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Powers of Appointment in California

IN ENGLAND and most of our states it is possible, by instrument in writing, for one person to invest another person with a right or capacity to create interests or estates in land, in favor of some third person, which are just as operative as if the first person had himself made a direct conveyance, and which take effect as executory interests in derogation of some other interest or estate in the land. The person in whom this capacity is vested is said to have a power of appointment. The donee of the power may or may not, himself, have some existing interest or estate in the land.¹

The purpose of the present article is to discuss the validity of such powers in California. To lawyers outside of the state, a suggestion that the question may be an open one here, will undoubtedly be surprising. In most common-law jurisdictions the validity and propriety of powers of appointment are as fundamental as the rule that consideration is necessary for simple contracts. Yet as recently as the 182nd California Report, our Supreme Court indicated that the existence of powers of appointment under our law is still an open question.² The actual decisions of our courts are, perhaps, not wholly satisfactory. The reasons for believing such powers do exist seem compelling.

¹ See 1 Tiffany, *Real Property* (2d ed.) §§ 310, 313, 315; Gray, *Release and Discharge of Powers*, 24 *Harvard Law Review*, 511; Farwell on Powers (2d ed.) p. 1; 1 Chance, *Powers*, p. 1 et seq.; Sugden, *Powers* (3d Am. ed.) p. 1 et seq.; Reeves, *Real Property*, § 920 et seq.; 31 Cyc. 1038, note 1. Classification of powers. See Gray, *Release and Discharge of Powers*, 24 *Harvard Law Review*, 511; 1 Tiffany, *op. cit.*, § 313; Farwell on Powers (2d ed.) p. 7; 1 Chance, *op. cit.*, p. 9 et seq.; Sugden, *op. cit.*, p. 106 et seq.

For a discussion of the statutory system of powers in New York see Chaplin on Express Trusts and Powers, § 529 et seq.

² *Estate of Murphy* (1920) 182 Cal. 740, 746, 190 Pac. 46.

HISTORY OF POWERS OF APPOINTMENT IN CALIFORNIA

Powers of appointment are dependent upon a system of estates in property, which allows estates to take effect as executory limitations,³ and in a sense are dependent upon the Statute of Uses. But they are in no original sense the creatures of statute—to the contrary they were worked out by the English courts, became part of the common law, and as such were adopted in the States of the United States.⁴

Our Legislature in 1850 adopted the common law by providing that

"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 Courts of this State."⁵

Powers of appointment are not repugnant to or inconsistent with the Constitution of the United States or the Constitution of this State.⁶ Nor were they repugnant to or inconsistent with the laws of this State in 1850. It cannot be said that they never became part of the law of California because not suited to the conditions of American life and the habits and needs of the people of California, for (1) the Act of 1850, and not loose and general considerations of "policy," determines how far the common law was adopted in California; and (2) even if we look beyond the Act of 1850, the general adoption of powers of appointment in other American jurisdictions abundantly shows that they are not unsuited to conditions of life in America.

It seems safe to say, then, that from 1850 to 1872 the common

³ This statement is correct in the great majority of cases. It is not correct so far as powers to nominate the taker of a remainder are concerned. See 1 Chance, *op. cit.*, p. 2 et seq. This confined class of powers is of no practical importance.

⁴ See a full discussion of this point below. It should further be noticed that whatever be our law now there is nothing to show that down to 1872 the Statute of Uses was not in force in California. But see 1 Perry on Trusts (6th ed.) § 299 n.

⁵ Cal. Stats. 1850, p. 219; Cal. Pol. Code, § 4468. See *McDaniel v. Cummings* (1890) 83 Cal. 515, 518, 23 Pac. 795, 8 L. R. A. 575; *Morris v. Moody* (1890) 84 Cal. 143, 24 Pac. 814.

