated without the consent of these remaindermen.

By way of dictum at page 642 the court said: "There is in this trust a power of appointment or nomination reserved to the trustor." This statement was not necessary to the decision. The opinion was joined in by Henshaw, Lorigan, and Melvin, J.J. A hearing in banc was denied.

Item No. 10

Reed v. Hollister, 44 Cal. App. 533,
187 Pac. 167, 1919

William H. Hollister, a resident of New York, created a trust of $40,000 with a New York corporate fiduciary to pay the income to a sister-in-law, Philoclea, for life and at her death, to distribute the principal "to such persons as she may direct by her last will" and if there is no will, to her then surviving children.

The question in the case was whether the will of Philoclea, which made no mention of the power of appointment, exercised this power. The donee's personal assets were $1700. The appointive assets were $39,000. The will of Philoclea left $32,000 to Frances Furry, $2,000 to George, $1,000 to each of several named persons with the residue to Frederick.

Applicability to the New York law was eliminated by the New York trustee's payment to the defendant. Oregon law was eliminated by the defendant's submission to the California court.

The power was found exercised due to the circumstances proved.

This is the first case in which a California court gave effect to the exercise of a power of appointment not mentioned in the instrument claimed to exercise it.

Item No. 11

Estate of Murphy, 182 Cal. 740,
190 Pac. 46, 1920

This case dealt with the taxability of a remainder limited in default of a power's exercise under the California statute enacted in 1911. The date on which the exercise was claimed to have occurred was 1915. This claimed exercise was in favor of the takers in default. Under the California law, if the takers took by an exercise of the power, the appointive assets were not to be taxed to the donee in the period from 1913 to 1917. These assets were taxable as a part of the donee's estate on the ground that an exercise in favor of the takers in default has no effect. The court made substantial use of New York cases in reaching this result.

At page 745 the court said: "It is not necessary for us finally to determine whether this confirmatory clause amounted to the exercise of the power of appointment or is to be treated as a failure to exercise the power. In either event the result is the same."

This case marks the continued hesitance of the California courts to recognize powers of appointment.

Item No. 12

Estate of Bowditch, 189 Cal. 377
208 Pac. 282, 1922

A general testamentary power of appointment had been created by a Massachusetts will, speaking in 1889. The life tenant donee, domiciled in California exercised this power in 1919. In 1917 California had changed its inheritance tax so that an exercise was to be taxed as if the appointive assets had been owned by the donee. Despite this statute the court held no California inheritance tax on the ground that the appointees took from the Massachusetts donor and the appointive assets "are no part of the estate of the donee." The court used many Massachusetts cases in reaching this result.

This decision was overruled by Estate of Newton in 1950. See infra Item 26

Item No. 13

Estate of McCurdy, 197 Cal. 276,
240 Pac. 498, 1925

A will operative in 1922 created a trust for the life of Louise and conferred on Louise a general testamentary power. Since Louise died before the testator, the court did not have to pass on the validity of powers in California. The assets, therefore, passed under the gift in default to the "heirs of Louise," namely, a paternal aunt. The heirs of the testator lost.

At page 284 the court said: "It is as if no power had been created by the will of the aunt." Citing New York and New Jersey cases.

At page 286 the court said: "We are not concerned with the question whether or not powers of appointment are valid in this state since the repeal of the legislature in 1874 of the title in the civil code relating to powers."

This case stresses the continued hesitance of the California courts to recognize powers of appointment as a part of the California law.

Item No. 14

O'Neil v. Ross, 98 Cal. App. 306,
277 Pac. 123, 1929

The will of a husband giving to his wife 1/3 outright with a "mandatory special power" to appoint 1/12 to Johanna and Nellie, and 1/6 to son, John. Johanna and Nellie both died before both the donor husband and the donee wife. Their interests, therefore, failed unless the anti-lapse statute saved Johanna's share for her son, Robert.

The case has little relevance on powers of appointment. It talks about mandatory special powers, but there are no holdings concerning them.

Estate of Sloan 7 C.A. 2, 319,
47 P.2, 1007
1935

[69 A.L.R. 2, 1285, 1960 collects a large body of contra common law holdings]

The will of a California testator who died in 1935 gave a life estate to his wife, followed by a life estate in his son until the son reached the age of 30, with a provision that if the son died before 30, the property should go to the heirs of the son as the son's will designated.

The son died before attaining the age of 30 years, in Massachusetts, leaving a will appointing the appointive assets to his maternal aunt. The son's will was effective in California because he was over 18. The son's will could not be probated in the State of Massachusetts because he was under 21. The court declared that the validity of an exercise of a power created by will is to be determined by the law of the donor's domicile. Consequently, the instrument of this young man could be treated as an exercise of the power.

