Santa Clara Law Review

Volume 14 | Number 2 Article 9

1-1-1974

Recent Cases

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EMINENT DOMAIN—COMPENSATION FOR THE VIOLATION OF A BUILDING RESTRICTION—*Southern California Edison Co. v. Bourgerie*, 9 Cal. 3d 169, 507 P.2d 964, 107 Cal. Rptr. 76 (1973).

In 1964, defendants Glenn and Bourgerie purchased a tract of land in Santa Barbara from the Bank of America. The bank retained a portion of the tract adjoining defendants' property. The deed from the bank to defendants provided that neither the property conveyed nor that retained by the bank could be used for an electrical transmission station.[1] The plaintiff, Southern California Edison Company, a public utility, sought to acquire the bank's land by eminent domain, for the purpose of building an electrical substation.[2] Southern California Edison Company joined Glenn and Bourgerie as defendants alleging that they owned or claimed some right, title or interest in the bank's land. The defendants asserted that the bank's land was burdened with a use restriction which benefited their land. The defendants further claimed that construction by plaintiff of the electrical substation would violate the restriction and that the defendants would be damaged by this violation. Following a trial on the issues relating to the propriety of the condemnation, the court held in the power company's favor. The trial court additionally held that the restriction forbidding construction of a transmission station on the bank's land did not create a compensable property interest in the defendants.[3] The defendants appealed.

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1. 2 NICHOLS ON EMINENT DOMAIN § 5.73 (3d ed. 1970) explains,
> [a] large tract of land is often cut up into lots . . . and each lot is sold subject to restrictions against use for various purposes, the restriction upon each lot being for the benefit of all other lots in the same development . . . . [These restrictions] are enforced by courts of equity in favor of the benefitted owner, so long as he continues to own any part of the tract for the benefit of which the restrictions were created, as well as in favor of the owner of any one of the lots into which the tract was divided, and against the owner of any of the lots who attempts to disregard the restrictions.

2. CAL. CIV. CODE § 1001 (West 1954) provides that "[a]ny person may . . . acquire private property for any use specified in Section 1238 of the Code of Civil Procedure either by consent of the owner or by proceedings had under the provisions of Title 7, Part 3, of the Code of Civil Procedure . . . ." CAL. CIV. PRO. CODE § 1238 (West 1972) states that "[t]he right of eminent domain may be exercised in behalf of the following public uses: . . . . 13. Electric power facilities."

3. Southern California Edison Co. v. Bourgerie, 9 Cal. 3d 169, 171, 507 P.2d 964, 965, 107 Cal. Rptr. 76, 77 (1973).

The judgment of the lower court, which determined that the defendants were not entitled to compensation for violation of the restriction, was reversed by the California Supreme Court. The court held that:

> whether the condemner is a public or private entity, a building restriction constitutes "property" within the meaning of Article I, section 14,[4] and compensation must be paid whenever damage to a landowner results from a violation of the restriction.[5]

The decision of the Court in the instant case alters California law. Prior to the *Bourgerie* ruling California courts consistently had held that a building restriction does not create an interest in property which is compensable in an eminent domain proceeding.[6] Based upon the authority of the two earlier cases, *Lombardy v. Peter Kiewit Sons' Co.*[7] and *Freisen v. City of Glendale*,[8] the trial court in the present case ruled against the defendants.

In *Freisen* the lots in a tract of land were subject to a restriction that they be used for residential purposes only. The city of Glendale acquired certain lots within the tract for street construction. The court found that although the property obtained by the city was burdened with a restriction for the benefit of other lots in the tract, this did not give the owners of these other lots a property interest in the lots acquired by the city. As a result the city did not have to procure the *interest* by purchase or condemnation before constructing the street.[9] The Supreme Court of California noted in *Freisen*, that the interest in land created by the building restriction was no more than a negative easement or an equitable servitude.[10] The court went on to comment that such interests do not rise to the dignity of an estate in the land itself.[11]

In *Lombardy* the plaintiffs were owners of property within a residential tract. By deed restriction all lots within the tract

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4. CAL. CONST. art. I, § 14 provides, "Private property shall not be taken or damaged for public use without just compensation having first been made to . . . the owner . . . ."

5. Southern California Edison Co. v. Bourgerie, 9 Cal. 3d 169, 171, 507 P.2d 964, 965, 107 Cal. Rptr. 76, 77 (1973).

6. *E.g.*, Freisen v. City of Glendale, 209 Cal. 524, 288 P. 1080 (1930); Lombardy v. Peter Kiewit Sons' Co., 266 Cal. App. 2d 599, 72 Cal. Rptr. 240 (1968); Sackett v. Los Angeles City School Dist., 118 Cal. App. 254, 5 P.2d 23 (1931).