⁶ In so far as powers of appointment might tend to create "perpetuities", they were carefully limited at common law, and after 1872, by our Civil Code sections 715 and 716. See *Farwell, op. cit.*, p. 110 et seq., also p. 286; *Sugden, op. cit.*, p. 233; *Gray, Rule against Perpetuities* (3d ed.) ch. XV.

law as to powers of appointment was in force in this state. There is support for this conclusion in our cases.⁷

On March 21, 1872, the Civil Code was adopted. As enacted, the code contained a skeleton scheme of powers.⁸ The code sections on the whole follow the common law. They depart slightly with respect to the effect of giving a general beneficial power, and also with respect to the validity of general beneficial powers as tested by the rule governing restraints on the power of alienation. Nowhere, either directly or by implication, do any of these sections declare or intimate that by permitting the powers specified, an innovation was made in the law of California.

Without having been cited or discussed these code sections with a few others, notably section 860, were repealed in 1874.⁹

Now, then, the problem to be discussed here is, how far did the repeal of Division II, Part II, Title V of the Civil Code operate to reinstate the common law of powers of appointment in California?

⁷ *Burnett v. Piercy* (1906) 149 Cal. 178, 86 Pac. 603 (semble). Compare also the following cases on collateral powers of sale: *Kidwell v. Brummagin* (1867) 32 Cal. 437; *Larco v. Casaneuaya* (1866) 30 Cal. 561, 568; *Payne v. Payne* (1861) 18 Cal. 292, 303; *Norris v. Harris* (1860) 15 Cal. 226. In these cases the holder of the power did not have the fee in trust with a power of sale. Such a case would be distinguishable. See 1 *Tiffany, Real Property* (2d ed.) § 314. Cases on powers of attorney do not seem in point. There the attorney does only what the donor of the power could himself do. See *Chaplin on Express Trusts and Powers*, § 536. Our problem is how far can a power over property be given where the power is to be exercised at a time when the donor could not have acted because dead or because he had divested himself of all power in the premises.

⁸ Cal. Civ. Code, Div. II, Part II, Title V, §§ 878-940. Section 878 provided that powers in relation to real property were only those specified; section 879 excepted powers of attorney; sections 880-888 classified powers and defined various terms; sections 889-911 provided who could create powers, who receive them, how they were created, whether revocable, who could execute them, and how; section 894 made a power a lien; section 915 covered defective execution; sections 912-913 dealt with suspension of alienation by means of powers; sections 918-923 dealt with powers of appointment and of revocation, when absolute, as creating a fee in favor of certain persons; certain other sections then made special rules for married women and for powers to lease; there are a few scattered sections dealing with the rights of creditors; still other sections deal with "trust powers."

⁹ Code amendments 1873-74, p. 223, § 123. The repealing clause read: "Title Five, of Part Two, of Division Two, on Powers, of the Civil Code, embracing sections of said code from section eight hundred and seventy-eight to nine hundred and forty-six, inclusive, is repealed."

The Code Commissioners, in recommending this repeal, said:

"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 code in places where the provisions of those sections properly belong."

ARGUMENTS FOR THE PROPOSITION THAT POWERS OF APPOINTMENT
ARE VALID IN CALIFORNIA

Aside from statutes and cases, there is every reason why powers of appointment should be valid. Why should not A be able to confer on B a benefit by giving B a power to make a gift, without giving B more? If there is any policy against such an arrangement, it is far to seek.

But more than that. A testator may wish to place a discretionary power in the hands of some one worthy of trust, so that changing circumstances with respect to intended beneficiaries, their family affairs, the birth of children, financial reverses, etc., may be dealt with. Certainly such a scheme of things is highly more desirable than a scheme which says to a testator, "make your disposition now, for all time. To be sure, some child may lose money and be left in poverty, or other things may happen. You may want to provide for such contingencies. But you cannot. The policy of the law is, that you, yourself, must completely dispose of your property, irrespective of how complicated your scheme of disposition may be." And so far as settling titles in advance is concerned, it is worth while to notice that a scheme of conditional devises may be drawn up which will give no more assurance, at the time of the testator's death, as to where his property is to be ultimately vested than would a power of appointment.

Do our statutes and cases compel us to say that, desirable as powers to appoint may be, nevertheless they cannot be employed? It is submitted they do not.