But the power was a non-exclusive power and the donee could not give the property wholly to a maternal aunt to the exclusion of the two paternal aunts, since all three were permissible appointees.

This case has large importance as the first explicit application in California of what was believed to be the common law of powers of appointment. The opinion from page 339 deals with non-exclusive powers. At page 340 the court stated: "The law is fairly well established that in the absence of controlling statute to the contrary, in exercising the power of appointment, no member of a class designated by the donor of the power may be entirely excluded by the donee of the power from at least a substantial participation in the distribution of the trust fund or estate." In support of this position, the court cites the 21 Ruling Case Law 806, 49 Corpus Juris 1265, English Case of 1853, 1854 and early decisions of Minnesota, New Jersey, Virginia and West Virginia.

York, Jr. dissented on this one exclusive point and his dissent represents the common law presently prevailing in the United States.

The case has its greatest importance in its discussion of the California Legislation of 1872 and 1874. It mentioned that there had been a California statute of 1850 at page 219 adopting the common law; that this 1850 statute was continued in the Political Code Section 4468 adopted in 1872. It cited Martin v. Superior Court in 176 Cal. 289, 168 Pac. 135, which declared that the common law embraced "the whole body of the common law jurisprudence as it stood influenced by statute, at the time the code section was adopted.

It concluded that it was clear that the 1874 statute did not abrogate the common law of powers. It cited in support of its position the existence of California statutes: (1) making vested the interest subject to an exercise of a power; (2) declaring that a residuary clause passes appointive assets; (3) the provisions of the inheritance tax.

The court stated at page 332 "the whole question is solved whenever it is determined what the common law rule is."

There were extensive citations of cases on the common law from England, Massachusetts, New York, Pennsylvania and Rhode Island.

Item No. 16

Estate of Davis, 13 Cal. App. 2d 64
56 P.2d, 584, 1936

A will speaking in 1929 created in one son, William, a power in trust to appoint to three sons and two grandchildren. This discretionary power to fix the shares of the takers was valid under the California common law. The court supported this by reference in re Dewey's Estate, 45 Utah 98, 143 Pac. 124.

The opinion contains no discussions of exclusive or non-exclusive powers but says that all doubts as to the validity of powers of appointment in California was eliminated by Estate of Sloan, supra.

Item No. 17

Estate of Elston, 32 Cal. App. 2, 652
90 P.2d, 608, 1939

A will speaking in 1936 gave Wyckoff 10% (of an estate valued at approximately $76,000) "he to handle the residue for the benefit of my relatives most in need." This language re-enforced by the terms of a codicil was construed to create a special power to appoint. The question in the case was whether for purposes of the California Inheritance Tax the 10% bequest should be treated separately from the appointive assets, so as to obtain a lower bracket of tax.

The court at page 656 reviewed the periods of different law under the California Inheritance Tax concerning powers of appointment separating the following periods: 1905-1913; 1913-1917; 1917-1935; and 1935 and thereafter. The court held that under the 1935 statute the appointive assets should be taxed separately from the 10% bequest.

The court commented on the general acceptance of powers of appointment in California.

Item No. 18

Childs v. Gross, 41 Cal. App. 2d, 680
107 P.2d, 424 1940

The appointive assets were shares of bank stock. The general testamentary power was held to have been exercised under Probate Code 125 by a will giving all the assets to a trustee for the benefit of named persons. This meant that Probate Code Section 125 was construed to apply to both land and personalty. The circumstances proved the intent of the donee to exercise in this case.

The more important point of this case is its holding that an inter vivos agreement made by the donee could not be effective to modify the exercise of the conferred power by will.

Item No. 19

Estate of Kalt, 16 Cal. 2d 807,
108 P.2d 401, 1940

This case passed on the ability of the residuary legatee under a will to renounce his right so as to beat his creditors. Traynor, J. decided that he could not so renounce. He used as an analogy the lack of power of the donee of a general power of appointment to exercise his power in a fashion which would bar his creditors. The ability to take or not to take amounts to a general power of appointment. Consequently, the renounciation in this case had no effect on the distribution of the estate and the creditor of the residuary taker was paid.

Item No. 20

Security-First Nat'l Bank v. Ogilvie
47 Cal. App. 2d 787, 119 P.2d 25, 1941

A will stating three separate combinations of fact by implication gave wife Belle a testamentary power to appoint. Since Belle had furnished consideration for the transfer by dismissing the divorce action, even if she had no power, there was a resulting trust of undisposed assets to Belle. Thus the residuary takers from her husband who set up the trust loses, first on the theory that Belle had a testamentary power and second on the theory of a resulting trust.