7. 266 Cal. App. 2d 599, 72 Cal. Rptr. 240 (1968).

8. 209 Cal. 524, 288 P. 1080 (1930).

9. *Id.* at 530, 288 P. at 1082-83.

10. *Id.* at 531, 288 P. at 1083.

11. *Id.*

were limited to single family residential uses. The plaintiffs' lots were adjacent to land which was condemned by the State of California for the purpose of building a freeway through the tract. The plaintiffs alleged that the construction of the freeway violated the deed restrictions thereby depriving them of certain property rights. The appellate court, relying on *Freisen*, held that the building and use restrictions of a residential tract do not constitute an interest in property vested in lot owners which is damaged by the construction of a freeway through the tract.[12] The holdings of *Lombardy* and *Freisen* were based on the general proposition that a restrictive convenant does not create a common law property interest.

Additional grounds have been relied on by the courts to justify their denial of compensation. First, the use proposed by the condemning authority has sometimes been found not to violate the restriction.[13] Second, it has been reasoned that compensation for violation of restrictive covenants would be against public policy in that it would increase the cost of condemnation thus inhibiting the exercise of eminent domain.[14]

The decisions of the California courts in *Freisen* and *Lombardy* follow the minority position in the United States. The California Supreme Court's decision in the instant case, that building restrictions constitue compensable property rights for purposes of eminent domain proceedings, represents a shift by California to the majority position. The majority of jurisdictions hold that building restrictions, often termed equitable servitudes, are property in the constitutional sense and compensation must be paid for these property interests if taken.[15] As early as 1944 the Restatement of Property adopted the view that a promise respecting the use of land of the promisor usually creates an interest in such land for which compensation must be made if this interest is extinguished by condemnation.[16]

Justice Mosk, writing for the majority in *Bourgerie*, explained the court's adoption of the majority position by first point-

12. Lombardy v. Peter Kiewit Sons' Co., 266 Cal. App. 2d 599, 605, 72 Cal. Rptr. 240, 244 (1968).

13. Freisen v. City of Glendale, 209 Cal. 524, 528, 288 P. 1080, 1082 (1930). In *Freisen*, deed restrictions permitted certain lots to be used for residential purposes only. The court found that the construction of a public street on a portion of a lot acquired by the city was not inconsistent with the use of the land for residential purposes. It was noted by the court that the aim of the restrictions was to preserve the tract for high-class residential uses, and to accomplish this goal it was essential that adequate street frontage be made available to the lots.

14. *Id.* at 530, 288 P. at 1083.

15. 2 NICHOLS ON EMINENT DOMAIN § 5.73(1) (3d ed. 1970).

16. RESTATEMENT OF PROPERTY § 566 (1944).

ing out that building restrictions had previously been held to constitute property rights for other purposes. The California appellate court in *Mock v. Shulman*[17] ruled, for example, that for the purpose of protecting the right to receive light and air, tract restrictions constitute property rights.

The majority opinion also noted the similarities between easements and restrictions and the incongruity of allowing compensation for the appropriation of an easement[18] while denying payment for the violation of a restriction.[19] It has been argued that there is no justification for denying compensation when the interest in property extinguished by condemnation was created by covenant, instead of by a deed of conveyance, and is called an equitable rather than a legal easement.[20]

On the other hand, much criticism has been aimed at the majority view that a building restriction is a compensable property interest. It has been argued that if compensation is allowed for the violation of building restrictions, the cost of constructing a public project would be greatly increased, thus directly or indirectly inhibiting the "public purpose" development for which eminent domain is employed.[21]

While conceding the possibility that the cost of condemnation might be increased by allowing compensation for building restrictions, the *Bourgerie* court concluded that such an increase would not greatly burden the exercise of the power of eminent domain.[22] This conclusion is based on the premise that only a few owners of the building restriction would actually suffer any substantial damage from a violation of the restriction by the condemning authority.[23] In *Bourgerie* the defendant landowners were

17. 226 Cal. App. 263, 269-70, 38 Cal. Rptr. 39, 44 (1964).

18. 2 NICHOLS ON EMINENT DOMAIN § 5.72 (3d ed. 1970) states that

> [i]t is well-settled that a private easement in real estate is property in the constitutional sense, and may be taken via exercise of the power of eminent domain. When one parcel of land is subject to an easement in favor of another, and the servient tenement is taken for or devoted to a public use which destroys or impairs enjoyment of the easement, the owner of the dominant tenement is entitled to compensation.