Powers of appointment did exist at common law and in California prior to 1872. The repeal of the Title on Powers operated, of course, to extinguish the code sections involved. Beyond this, there was no legislative expression of intent as to the scope of the repeal. The repeal of these code sections, then, reinstated the common law as to powers whether the sections repealed were merely declaratory of the common law, or were in derogation of the common law.¹⁰ Our statute regulating the effect of the repeal of a repealing statute¹¹ does not apply to the repeal of a statute whose only predeces-

¹⁰ See *Estate of Fair* (1910) 132 Cal. 523, 559, 60 Pac. 442 (Temple, J., dissenting); 1 Lewis' *Sutherland, Statutory Construction* (2d ed.) § 293. See also cases collected in 12 C. J. 187 and 36 Cyc. 1101.

¹¹ Cal. Pol. Code, § 4504, enacted in 1872.

sor in the field covered by the statute repealed was the common law.¹²

This result is recognized by our Civil Code. It is true that the Civil Code nowhere contains an express authorization of powers of appointment.¹³ Sections of that Code do, however, undeniably assume the validity of such powers.

Section 860 expressly provides how a power, vested in several persons, shall be exercised.¹⁴ The language of this section is broad enough to cover powers of appointment. When first found in the Code, it was a part of the chapter on powers and clearly referred to powers of appointment. Its reenactment in 1874 without change requires that it be given the same interpretation as it would have received in 1872—its meaning and construction are unchanged.¹⁵ There is nothing in its history, then, to cut down the plain and comprehensive scope of its language.

Section 781 declares the common-law rule that a general or special power does not prevent the vesting of estates limited to take effect in default of appointment.¹⁶ It has been said that this section merely regulates the effect of powers; that it "does not state the purpose of the supposed power, except that it must refer to a power to convey land."¹⁷ But the section clearly assumes the validity of powers to appoint California real property.¹⁸ Its full significance cannot be cut down by arguing that it may refer to powers over

¹² *Florida, etc. Co. v. Boswell* (1903) 45 Fla. 301, 34 So. 241; *Beavan v. Went* (1895) 155 Ill. 592, 41 N. E. 91, 31 L. R. A. 85; *Baum v. Thoms* (1898) 150 Ind. 378, 50 N. E. 357, 65 Am. St. Rep. 268; *State v. Mines* (1893) 38 W. Va. 125, 18 S. E. 470.

¹³ See *Estate of Fair*, 132 Cal. 523, 557 (Temple, J., dissenting).

¹⁴ Cal. Civ. Code, § 860. This section was originally section 900 and was part of the Title on Powers. It was repealed when that Title was repealed and was then reenacted without change as section 860 in place of the old section 860. Section 860 as first enacted covered "powers in trust" resulting from an attempt to create a trust not permitted by the Code. It was repealed when the Title on Powers was repealed. Code Amendments 1873-1874, pp. 222, 223.

¹⁵ *Riley v. Havens* (1924) 67 Cal. Dec. 337, 340, 225 Pac. 275; 2 Lewis' *Sutherland, Statutory Construction* (2d ed.) § 403; 25 R. C. L. 908, § 61. Cf. 36 Cyc. 1102, 1152.

¹⁶ Cal. Civ. Code, § 781. This section was enacted in 1872 and has remained unchanged since then. For the common-law rule see 2 Sugden, op. cit., p. 1 et seq.

¹⁷ *Estate of Fair*, 132 Cal. 523, 558 (Temple, J., dissenting).

¹⁸ This section is in that part of the code which regulates future interests in real property. It must obviously refer to California real property—interests and estates in real property and powers over real property, their validity and effect are governed by the *lex rei sitae*. *Campbell-Kawannanako v. Campbell* (1907) 152 Cal. 201, 206, 92 Pac. 184; *Sewall v. Wilmer* (1882) 132 Mass. 131, and cases collected in 31 Cyc. 1135.

personalty created by the will of a non-resident under the doctrine that the devolution of personalty is governed by the law of the residence of the testator. The section obviously refers to real property. Secondly, if the rule as to powers over personalty is as stated, then under the same rule the nature and extent of future interests in that personalty would be governed by the law of the testator's domicile and not by the law of California.