The case has chief importance concerning powers of appointment as a holding on the ease with which a power to appoint can be spelled out from circumstances not mentioning a power.

Item No. 21

Swart v. Security-First National Bank of L.A.
48 Cal. App. 2d, 824, 120 P.2d, 697 (1942).

A reserved power to amend a trust (talked about in terms of a power to appoint) is not exercisable after the reserver of the power becomes mentally incompetent.

Item No. 22

California Trust Company v. Ott
59 Cal. App. 2d 715, 140 P.2d 79

1943

An intervivos trust created in 1930 created a general testamentary power in one of the two settlors of the trust. The will of this settlor executed in July 1929 effectively exercised the 1930 created power by its residuary clause. This is an application of the Restatement of Property Section 344.

Item No. 23

Henderson v. Rogan, 159 F.2d 855,
C.C.A.9, 1947

In 1931 Nellie's husband established an inter vivos trust to pay the net income to Nellie giving her an absolute power of appointment to be exercised by "the last unrevoked instrument exercising such power and on file with the trustee at the time of her death."

In 1932 after her husband died Nellie executed such a document directing that the trust assets become a part of her estate for distribution according to her will.

The appointive assets were held to be includible in Nellie's estate for federal estate tax purposes because of the 1932 exercise of the general power. The case contains much unnecessary language reciting various aspects of the law of powers of appointment. The power in question was, under the court's decision a general power presently exercised.

Item No. 24

Horne v. Title Insurance & Trust Co.
79 F.Supp. 91, S.D., Cal. 1948

In 1940 George Day created a trust with a corporate fiduciary and his son, William as co-trustees. The son, William, was given power to change the shares of three in 60% of the corpus provided he obtained the consent of the trustee. Frances, wife of son William died. Son, William, married a lady named Ruth. William sought diligently to secure the release of fractions of the 20% given to Walter, to Richard and to Gwendolyn. Gwendolyn refused. The other two consented, each releasing 7-1/2% of their 20% to Ruth. After Gwendolyn's refusal in November, 1946, William changed the shares to 28% for Walter, 28% for Richard and 4% for Gwendolyn. The trustees certified its acceptance. William died December 17, 1946. Gwendolyn seeks and obtains her original 20% on the ground that William's conduct was a "fraud on the power," namely, an effort to divert the benefit of a special power to a non-object. The stated facts do not show the manner in which Ruth was to get a share.

This was a federal case decided on the basis of California law. It purported to apply Restatement of Property Section 353 citing English, Kentucky, Mississippi, and New York cases.

Item No. 25

Estate of Parker, 98 Cal. App. 2d 393,
220 P.2d 580, 1950

A will probated June 1939 established a trust for three people giving to one of them, Alice, a general testamentary power to convey the principal. In February 1943 Alice executed her will specifically exercising the power. A codicil made in December 1946 provided "Every legacy and any property passing in the probate of my estate or by reason of my death shall be delivered free from all federal and estate tax and all inheritance taxes. Such taxes shall be paid out of the residue of my estate." Her personal estate amounted to $40,000. The appointive assets amounted to $274,000. All of the federal estate tax was ordered to be paid out of the owned assets of Alice Parker. The codicil clause excluded the application of California Probate Code 970 which became effective August 4, 1943, and which required proration unless the testator directs otherwise.

Item No. 26

Estate of Newton, (commented on 39 Cal. L.R. 150) 35 Cal. 2d 830, 221 P.2d 952, 1950

Charles Newton dying in New York in 1921 created a testamentary power in his son, Arthur Newton, to appoint a fraction of the principal to his wife. Son, Arthur, executed his will in New York in 1930 exercising the power. He moved to California and died in March 1943. The appointive assets (not including any shares of California corporations) were valued at $412,000 and were in the custody of New York trustees. The lower court followed Estate of Bowditch, supra. Item No. . The Supreme Court reversed. The power was exercised in California at Arthur's death in 1943. Consequently, the case came within the 1935 California Inheritance Tax Statute providing that appointive assets are to be taxed to the donor except where the donor has died before 1935, in which case the transfer is taxable as if the property belonged to the donee.

The court followed the reasoning of the Supreme Court decision in Graves v. Schmidlapp 315 U.S. 657 stating that the exercise of a power of appointment is a source of potential wealth and, therefore, a taxable property right in the donee.

The concurring opinion of Traynor, J. at page 838 states "The imposition of an inheritance or an estate tax does not depend upon the decedent's ownership of the property under common law principles." The tax is not imposed on the property but on the decedent's transfer of the property. It is irrelevant that the property did not belong absolutely to the decedent.

This case overruled Estate of Bowditch.

At page 831 the court traces the California history of the applicability of its inheritance tax to powers of appointment.