19. Southern California Edison Co. v. Bourgerie, 9 Cal. 3d 169, 173, 507 P.2d 964, 966, 107 Cal. Rptr. 76, 78 (1973).

20. *See* Aigler, *Measure of Compensation for Extinguishment of Easement by Condemnation*, 1945 WIS. L. REV. 5, 23-24 n.44 [hereinafter cited as Aigler].

21. Freisen v. City of Glendale, 209 Cal. 524, 530, 288 P. 1080, 1082-83 (1930).

22. Southern California Edison Co. v. Bourgerie, 9 Cal. 3d 169, 174, 507 P.2d 964, 967-68, 107 Cal. Rptr. 76, 79-80 (1973).

23. Aigler, *supra* note 20, at 32, states:

> [P]ublic works, like parks and highways, ordinarily would warrant little, if any, compensation. Schools, fire stations, etc., might be ground for some substantial awards but only to a relatively few nearby owners, even in highly restricted areas. As the distance of the claimant's lot from the invaded tract increased, the amount of compensation would rapidly diminish, soon to the vanishing point.

only two in number. It is conceivable, however, that where the benefit of a restriction runs to numerous lots, the violation of a building restriction by a condemning authority could result in damage to a large number of landowners and thus substantially increase the cost of condemnation.

The *Bourgerie* court had to determine who should be responsible for the cost of public improvements, however substantial that cost might be. If the court held that the use restriction was not a property interest for which compensaion had to be paid in a condemnation proceeding, each individual lot owner benefited by the restriction would have to "pay" for the violation by suffering a diminution in the value of his lot. If, however, the court classified the restriction as a compensable property interest, the condemner would have to bear the cost of violating that restriction. The *Bourgerie* court, basing its decision on equitable principles of fairness, reasoned that the condemning authority was better able to shoulder the cost then the individual lot owners. The court stated:

> [u]nder the minority view, compensation is denied to persons whose property may have been damaged as a result of the violation of a valid deed restriction, thereby placing a disproportionate share of the cost of public improvements on a few individuals. Neither the constitutional guarantee of just compensation, nor public policy permit such a burdensome result.[24]

Courts following the minority view have also argued that if building restrictions were held to be compensable property interests, the condemner might be required to join a large number of landowners as defendants thereby making it more difficult to acquire the essential property.[25] This question did not arise in *Bourgerie* because the tract of land involved was apparently commercial and only two persons, other than the Bank of America, owned property benefited by the use restriction. In contrast, use restrictions benefiting a residential tract would probably involve a greater number of lot owners in the action. Although this procedural problem was not at issue in the instant case, the court answered this criticism by commenting that a "condemner need only selectively join in the action landowners whose property is most likely to be damaged by the violation of the building restriction . . . ."[26] It is, however, questionable whether this

24. Southern California Edison Co. v. Bourgerie, 9 Cal. 3d 169, 175, 507 P.2d 964, 968, 107 Cal. Rptr. 76, 80 (1973).

25. Freisen v. City of Glendale, 209 Cal. 524, 530, 288 P. 1080, 1082-83 (1930); Lombardy v. Peter Kiewit Sons' Co., 266 Cal. App. 2d 599, 603-04, 72 Cal. Rptr. 240, 243 (1968).

26. Southern California Edison Co. v. Bourgerie, 9 Cal. 3d 169, 174, 507 P.2d 964, 968, 107 Cal. Rptr. 76, 80 (1973).

would be an acceptable procedure. In his dissent, Justice Burke noted that the owner of each benefited parcel should be joined if each has suffered a taking of "property".[27] It is possible that under the holding of *Southern California Edison Company v. Bourgerie* the courts could find each owner of a parcel benefited by a building restriction to be an indispensable party to a condemnation proceeding which violates the restriction.[28]

Finally, courts have criticized the majority position by suggesting that if owners of restrictions receive compensation for their violation, landowners might enter into agreements imposing building restrictions solely for the purpose of collecting compensation in future condemnation proceedings.[29] Justice Mosk, in the majority opinion, dismissed this criticism by concluding that "[i]f bad faith or sharp practices were established, a court could properly refuse to allow compensation."[30] Recovery has been denied in a few cases on the ground that the restrictions were created for the purpose of creating condemnable values.[31]

As a result of the *Bourgerie* decision, California courts in future condemnation proceedings involving the violation of building restrictions, will be faced with a procedural joinder problem. The courts will have to resolve whether or not every lot owner benefited by a restriction is an indispensable party to a condemnation proceeding which violates that restriction.