Section 1330 provides that "Real or personal property embraced in a power to devise, passes by a will purporting to devise all the real or personal property of the testator."¹⁹ There could hardly be an inference more clearly drawn than that to be drawn from this section. Certainly so far as real property is concerned, the section must refer to California real property, for our legislature is powerless to provide how a power affecting real property elsewhere is to be exercised.²⁰

An even stronger argument, so far as legislative recognition of powers of appointment is concerned, may be based on the California Inheritance Tax Act.²¹ Section two of this Act expressly provides how gifts taking effect under a power shall be taxed, and how gifts in default of appointment shall be taxed.

Such California cases as have been found, while not entirely satisfactory, support the conclusion that powers of appointment are valid. In *Estate of Dunphy*,²² the court gives the clearest sort of

¹⁹ Cal. Civ. Code, § 1330. This section was enacted in 1872 and has remained unchanged since then.

²⁰ See note 18, *supra*. It might, however, be argued that this was merely a rule of construction for finding an intent to exercise a power, and is to be applied to California wills exercising powers over property, the situs of which puts it under the law of another jurisdiction, i. e., that the section applies to powers valid by a law other than ours. But the Legislature of California is as powerless to prescribe what words shall affect estates in foreign lands, and what shall constitute an exercise of a power over foreign lands, as it is to prescribe what interests, estates or powers may be created in or over foreign lands. *Sewall v. Wilmer*, *supra*, n. 18. See further cases collected in 31 Cyc. 1135.

Section 1330 will not apply when a contrary intent appears on the face of the will. *Estate of Murphy*, *supra*, n. 2..

For a discussion of what amounts to the exercise of a power in the absence of such a statute as section 1330 see *Sugden*, op. cit., p. 404; 2 *Chance*, op. cit., p. 70 et seq.; *Farwell*, op. cit., p. 176 et seq., and p. 222 et seq.; *Kales*, *Future Interests* (2d ed.) § 640 et seq.; 1 *Tiffany*, op. cit., § 323 et seq.; 64 *L. R. A.* 849 n.

²¹ Cal. Stats. 1921, p. 1500 (ch. 821, § 2, subd. 6); see also Cal. Stats. 1917, p. 882 (ch. 589, § 2, subd. 6).

²² (1905) 147 Cal. 95, 102, 81 Pac. 315. The case is of particular interest because in spite of his concurring opinion in *Estate of Fair*, *Shaw*, J., concurs in the opinion written by Mr. Justice McFarland.

indication that it considers powers of appointment valid. In *Elmer v. Gray*,²³ application was made by the executors of the deceased to determine whether, after they had been discharged as executors, they could increase certain monthly payments to the sister of the deceased, as provided in the will. It was held that they could. In other words, the court holds that the donees of a power simply collateral may exercise it if they see fit.

But two other cases have been found involving powers of appointment. In both, a discussion of the validity of powers was unnecessary, yet in both the court discusses the case upon the hypothesis that the power was valid.²⁴

In addition, the California cases establish two striking analogies to powers of appointment, namely, powers of revocation and collateral powers of sale.²⁵

Powers of revocation, like powers of appointment, though recognized by our Civil Code,²⁶ are nowhere expressly authorized.²⁷ Like powers of appointment, they operate by creating an executory estate which takes effect in derogation of other estates or interests limited in the instrument giving the power. Their validity is undoubted.²⁸

Collateral powers of sale, i. e., powers of sale which operate upon an estate other than that of donees,²⁹ are not authorized in terms by our Code. They are nevertheless valid.³⁰ Their operation is even

²³ (1887) 73 Cal. 283, 14 Pac. 862.

²⁴ *Estate of Murphy*, supra, n. 2; *Gray v. Union Trust Co.* (1915) 171 Cal. 637, 154 Pac. 306; *Burnett v. Piercy*, supra, n. 7, is not in point as the instrument there considered was executed in 1867. *Lewis v. Lewis* (1906) 3 Cal. App. 727, 86 Pac. 994, is not in point as the deed there considered was executed in 1873. Neither of these last two cases, however, in any way intimates that a power given in an instrument becoming effective after 1874 is invalid.

²⁵ These powers and powers of appointment are so nearly alike as usually to be treated together by text-writers. See *Farwell*, op. cit.; *Sugden*, op. cit.; 1 *Chance*, op. cit.; *Chaplin*, op. cit., § 555.