Item No. 27

Estate of Baird, 120 Cal. App. 2d 219
260 P.2d 1052, 1953

A testamentary trust created in 1924 created a life income for wife, Margaret, plus a general testamentary power with a gift in default to the heirs of Margaret. The donee died March 6, 1951. The will said that it was exercising the power in the giving of 26 bequests totaling $75,500. The donee's owned assets were $48,000. The heirs of Margaret consented that the executor of Margaret was entitled to get the expenses of her last illness, her funeral expenses, her debts and the legacies of those who survived Margaret, amounting to $60,000. The heirs of Margaret claim the balance as takers in default under the 1924 instrument.

The heirs of Margaret took anyway, but if they took by the gift in default they took from the donor and these assets were not part of the donees estate for the purpose of computed executor's fees, attorney's fees and appraiser's fees. The court held that they took as takers in default, citing New York and Rhode Island cases, except insofar as the California inheritance varied this for tax purposes.

This holding that the appointee took from the donor minimized the expenses in the settlement of the estate of the donee.

Item No. 28

Briggs v. Briggs, 122 Cal. App. 2d 766,
265 P.2d 987

1954

A testamentary trust created in 1940 for the benefit of testator's widow, Nellie, was accompanied by a general testamentary power. There was also a power in the two named trustees to make an inter vivos transfer.

A deed by Nellie in which her co-trustee did not join gave nothing to her second and now divorced husband.

An inter vivos instrument is not an effective exercise of a testamentary power. The remainder interests of the takers in default, although defeasible, was vested. Thus Nellie was barred from claiming a community property interest in this land on the basis that it had been owned by her second husband.

Item No. 29

Estate of Smythe, 132 Cal. App. 2d 343,
282 P.2d 141, 1955

A 1955 will gave the life benefit to Ruth with a special testamentary power to appoint anything that is left to two named charities in equal shares.

The court talked about this in terms of a testamentary power to appoint which the court will execute if the donee doesn't. The donee was still alive. The donee was not entitled presently to complete ownership.

This case does not make any holding which is significant concerning powers of appointment.

Item No. 30

Estate of Baird, 135 Cal. App. 2d 333,
287 P.2d 365, 1955

This deals with the same dispositions as are treated in Item No. [illegible] supra. In picking the heirs of Margaret entitled by intestacy, all of the property was to go to her blood heirs. Since none of the unappointed assets belonged to Margaret herself, this prevents Civil Code 229 from applying. Thus the sister, nieces, nephews, grandnephews and grandnieces of Margaret take to the exclusion of children of the original testator by his former wife.

This case makes an important application of the basic idea that an appointee (or a taker in default) takes from the donor and not from the donee.

Item No. 31

Estate of Masson, 142 Cal. App. 2d 510,
298 P.2d 619, 1956

Father Paul in 1940 created a testamentary trust to pay $500 a month to his daughter, Adele, for life with a general testamentary power to appoint. The will of Adele who died in about 1955 gave $10,000 to named persons and the balance "to the American Society which in the judgment of my executors does the best research into diseases of old age." The executors of Adele claimed $48,000 out of the appointive assets to pay Adele's debts, executors' fees and back income taxes. The lower court gave the appointive assets to the appointees free of these claims. This was reversed. Since the power was general, the donee's exercise is to be treated as an appointment to her estate. The appointive assets thereby become subject to the claims which cannot be paid out of Adele's own assets.

This case seems to apply the common law rule concerning the rights of creditors of a donee of a general power.

Item No. 32

Estate of Carter, 47 Cal. 2d 200,
302 P.2d 301, 1956

A will speaking in 1951 created a trust for the benefit of testator's wife, Mabel, for life giving her a general testamentary power with gifts in default. The wife died in 1954. Neither her will nor codicils mentioned the power. She gave residue of her assets to six children.

The court held that the residuary clause exercised the power. The fact that the wife executed her will two years before the husband's death is irrelevant. The attorney who executed her will testified that he told the donee that there could be no exercise of a power except after the husband died and by an instrument specifically referring to the power. The court held that this advice was not law; that the testimony was not necessary and that it was an error to admit it.

This is a strong armed application of Probate Code 125 based on New York and English cases.

The case is commented on in 95 Trusts & Estates 1168, 1956.

Item No. 33

In re Huntington's Estate, 10 Misc. 2d 932,
170 N.Y.S.2, 452, 1957

The donor of this power with respects of upwards of $2,000,000 was domiciled in California. The donee died domiciled in Connecticut. The will of the donee made no mention of the existence of the power. The validity of the exercise of the power was to be determined by the law of California. The common law rule of powers is enforced in California except as modified by statute. As to 7/8 of the appointive assets no decision is needed because the donee was the residuary taker under the donor's will.