Another consequence of the *Bourgerie* decision will be an increase in the cost of condemnation in certain instances. Whether this increase in cost will greatly burden the exercise of eminent domain will depend on the facts of each individual case.

The two consequences noted above may be partially avoided if the holding in *Bourgerie* is found to apply to commercial property only. Since commercial tracts usually include fewer lot owners and often are burdened with fewer use restrictions than

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27. *Id.* at 177, 507 P.2d at 972, 107 Cal. Rptr. at 82.

28. *See* CAL. CIV. PRO. CODE § 389(a) (West 1973) which provides:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party to the action if . . . (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party.

29. Arkansas State Highway Comm'n v. McNeill, 238 Ark. 244, 381 S.W. 2d 425, 427 (1964).

30. Southern California Edison Co. v. Bourgerie, 9 Cal. 3d 169, 175, 507 P.2d 964, 968, 107 Cal. Rptr. 76, 80 (1973).

31. Smith v. Clifton Sanitation Dist., 134 Colo. 116, 300 P.2d 548 (1956); Taylor v. VanWagoner, 238 Mich. 215, 278 N.W. 49 (1938).

residential tracts, the potential problems of joinder and of increased cost of condemnation might prove to be relatively insignificant.

Suzanne F. Jones

TORTS—AUTOMOBILES—PROVISION OF GUEST STATUTE BARRING GUEST ACTIONS FOR NEGLIGENCE VIOLATES EQUAL PROTECTION GUARANTEES—*Brown v. Merlo*, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973).

On October 15, 1967, Guiseppe Merlo was driving his jeep along a Butte County highway, with his guest Ralph Brown. Losing control of the wheel, Merlo crashed into the embankment bordering the road. As a result of this accident, Brown was seriously injured.

Thereafter, Brown brought suit against Merlo, alleging negligence as one cause of action. Merlo moved for summary judgment on the negligence theory, on the ground that the California automobile guest statute[1] prohibited guests from recovering for injuries caused by the careless driving of their hosts. Brown contended that the guest statute denied him equal protection of the law by withdrawing from him, as an automobile guest, a cause of action available to paying passengers. After the Butte County Superior Court granted Merlo's motion for summary judgment, Brown appealed to the California Supreme Court.[2]

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1. No person riding in or occupying a vehicle owned by him and driven by another person with his permission and no person who as a guest accepts a ride in any vehicle upon a highway without giving compensation for such ride, nor any other person, has any right of action for civil damages against the driver of the vehicle or against any other person legally liable for the conduct of the driver on account of personal injury to or the death of the owner or guest during the ride, unless the plaintiff in any such action establishes that the injury or death proximately resulted from the intoxication or willful misconduct of the driver.

CAL. VEH. CODE § 17158 (West 1971).

2. The California Supreme Court had never directly ruled on the constitutionality of the guest statute. Brown v. Merlo, 8 Cal. 3d 855, 863-64 n.4, 506 P.2d 212, 218 n.4, 106 Cal. Rptr. 388, 394 n.4 (1973). Nevertheless, the California appellate courts have always assumed that the supreme court had upheld the constitutionality of the statute. On this assumption, appellate courts declared the guest statute constitutional in Forsman v. Colton, 136 Cal. App. 97, 102, 28 P.2d 429, 431 (1933), and Ferreira v. Barham, 230 Cal. App. 2d 128, 131, 40 Cal. Rptr. 739, 741-42 (1964).

In a unanimous decision, authored by Justice Tobriner, the supreme court sustained Brown's constitutional challenge on the grounds that the guest statute violated both California[3] and federal[4] equal protection guarantees.[5] The summary judgment was reversed and the case remanded to the trial court to permit Brown to proceed with his negligence cause of action. Thus, the decision invalidates the guest statute as it applies to guests injured because of the host's negligence.[6]

The supreme court employed the equal protection "rationality" standard of review in *Brown*.[7] Under this standard (1) a statute may single out a class for distinctive treatment only if such classification bears a rational relation to the purposes of the legislation, and (2) persons similarly situated with respect to the legitimate goals of the law must receive like treatment.