²⁶ Cal. Civ. Code, §§ 1229, 2280.

²⁷ See *Estate of Fair*, 132 Cal. 523, 558 (Temple, J., dissenting).

²⁸ *Tennant v. John Tennant Memorial Home* (1914) 167 Cal. 570, 140 Pac. 242; *Carr v. Carr* (1911) 15 Cal. App. 480, 115 Pac. 261; *Booth v. Oakland Bank of Savings* (1898) 122 Cal. 19, 54 Pac. 370; *Nichols v. Emery* (1895) 109 Cal. 323, 41 Pac. 1089; *Hellman v. McWilliams* (1886) 70 Cal. 449, 11 Pac. 659.

²⁹ Where a trustee having the fee has a power of sale and sells, the legal estate goes of course by force of his conveyance and not under the power.

³⁰ *Estate of Campbell* (1906) 149 Cal. 712, 87 Pac. 573; *Morffew v. S. F.*, etc. R. Co. (1895) 107 Cal. 587, 40 Pac. 810. See also cases decided before 1872, supra, n. 7. It is of course clear that where a trustee is given a power to sell, the power is valid. *Roberts v. Taylor* (1924) 300 Fed. 257, and cases cited; in *re Williams* (1891) 92 Cal. 183, 28 Pac. 227.

more like the operation of a power of appointment than is the operation of a power of revocation. The only distinction between them and a power of appointment is that receipt of a consideration is a condition to their exercise. But this is a "distinction without a difference" so far as the structure of our system of future interests in property is concerned. It may be argued that they are legitimate because for a legitimate purpose—to meet the exigencies of changing conditions with respect to property. But what can be more legitimate than a scheme to meet changes in circumstances with respect to the intended beneficiary?

DOCTRINE OF ESTATE OF FAIR

Such confusion and doubt as may exist with respect to powers in California is directly traceable to *Estate of Fair*.³¹ A careful analysis of just what that case and the cases following it decided as to powers will be instructive.

Estate of Fair first decided that certain trusts which Senator Fair attempted to create by his will were void because they were "trusts to convey," trusts not permitted by sections 847 and 857 of the Civil Code as those sections were then written. It was then argued that these several dispositions, though void as trusts, were valid as powers,—“powers in trust to convey.” The case held that they were not valid as powers. The opinions devote considerable space to the discussion of various sorts of powers. To understand fully the precise point that was decided, some reference to the law of trusts is necessary.

Whatever may have been the law of California prior to 1872, in that year California, by adopting the Civil Code, followed the example of New York, did away with the common-law scheme of trusts, and set up in its place a statutory scheme. This scheme did not include certain trusts of real property which would have been valid at common law;³² and all trusts of real property other than those expressly provided for were invalid.³³ The Code of 1872 did provide, however:

“Where an express trust in relation to real property is created for any purpose not enumerated in the preceding sec-

³¹ *Supra*, n. 10.

³² For example, a trust to convey, *Estate of Fair*, *supra*, n. 10, or a trust to hold property, *Carpenter v. Cook* (1901) 132 Cal. 621, 64 Pac. 997.

³³ Cal. Civ. Code, § 847.

tions, such trust vests no estate in the Trustees; but the trust, if directing or authorizing the performance of any act which may be lawfully performed under a power, is valid as a power in trust, subject to the provisions in relation to such powers contained in Title V of this Part."³⁴

This was an innovation. At common law, if a trust were void for any reason it was void for all purposes. It was not valid as a power. The classic illustration of this at common law was a private trust void for uncertainty in the beneficiaries.³⁵

In 1874 the quoted section of the Civil Code (860) was repealed. This left in force the common-law rule that an invalid trust was not valid as a power. This is all that the Fair case decided. Express powers of appointment, that is, beneficial powers created in the first instance, were in no wise involved. The opinion of Mr. Justice McFarland makes this abundantly clear.³⁶ Such expressions, then, as that found in *McCurdy v. Otto*,³⁷ that under the Fair case "the common-law rule as to 'powers in trust to convey' . . . has no application in this state," show, it is believed, a misconception of the Fair case. The common-law rule was concerned with original, primary powers in trust, whether to convey, or for some other beneficial purpose. It was not concerned with powers in trust to convey, derived secondarily, by a statute, and designed as a substitute for an invalid trust.