As to the remaining 1/8 there were 22 beneficiaries born before the original testator died, and, consequently, trusts for their lives were lawful. But there were 32 beneficiaries not born before the testator died. The difference between an exercise and nonexercise fixes the amount of charges incurred by passing through the estate of the donee. Since the appointment here was partly bad and partly good, by holding the appointment completely invalid, the property passes as a disposition under the gifts of default and expenses in the estate of the donee are thereby eliminated.

Item No. 34

Estate of Kuttler 160 Cal. App. 2d 332
325 P.2d 624
1958

A testator dying in 1956 left a vague holographic will disinheriting the descendants of his two sons but creating as the court found, a general power of appointment in testator's fiance, Hater and sister, McQuarrie. The court used Arizona, Iowa, Maine, New Jersey, Tennessee, Washington and Wisconsin cases.

At page 628 the co rt said: "Powers of appointment have been ecognized in this state ever since the decision in re the Estate of Sloan." Supra Item .

There was a dissent based on the insufficiencies of the instrument to create the power of appointment or to make any disposition. The dissent relied on Restatement of Property Section 323 Comment (e).

Item No. 35

Estate of Bird, 37 Cal. Rptr. 288, 1964

Jeannette died June 16, 1961 leaving a will which created a trust for the life of her husband, Jeffrey, with a general power to appoint by will followed by gifts in default to his heirs. Jeffrey died three months later leaving a will which specifically exercised the power. This will created a trust for his children for life and on the death of the last survivor, of children and grandchildren living at his death to the children of grandchildren per capita.

Since this power was a general testamentary power, the permissible period under the rule against perpetuities is to be applied from the creation of the power; but facts and circumstances are considered as they are known at the time of its exercise. Since all of the persons used as measuring lives in Jeffrey's will were also lives in being three months earlier when Jeannette died, the limitation is valid.

This case accepts and applies Restatement of Property Section 392. The decision was unanimous by Stone, Griffin and Coughlin, J.J.

Item No. 36

Estate of Keeble
234 C.A. 2, 295, 44 Cal. Rptr. 395, 1965

Edward Keeble died in 1962. He made some outright bequests to his widow and left the balance in trust to pay the income to the widow with a power to invade the corpus if necessary at the trustee's discretion. The remainder was given to the widow's issue subject to her power to appoint to one or more of her issue during her lifetime.

The question is whether the outright gifts to the widow and the appointive assets should be aggregated for the computation of the California Inheritance Tax. The court held that they should, stating that taxing the transfer on the donor's death was in accord with the common law theory that appointive assets pass from the donor to the appointee. This result was reinforced by the widow's beneficial interest in the trust included in the power to encroach for her benefit.

Item No. 37

Industrial National Bank of R.I. v. Barrett
220 A. 2, 517, R.I., 1966

Arthur died January 28, 1959, creating a trust for the benefit of his wife and giving her a general testamentary power to appoint. Mary died October 28, 1963, exercising the power by creating a trust to pay income to two named grandchildren for life and to pay over the corpus on the death of each granddaughter to her issue per stirpes. The will contained a provision that the trust was to end twenty-one years after the death of the younger grandchild or issue of either grandchild living at the death of Mary.

When Arthur died, the two named granddaughters had one great grandchild. When Mary died, the same two granddaughters had seven great grandchildren alive.

The exercise of the power was valid if the permissible period of the rule against perpetuities was applied from the death of Mary. It failed otherwise.

The court adopted the English position, which is a minority position in the United States, sustaining the validity of the exercise of the power.

Item No. 81

Preface to the Civil Code

Written by the commissioners on October 2, 1871, in the draft prepared in 1871 for consideration by the Legislature.

Our Act adopting the Common Law of England (Stats. 1850, 219) is as follows: "The Common Law of England, so far as it is not repugnant to, or inconsistent with, the Constitution of the United States, or the Constitution or laws of the State of California, shall be the rule of decision in all the Courts of this State." The Courts hold that this Act does not mean Common Law of England, but of the United States - "American Common Law;" the Common Law of England, as modified by the respective States. There are as many authoritative modifications as there are States in the Union. Rules upon the same subjects differ much in different States. When they so differ, or when they need modifications to suit our conditions, the Court, not the Legislature, establishes the law.

Item No. B2

California Civil Code

§ 22.2 Common Law of England; rule of decision

The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all the courts of this State. (Added Stats. 1951, c. 655, p. 1833, § 1.)

Derivation: Stats. 1850, c. 95, p. 219; Pol. C. § 4468.