The *Brown* court determined that the guest statute bore no rational relation to the two main purposes of the legislation: the promotion of hospitality and the prevention of collusive lawsuits. The state had always maintained that hospitality was encouraged by shielding hosts from suits by ungrateful guests after an accident. However, the court noted that the prevalence of liability insurance today already afforded hosts sufficient insulation from such actions. Nor was the court convinced that the prevention of guest litigation led to the prevention of guest collusion. A person bent on fraud could simply claim that some

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3. Article I, Sections 11 and 21 of the California Constitution comprise the state's equal protection provision. Section 11 reads: "All laws of a general nature shall have a uniform operation." CAL. CONST. art. I, § 11. Section 21 provides in relevant part that: "No . . . citizen, or class or citizens, [shall] be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens." CAL. CONST. art. I, § 21.

4. "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

5. The only other case to hold a guest statute unconstitutional on equal protection grounds was Birmingham-Tuscaloosa Ry. & Utilities Co. v. Carpenter, 194 Ala. 141, 69 So. 626 (1915) (automobile law imputing contributory negligence of operator to occupant repugnant to state and federal constitutions). Otherwise, guest statutes of various states have consistently overcome this form of constitutional challenge. *See, e.g.*, Silver v. Silver, 108 Conn. 371, 143 A. 240 (1928), *aff'd*, 280 U.S. 117 (1929); Naudzius v. Lahr, 253 Mich. 216, 234 N.W. 581 (1931); Shea v. Olson, 185 Wash. 143, 53 P.2d 615, *aff'd on rehearing*, 186 Wash. 700, 59 P.2d 1183 (1936).

6. The court expressly intimated no opinion as to the validity of the owner-passenger provision of the guest statute. 8 Cal. 3d at 862 n.3, 506 P.2d at 217 n.3, 106 Cal. Rptr. at 393 n.3. Noting this fact, the court in the recent case of Schwalbe v. Jones, 35 Cal. App. 3d 214, 110 Cal. Rptr. 563 (1973), *hearing granted*, Civil No. 23072, Jan. 3, 1974, applied the guest statute to the owner-passenger situation. The *Schwalbe* court denied plaintiff recovery, following Patton v. La Bree, 60 Cal. 2d 606, 387 P.2d 398, 35 Cal. Rptr. 622 (1963) (Peters, J., dissenting). For a discussion of *Patton* see note 10 *infra*.

7. 8 Cal. 3d at 861, 506 P.2d at 216, 106 Cal. Rptr. at 392.

compensation had been paid for the ride, thereby avoiding the unfavorable classification as a guest. The supreme court thus considered the operation of the law in realistic rather than abstract terms.[8]

Furthermore, the court explicitly refused to consider possible, although unrealistic, alternative justifications for the law,[9] thus increasing the burden of demonstrating a rational relationship between the statute and its purposes. In contrast, only a decade ago the same court, in *Patton v. La Bree*,[10] had upheld the constitutionality of the guest statute's denial of recovery to owner-passengers, then under equal protection attack, on the strength of a rather speculative rationale.

In reviewing the validity of the guest statute, the present California Supreme Court followed the United States Supreme Court's counsel that the constitutional validity of a law should not be determined by confining review within the "four corners" of the enactment.[11] The *Brown* court thus analyzed the guest statute's operation against the background of other legislative and judicial directives which govern the legal rights of similarly situated persons. In so doing, the court found many instances where persons similarly situated with respect to the purposes of the guest statute received opposite treatment.

The *Brown* court noted that the automobile guest lacked the avenues of redress open to his three major counterparts: the

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8. *See* text accompanying note 11 *infra*.

This concern stands in marked contrast with the United States Supreme Court's stance in Silver v. Silver, 280 U.S. 117 (1929), where the Connecticut guest statute withstood an equal protection assault. The *Silver* Court felt that the "wisdom [of the legislature] is not the concern of courts" (*id.* at 123), and cited Ohio *ex rel.* Clarke v. Deckebach, 274 U.S. 392 (1927), wherein the Court observed: "It is not necessary that we be satisfied that [a legislative rationale] is well founded in experience." 274 U.S. at 397. The *Silver* Court feared "a priori" judicial determinations that classifications were irrational. 280 U.S. at 123. Arguably, the present California Supreme Court made just such a determination in the *Brown* decision.

9. 8 Cal. 3d at 865-66 n.7, 506 P.2d at 219-20 n.7, 106 Cal. Rptr. at 395-96 n.7.

10. 60 Cal. 2d 606, 387 P.2d 398, 35 Cal. Rptr. 622 (1963) (Peters, J., dissenting). The *Patton* court ruled the guest statute's denial of recovery for negligence to owner-passengers not arbitrary because a passenger who owned the vehicle in which he was riding had the right to control the driver.