CONSIDERATIONS WHICH MIGHT BE URGED TO SHOW THAT POWERS OF APPOINTMENT DO NOT EXIST IN CALIFORNIA

The first objection to be noted is that powers of appointment depend for their existence on the Statute of Uses, and the Statute of Uses is not in force in California.

Assuming for the present discussion that the Statute of Uses is not in force in California, the conclusion that we have no powers of appointment does not follow.

³⁴ Cal. Civ. Code, § 860.

³⁵ *Morice v. Bishop of Durham* (1805) 9 Ves. 399, 10 Ves. 522, 32 Eng. Rep. R. 947. See Gray, *Rule against Perpetuities* (3d ed.) § 894 et seq.; 1 Perry on Trusts (6th ed.) § 160. Few examples of this rule will be found because most of the grounds upon which trusts were held invalid in England were based upon some policy, real or supposed, which a power would have violated. This is not true of cases like *Morice v. Bishop of Durham*.

³⁶ See particularly 132 Cal. 537 and 538 and compare Mr. Justice McFarland's statement in *Estate of Dunphy*, supra, n. 22.

³⁷ (1903) 140 Cal. 48, 54, 73 Pac. 748.

In the first place there were certain common-law powers of appointment created by transfers *inter vivos* which antedated the Statute of Uses.³⁸ Likewise powers existed where land by custom was devisable.³⁹

Secondly, while the Statute of Uses made powers to appoint land not held by custom possible, it did not create powers. Powers to appoint are dependent upon the Statute only in a limited sense. Before the Statute of Uses, only such future estates as exactly fitted on to the preceding estate were allowed. There could be no laps or gaps—there could be no springing or shifting estates.⁴⁰ Obviously, then, it was impossible to create an estate by means of a power, for the estate thus created must always take effect by way of cutting short a reversion or a remainder (unless of course the appointment was to the person having the reversion or remainder). Now the operation of the Statute of Uses made shifting and springing estates possible—an estate could vest so as to cut short a vested remainder or a reversion.⁴¹ Consequently, it is now possible to have powers over the legal estates.⁴² In fact, powers to appoint uses existed before the Statute of Uses, and the operation of the Statute simply made these legal powers.⁴³ While the Statute of Uses made this result possible, it was not a necessary condition to it. Exactly the same result would follow under any system where future interests are allowed to take effect by terminating some other estate.

Thus where, by custom, land was devisable before the Statute of Uses and the Statute of Wills, powers existed.⁴⁴ So powers of appointment over personal property are valid, though the Statute applies only to freehold estates held to uses.⁴⁵ Lastly,

³⁸ 1 Chance, op. cit., pp. 2-4. Powers in wills are often spoken of as common-law powers because said to take effect without the aid of the Statute of Uses. See 1 Tiffany, op. cit., § 313. But see 2 Jarman on Wills (6th ed.) p. 1811.

³⁹ Gray, op. cit., § 124; 1 Chance, op. cit., p. 4; Sugden, op. cit., pp. 288-289.

⁴⁰ Gray, op. cit., § 5 et seq.; Kales, op. cit., § 26.

⁴¹ Gray, op. cit., § 135 et seq.; Kales, op. cit., § 72.

⁴² Kales, op. cit., § 73; Reeves, op. cit., § 922.

⁴³ See Estate of Fair, 132 Cal. 523, 559 (Temple, J., dissenting); Sugden, op. cit., p. 74 et seq., 81 et seq.; 2 Reeves, Real Property, § 920.

⁴⁴ Supra, n. 39.