Item No. 83

California Laws 1873 - 1874
contained Amendments to the
Civil Code

Sect. 123 of these Amendments is worded as follows:

> Title V of Part II of Div. II on powers of the Civil Code embracing sections of said Code from 678 - 946 inclusively is repealed. The number 946 is obviously an error for 940 as the Powers chapter never included any sections numbered 941 to 946.

This statute was approved April 30, 1874, and became effective July 1st, 1874.

Item No. B4

Cal. Civ. Code § 1060, enacted by Cal. Laws, 1945 c. 318

§ 1060. Release of power; extent; delivery of release; validation

1. Any power, which is exercisable by deed, by will, by deed or will, or otherwise, whether general or special, other than a power in trust which is imperative, is releasable, either with or without consideration, by written instrument signed by the donee and delivered as hereinafter provided unless the instrument creating the power provides otherwise.

2. A power which is releasable may be released with respect to the whole or any part of the property subject to such power and may also be released in such manner as to reduce or limit the persons or objects, or classes of persons or objects, in whose favor such powers would otherwise be exercisable. No release of a power shall be deemed to make imperative a power which was not imperative prior to such release, unless the instrument of release expressly so provides.

3. Such release may be delivered to any of the following:
   (a) Any person specified for such purpose in the instrument creating the power.
   (b) Any trustee of the property to which the power relates.
   (c) Any person, other than the donee, who could be adversely affected by an exercise of the power.
   (d) The county recorder of the county in which the donee resides, or has a place of business, or in which the deed, will or other instrument creating the power is filed, and from the time of filing the same for record, notice is imparted to all persons of the contents thereof.

4. All releases heretofore made which substantially comply with the foregoing requirements are hereby validated. The enactment of this section shall not impair, nor be construed to impair, the validity of any release heretofore made.

Item No. 55 B5

California Probate Code

§ 120. Devise of Land.

A devise of land conveys all the estate of the testator therein which he could lawfully devise, unless it clearly appears by the will that he intended to convey a less estate.

This section was derived from the Statutes of 1850, Chap. 72, p. 179, Sect. 21.

§ 125. Disposition of all real or personal property; property included

A devise or bequest of all the testator's real or personal property, in express terms, or in any other terms denoting his intent to dispose of all his real or personal property, passes all the real or personal property which he was entitled to dispose of by will at the time of his death, including property embraced in a power to devise.

This provision was substantially derived from Calif. Statutes of 1850, Chap. 72, Sect. 22.

Item No. 56

Cal. Rev. and Taxation Code §§ 13691-13697
enacted by Cal. Laws 1935, C.1070

§ 13691. Charitable beneficiary

"Charitable beneficiary", as used in this article, means a transferee of property which is within the exemption specified in Article 3 (commencing with Section 13841) of Chapter 5 of this part.

§ 13692. General power of appointment

"General power of appointment" means a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate, provided that the following shall not be deemed to be general powers of appointment:

(a) A power to consume, invade, or appropriate property for the benefit of the decedent which is limited by an ascertainable standard relating to the health, education, support or maintenance of the decedent.

(b) A power not exercisable by the decedent except in conjunction with the creator of the power.

(c) A power not exercisable by the decedent except in conjunction with a person having a substantial interest in the property subject to the power, which is adverse to exercise of the power in favor of the decedent. For the purposes of this sub-section a person who, after the death of the decedent, may be possessed of a power of appointment (with respect to the property subject to the decedent's power) which he may exercise in his own favor shall be deemed as having an interest in the property and such interest shall be deemed adverse to such exercise of the decedent's power.

If the power is exercisable by the decedent only in conjunction with another person and if after the application of subdivisions (b) and (c) the power is a general power of appointment and is exercisable in favor of such other person, such power shall be deemed a general power of appointment only in respect of a fractional part of the property subject to such power, such part to be determined by dividing the value of such property by the number of persons (including the decedent) in favor of whom such power is exercisable.

For purposes of subdivisions (b) and (c) of this section, a power shall be deemed to be exercisable in favor of a person if it is exercisable in favor of such person, his estate, his creditors or the creditors of his estate.

§ 13693. Limited power of appointment

"Limited power of appointment" means a power which does not qualify under the preceding section as a general power of appointment.

§ 13694. Disposition of property before or after 5 p.m., June 25, 1935

Except as otherwise provided in this article, a gift of a general or limited power if appointment made in conjunction with a disposition of property otherwise subject to this part effected before or after 5 p.m. of June 25,

1935, is a transfer subject to this part from the donor to the donee at the date of the donor's death, except that if a power of appointment over any portion or all of the donor's half interest in community property is given to the donor's spouse, the value of any interest, other than the power itself, given the donee in such property subject to such power, up to but not exceeding the value of a life estate therein of the donee, is not subject to this part.