Patton also contains the classic statement of judicial deference to the legislature:

> Wide discretion is vested in the legislature in making a classification, and its decision as to what is a sufficient distinction to warrant the classification will be upheld by the courts unless it is 'palpably arbitrary and beyond rational doubt erroneous' and no set of facts reasonably can be conceived that would sustain it.

Id. at 609, 387 P.2d at 400, 35 Cal. Rptr. at 624.

11. 8 Cal. 3d at 862, 506 P.2d at 217, 106 Cal. Rptr. at 393, *following* Gregg Dyeing Co. v. Query, 286 U.S. 472, 480 (1932).

social licensee, the family member, and the automobile passenger who escaped a disadvantageous guest classification through loopholes in the statute. Yet suits by these plaintiffs all involve a similar potential for collusiveness and similar hospitality problems as are present in automobile guest actions.

Automobile guests and social guests had fared about the same in regard to tort protection in California until 1968. Then, in the landmark case of *Rowland v. Christian*,[12] the California Supreme Court declared that landowners could not disregard safety hazards to social licensees,[13] and extended the statutory duty of due care, found in Civil Code section 1714,[14] to these social guests. Thus, the elimination of one inequity created another between the duty of due care owed recipients of residential hospitality and the much lower standard of care owed automibile guests.

The court also pointed to the many automobile guests to whom the guest statute did not apply. It has been argued[15] that the California Supreme Court itself was responsible for this limitation of the guest statute's scope, by narrowly construing its provisions over the years. For example, the court had granted exemptions from the statute's bar to any passenger who provided the host the slightest compensation,[16] or was injured partially outside the vehicle,[17] or on a private highway.[18] Clearly a guest injured on a private highway deserves no greater recovery rights than one hurt on a public road. The court found the other exceptions equally untenable. The fact that these loopholes bore "no discernible relationship to the realities of life,"[19] manifested

12. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

13. Justice Peters declared: "A man's life or limb does not become less worthy of protection by the law . . . because he has come upon the land of another without permission or with permission but without a business purpose." 69 Cal. 2d at 118, 443 P.2d at 568, 70 Cal. Rptr. at 104.

14. CAL. CIV. CODE § 1714 (West 1973) reads in relevant part: "Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person . . . ."

15. *See* Comment, *Judicial Nullification of Guest Statutes*, 41 S. CAL. L. REV. 884 (1968).

16. *See, e.g.*, Kruzie v. Sanders, 23 Cal. 2d 237, 143 P.2d 704 (1943) (assistance in selecting Christmas presents called compensation).

17. *See, e.g.*, Prager v. Isreal, 15 Cal. 2d 89, 98 P.2d 729 (1940) (one foot on the ground and one foot on running board not "in" car). The guest statute applies to persons "riding *in* or occupying a vehicle . . . ." CAL. VEH. CODE § 17158 (West 1971) (emphasis added).

18. *See, e.g.*, O'Donnell v. Mullaney, 66 Cal. 2d 994, 429 P.2d 160, 59 Cal. Rptr. 840 (1967) (term "highway" in guest statute ruled not to include private roads).

19. 8 Cal. 3d at 882, 506 P.2d at 231, 106 Cal. Rptr. at 407, *quoting* Harvey v. Clyde Park Dist., 32 Ill. 2d 60, 67, 203 N.E.2d 573, 577 (1965).

to the *Brown* court the irrationality of the guest statute's actual operation in the world outside the "four corners" of the act.

Finally, the supreme court noted the irrationality of the automobile guest's position in light of the judicial abrogation of intrafamilial tort immunities over the past two decades.[20] The theory had been that members of the same family would be likely to file spurious tort claims to defraud their insurers. Yet California's Supreme Court had adopted the view in intrafamilial tort cases,[21] that family members must be held to the same standard of due care with respect to each other as they owed to strangers. Therefore, denial of the protection of a similar standard to automobile guests was anomalous.