⁴⁵ See Sugden, op. cit., p. 74; 1 Chance, op. cit., p. 1; Farwell, op. cit., p. 1; cf. Cutting v. Cutting (1881) 86 N. Y. 522, 544. Few cases will be found which discuss the validity and theory of powers to appoint personalty. The cases recognizing and enforcing the gifts made under such powers are

the courts of those American states, other than California, which have apparently rejected the Statute of Uses⁴⁶ and have set up a statutory scheme of estates and conveyancing, have had no difficulty in holding powers valid, and have repeatedly recognized the estates created by the exercise of a power of appointment.⁴⁷

California has provided for a system of springing and shifting estates;⁴⁸ and there is nothing in our scheme of estates which would prevent them from shifting on the exercise of a power to appoint. Moreover, if the argument that powers to appoint depend for their existence on the Statute of Uses is tenable, how are our cases on collateral powers of sale to be explained?

It may also be argued that the Legislature, by repealing the Code Title on Powers, intended to do away with all powers and that the statement of the Code Commissioners⁴⁹ in recommending the repeal makes this clear.⁵⁰

The answer is obvious. The repealing act is short⁵¹ and when subjected to ordinary rules of construction is unambiguous.⁵² Under these circumstances, a reason or theory suggested by the Code Commissioners for the repeal is not material. When a statute, after being properly construed within itself, is unambiguous, resort to extrinsic evidence of intention is improper.⁵³

Lastly, it may be argued that the Legislature could not have intended to adopt the abstruse common-law system of powers in preference to the simpler New York system. But the premise is yet to be proved. 'Undoubtedly, New York tried to make the system simpler. It has not been demonstrated that she succeeded.'⁵⁴

CONCLUSION

1. California statutes assume the validity of powers of appointment, and no California statute expressly prohibits them.

legion. For example, see *In re D'Angibau* (1879) 15 Ch. Div. 228, 49 L. J., Ch. 756, 43 L. T. 135.

⁴⁶ See 1 Perry, *op. cit.*, § 299 n.

⁴⁷ *Loosing v. Loosing* (1909) 85 Neb. 66, 122 N. W. 707; *Stableton v. Ellison* (1871) 21 Ohio St. 527; *Park's Adm'r. v. American, etc. Soc.* (1890) 62 Vt. 19, 20 Atl. 107.

⁴⁸ Cal. Civ. Code, § 761 et seq., particularly § 773.

⁴⁹ See note 9, *supra*.

⁵⁰ See *Estate of Fair*, 132 Cal. 523, 552 (Henshaw, J., concurring).

⁵¹ Quoted in note 9, *supra*.

⁵² See cases cited *supra*, n. 12.

⁵³ *McGarrahan v. Maxwell* (1865) 28 Cal. 75, 95; cf. *Davies v. Los Angeles* (1890) 86 Cal. 37, 42, 24 Pac. 771. See 2 Lewis' *Sutherland, op. cit.*, §§ 366, 456, 470, at pp. 882 and 883.

⁵⁴ See 1 California Law Review, 305.

2. No California case can be found holding that they are invalid, while one California case clearly intimates that they are valid, and one allows a power purely collateral to be exercised.

3. On principle, all arguments tend to show that they should and do exist.

EFFECT OF GENERAL POWERS

The conclusion above clearly applies to special powers and, so far as it goes, to general powers. But a further question remains—does a life tenant with a power of revocation or with a general power by deed or will, or by will alone, take a fee? Under the provisions of the Title on Powers as enacted in 1872, he did in many cases,⁵⁵ and this is the rule by judicial decision in some states. In the absence of statute, the great weight of authority is opposed to this rule and the estates and powers take effect as limited.⁵⁶ The rule in California, if we have powers of appointment, is probably in accord with the great weight of authority.⁵⁷

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⁵⁵ Cal. Civ. Code, §§ 918-923; *Lewis v. Lewis*, supra, n. 24.

⁵⁶ See cases collected in 6 L. R. A. (N.S.) 1186; 39 L.R.A.(N.S.) 805; Ann Cas. 1912B 424; *Perry*, op. cit., § 252 n.

⁵⁷ *Estate of Murphy*, supra, n. 2; *Gray v. Union Trust Co.*, supra, n. 24; *Tennant v. John Tennant Memorial Home*, supra, n. 28; *Estate of Dunphy*, supra, n. 22; *Nichols v. Emery*, supra, n. 28. Cf. *Booth v. Oakland Bank of Savings*, supra, n. 28; *Burnett v. Piercy*, supra, n. 7.