§ 13695. Disposition of property before 5 p.m., June 25, 1935, but limited power exercised thereafter

Where a limited power of appointment given in conjunction with a disposition of property effected before 5 p.m. of June 25, 1935, by a donor who died prior to that date, is exercised after that date by the donee, the exercise of the power is a transfer subject to this part from the donee to the person appointed at the time of the exercise, as though the property to which the power relates belonged absolutely to the donee and is transferred by him by will.

§ 13696. General power not exercised at time of decedent's death

If at the time of his death a decedent has a general power of appointment with respect to property, the exercise of the power is subject to this part as a transfer of the property from the decedent to the person to whom the property is appointed and the decedent's failure to exercise the power is subject to this part as a transfer of the property from the decedent to the person to whom the property passes by virtue of the non exercise of the power. For purposes of this section, the power of appointment shall be considered to exist on the date of the decedent's death even though the exercise of the power is subject to a precedent giving a notice or even though the exercise of the power takes effect only on the expiration of a stated period after its exercise, whether or not on or before the date of the decedent's death notice has been given or the power has been exercised.

§ 13697. Exercise or release by decedent during lifetime of power with respect to property which, but for such exercise or release, would be subject to tax under section 13696

The exercise or release by the decedent during his lifetime of a power with respect to property which, but for such exercise or release would be subject to tax by virtue of the preceding section, is a transfer subject to this part if the exercise or release is of such a nature that if it were a transfer of property owned by the decedent such transfer would be subject to this part under Article 3 of Chapter 4 of this part. A disclaimer or renunciation of such a power of appointment shall not be deemed a release of such power.

The lapse of a power of appointment during the life of the individual possessing the power shall be considered a release of such power. The preceding sentence shall apply with respect to the lapse of powers during any calendar year only to the extent that the property, which could have been appointed by exercise of such lapsed powers, exceeded in value, at the time of such lapse, the greater of the following amounts:

(a) Five thousand dollars ($5000), or
(b) Five percent of the aggregate value, at the time of such lapse, of the assets out of which, or the proceeds of which, at the exercise of the lapsed powers could have been satisfied.

[§ 13698-13701 deal with dispositions involving both powers of appointment and charities.]

Restatement of the Law of Property

Chapter 25

POWERS OF APPOINTMENT

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Item No. C2

New York Estate, Powers and Trust Law

Table of sections in Article 10 - Powers

Tape No. C3

Wisconsin Statutes Sections 232.01 and following enacted by Wisconsin Laws of 1965 Chapter 52

232.01 Definitions

As used in this chapter, unless the context indicates otherwise:

(1) "Power" means a power of appointment over legal or equitable interests in real or personal property. A power of appointment is a power created or reserved by a person having property subject to his disposition which enables the donee of the power to designate, within such limits as may be prescribed, the transferees of the property or the shares or the interests in which it shall be received; it does not include a power of sale, a power of attorney, a power of revocation or a power exercisable by a trustee or other fiduciary in his fiduciary capacity.

(2) "Donor" means the person who creates or reserves the power; "donee" means the person in whom the power is created or reserved; and "appointee" means the person to whom an interest is appointed.

(3) "Creating instrument" means the deed, will, trust agreement or other document which creates or reserves the power.

(4) "General power" means a power exercisable in favor of the donee, his estate, his creditors or the creditors of his estate, whether or not it is exercisable in favor of others. A power to appoint to any person or a power which is not expressly restricted as to appointees may be exercised in favor of the donee or his creditors if exercisable during lifetime, and in favor of the donee's estate or the creditors of his estate if exercisable by will.

(5) "Special power" means a power exercisable only in favor of one or more persons not including the donee, his estate, his creditors or the creditors of his estate and, when exercisable in favor of a class, so limited in size by description of the class that in the event of nonexercise of the power a court can make distribution to persons within the class if the donor has failed to provide for this contingency.

(6) "Unclassified power" means a power which is neither a general power nor a special power as defined in this section.

232.03 Manifestation of intent to exercise powers

(1) If the donor has explicitly directed that no instrument shall be effective to exercise the power unless the instrument contains a reference to the specific power, in order to exercise effectively such a power the donee's instrument must contain a specific reference to the power or the creating instrument and expressly manifest an intent to exercise the power or transfer the property covered by the power.

(2) In the case of other powers, an instrument manifests an intent to exercise the power if the instrument purports to transfer an interest in the appointive property which the donee would have no power to transfer except by virtue of the power, even though the power is not recited or referred to in the instrument, or if the instrument either expressly or by necessary implication from its wording interpreted in light of the circumstances surrounding its drafting and execution manifests an intent to exercise the power. If there is a general power exercisable by will with no gift in default in the creating instrument a residuary clause or other general language in the donee's will purporting to dispose of all of the donee's estate or property operates to exercise the power in favor of the donee's estate, but in all other cases such a clause or language does not in itself manifest an intent to exercise a power exercisable by will.