The California Supreme Court's decision to abrogate family tort immunities had been based on the notion that the elimination of all intrafamilial suits to prevent a few fraudulent claims was unfair. This same consideration of fairness was paramount in *Brown*. There, the low correlation between persons likely to collude and persons actually denied recovery proved fatal to the guest statute's constitutionality.[22] Since the great majority of automobile guests are presumably honest, their inclusion in the class of persons barred recovery for negligence flew " 'squarely in the face of [American] antipathy to assertion of mass guilt and guilt by association.' "[23] The court suggested that the guest statute's classifications were "so grossly overinclusive as to defy notions of fairness or reasonableness."[24]

Thus, the court's concern for equal protection extended beyond a comparison of the positions of automobile guests and other similarly situated groups. The guest statute's classification scheme was also scrutinized for internal consistency. Accordingly, the determining feature of the classification must warrant the burden which the selective law imposes upon the class.[25] The

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20. *See, e.g.*, Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971); Klein v. Klein, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962); Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955).

21. *See* note 20 *supra*.

22. The court found: "[I]n barring suits by all automobile guests simply to protect insurance companies from some collusive lawsuits, the guest statute exceeds the bounds of rationality and constitutes a denial of equal protection." 8 Cal. 3d at 877, 506 P.2d at 228, 106 Cal. Rptr. at 404.

23. *Id.* at 887, 506 P.2d at 227, 106 Cal. Rptr. at 403, *quoting* Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 351-52 (1949).

24. 8 Cal. 3d at 877, 506 P.2d at 228, 106 Cal. Rptr. at 404. The court also discussed the United States Supreme Court case of Carrington v. Rash, 380 U.S. 89 (1965), in which some over-inclusion was sufficient to invalidate a law under an equal protection challenge. 8 Cal. 3d at 876-77 n.16, 506 P.2d at 227 n.16, 106 Cal. Rptr. at 403 n.16.

25. In his discussion of the federal equal protection standard, Justice To-

court noted that equal protection required there to be "some rationality in the *nature* of the class singled out."[26] Since there was nothing especially base in the nature of guests, forcing them to bear the brunt of measures directed against collusive lawsuits was unfair and arbitrary. Fraudulent claims might just as well be limited by throwing out half the cases.

As a result of the *Brown* ruling the California legislature amended the guest statute by deleting all references to guests.[27] This development hastens the move towards no fault insurance in California, now that the insurance companies are threatening to increase their rates to match their extended liability. One commentator[28] has speculated that a typical no fault statute with a provision treating serious injuries differently from minor ones would fail to meet *Brown's* constitutional standard, for the distinction between "serious and minor" would necessarily be arbitrary. The *Brown* case, however, merely stands for the proposition that equal access to tort remedy is a constitutional right, in the absence of any *valid* differentiation between claimants. No fault liability, grounded on defendable social policy, is probably quite another case.

Brown culminates the California Supreme Court's assault on tort immunities. As a result of this decision, the provision of the guest statute denying owner-passengers recovery for driver negligence is likely to be invalidated in *Schwalbe v. Jones*,[29] now before the California Supreme Court. The significance of the provision's additional rationale, concerning the special control the owner-passenger may exert upon the driver, is probably offset by the lack of any hospitality justification for limiting owner-

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briner quoted this language from the recent United States Supreme Court case of *Reed v. Reed*: "*A classification 'must be reasonable, not arbitrary, and must rest upon some ground of differences* [sic] *having a fair and substantial relation to the object of the legislation . . .*'" 8 Cal. 3d at 861, 506 P.2d at 216, 106 Cal. Rptr. at 392, *quoting* Reed v. Reed, 404 U.S. 71, 75-76 (1971) (emphasis by Justice Tobriner). In *Reed*, the Idaho probate code provision giving men preference over women for administrative appointments was struck down as arbitrary and in violation of the equal protection clause. Although the automatic preference eliminated the need for many court appointment proceedings, thus furthering the goal of judicial efficiency, the state action was clearly unfair to women.

26. 8 Cal. 3d at 861, 506 P.2d at 216, 106 Cal. Rptr. at 392 (emphasis added), *quoting* Rinaldi v. Yeager, 384 U.S. 305, 308-09 (1966).

27. Cal. Stats. (1973), ch. 803, § 4, at 1611. The law also repeals the California guest statutes applicable to airplanes (CAL. PUB. UTIL. CODE § 21406 (West 1965)) and motor boats (CAL. HARB. & NAV. CODE § 661.1 (West 1973)).

28. Kirchner, *California Guest Statute Unconstitutional: 'No Fault' Indications*, 14 F.T.D. 45 (1973).

29. 35 Cal. App. 3d 214, 110 Cal. Rptr. 563 (1973), *hearing granted*, Civil No. 23072, Jan. 3, 1974. See note 6 *supra*.

passenger claims. The late Justice Peters' dissent in *Patton*[30] may yet be vindicated.