232.05 Exercise of powers

(1) Capacity to exercise power. A power can be exercised only by a person who would have the capacity to transfer the property covered by the power.

(2) Kind of instrument and formalities of execution. A donee can exercise a power only by an instrument which meets the intent of the donor as to kind of instrument and formalities of execution. If the power is exercisable by will, this means a will executed with the formalities necessary for a valid will. If the power is exercisable by deed, this means a written instrument signed by the donee under seal. A written instrument signed by the donee is sufficient if the donor so directs or if he fails to indicate a deed or will, but if the power is to appoint legal interests in land, it can be exercised only by an instrument executed with sufficient formalities to pass legal title.

(3) Consent of third persons. When the consent of the donor or of any other person is required by the donor for the exercise of a power, such consent must be expressed in the instrument exercising the power or in a separate written instrument, signed in either case by the persons whose consent is required. If any person whose consent is required dies or becomes legally incapable of consenting, the power may be exercised by the donee without the consent of that person unless the donor has manifested a contrary intent in the instrument creating the power.

(4) Power vested in 2 or more donees. Unless the donor manifests a contrary intent, when a power is vested in 2 or more persons, all must unite in its exercise, but if one or more of the donees dies, becomes incapable of exercising the power or renounces or releases the power, the power may be exercised by the others.

232.07 Powers to be construed as exclusive

The donee of any power may appoint the whole or any part of the appointive assets to any one or more of the permissible appointees and exclude others, except to the extent that the donor specifies either a minimum share or amount to be appointed to each permissible appointee or to designate appointees, or a maximum share or amount appointable to any one or more appointees.

232.15 Disposition when special power is unexercised

If the donee of a special power fails to exercise effectively the power, the interests which might have been appointed under the power pass:

(1) If the creating instrument contains an express gift in default, then in accordance with the terms of such gift;

(2) If the creating instrument contains no express gift in default and does not clearly indicate that the permissible appointees are to take only if the donee exercises the power, then to the permissible appointees equally, but if the power is to appoint among a class such as "relatives," "issue" or "heirs," then to those persons who would have taken had there been an express gift to the described class; or

(3) If the creating instrument contains no express gift in default and clearly indicates that the permissible appointees are to take only if the donee exercises the power, then by reversion to the donor or his estate. But if the creating instrument expressly states that there is no reversion in the donor, then any language in the creating instrument indicating or stating that the permissible appointees are to take only if the donee exercises the power is to be disregarded and the interests shall pass in accordance with sub. (2).

232.17 Rights of creditors of the donee

(1) General policy. If the donee has either a general power or an unclassified power which is unlimited as to permissible appointees except for exclusion of the donee, his estate, his creditors and the creditors of his estate, or a substantially similar exclusion, any interest which the donee has power to appoint or has appointed is to be treated as property of the donee for purposes of satisfying claims of his creditors, as provided in this section.

(2) During lifetime of the donee. If the donee has an unexercised power of the kinds specified in sub. (1), and he can presently exercise such a power, any creditor of the donee may by appropriate proceedings reach any interest which the donee could appoint, to the extent that the donee's individual assets are insufficient to satisfy the creditor's claim. Such an interest is to be treated as property of the donee within ch. 273. If the donee has exercised such a power, the creditor can reach the appointed interests to the same extent that under the law relating to fraudulent conveyances he could reach property which the donee has owned and transferred.

(3) At death of the donee. If the donee has at the time of his death a power of the kinds specified in sub. (1), whether or not he exercises the power, any creditor of the donee may reach any interest which the donee could have appointed or has appointed, to the extent that the claim of the creditor has been filed and allowed in the donee's estate but not paid because the assets of the estate are insufficient.

(4) Assignment for benefit of creditors. Under a general assignment by the donee for the benefit of his creditors, the assignee may exercise any right which a creditor of the donee would have under sub. (2).

(5) Third parties in good faith protected. Any person acting without actual notice of claims of creditors under this section incurs no liability to such creditors in transferring property which is subject to a power or which has been appointed; and a purchaser without actual notice and for a valuable consideration of any interest in property, legal or equitable, takes such interest free of any rights which a creditor of the donee might have under this section.

232.19 Matters governed by common law

As to all matters within the scope of those sections of ch. 232 [Stats. 1963] which have been repealed, and not within this chapter or any other applicable statute, the common law is to govern. This section is not intended to restrict in any manner the meaning of any provision of this chapter or any other applicable statute.

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POWERS OF APPOINTMENT

Background Material Assembled by Staff

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