Peter Kerman

POWERS OF APPOINTMENT—UNDER THE CALIFORNIA COMMON LAW THE POWER TO REVOKE A PRIOR EXERCISE OF THE POWER OF APPOINTMENT MAY BE IMPLIED—*Estate of Wood*, 32 Cal. App. 3d 862, 108 Cal. Rptr. 522 (1973).

In 1964 Willard S. Wood executed a will in which he directed that the residue of his estate be divided into two trusts, Trust "A" and Trust "B". Mrs. Wood was named life beneficiary under both trusts and was given a general inter vivos power of appointment over Trust "A".[1]

In 1967 Mrs. Wood executed and filed with the trustee a written instrument exercising her power of appointment in favor of appellants Peake, Mathews, and Swarth. In 1969 Mrs. Wood, this time acting as a conservatee, executed and delivered to the trustee a second document in favor of, among others, appellant Swarth, exercising her power of appointment over the same property interests covered in the first exercise. Finally, in 1970 Mrs. Wood executed a third writing, notarized by her conservator and

30. 60 Cal. 2d 606, 609, 387 P.2d 398, 400, 35 Cal. Rptr. 622, 624 (1963).

1. The terms creating that power read:

> if my wife survives me, then she shall have the absolute power exercisable *only by a written instrument other than a will delivered to the Trustee during her lifetime* to appoint any part of the principal and any undistributed income of Trust 'A' in favor of herself, her estate or any person.

Estate of Wood, 32 Cal. App. 3d 862, 866, 108 Cal. Rptr. 522, 524 (1973), *hearing denied*, Civil No. 11389, Aug. 8, 1973 (emphasis by the court).

Typically, the owner of certain property, the "donor," grants to a particular person, the "donee," the power to designate the ultimate taker of the property, the "appointee" or "beneficiary," after the donor is deceased. By the "creating instrument" the donor may confer upon the donee a "general power of appointment" (permitting the donee complete discretion in designating the ultimate taker) or a "special power of appointment" (limiting the donee's choice to named individuals or to persons within a specified group). The donee designates the beneficiary by executing an "exercising instrument" which, absent contrary language in the creating instrument, may be a deed, will, or other written instrument. The appointee is considered to receive the property from the donor rather than from the donee who made the appointment. 3 R. POWELL, REAL PROPERTY ¶¶ 385, 396, 398 (1973); 9 CALIFORNIA LAW REVISION COMMISSION, REPORTS, RECOMMENDATIONS, AND STUDIES 307, 308 (1969).

delivered to her attorney, appointing the same trust assets to one Genevieve Knight, to whom these assets were ultimately distributed by order of the trial court.[2] It was from this order of distribution that appellants brought their appeal.

Although it was undisputed that Mrs. Wood intended to effect separate appointments by each exercise of her power, neither the first nor the second writing contained language reserving to her the power of revocation, nor was such a right provided for in the creating instrument, Mr. Wood's will.[3] All appointees' interests taken under these appointments, however, were to become possessory only upon Mrs. Wood's death.

At the outset, the court in *Estate of Wood*[4] was faced with difficult questions never before considered by it or any other California court: (1) whether under the common law an exercise of a power of appointment is irrevocable unless the donee reserves to himself the power of revocation;[5] (2) whether a conservatee, not adjudged an incompetent, has the legal capacity to exercise

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2. In this last instance, however, the exercising instrument was not delivered to the trustee until after the death of Mrs. Wood. 32 Cal. App. 3d at 882, 108 Cal. Rptr. at 535.

3. *Id.* at 866, 108 Cal. Rptr. at 524.

4. *Id.* at 862, 108 Cal. Rptr. at 522.

5. In 1872, California enacted comprehensive legislation codifying powers of appointment. Cal. Civ. Code of 1872, §§ 878-940 (repealed 1874). However, the entire act was repealed two years later without any of its provisions having been interpreted by the courts. Cal. Stats. (1873-74), ch. 612, § 123, at 223. Contrary to what was at first believed (*See* Estate of Fair, 132 Cal. 523, 64 P. 1000 (1901)), this event did not herald the eventual demise of the use of the power of appointment in California. In 1935, the court of appeal in Estate of Sloan, 7 Cal. App. 2d 319, 46 P.2d 1007 (1935), expressly rejected the notion that the intent of the 1874 legislature was to abrogate the common law of appointive powers as it applied to California. *See also* Estate of Elston, 32 Cal. App. 2d 652, 90 P.2d 608 (1939). As further evidence of the intent to preserve the common law as it relates to powers of appointment, the California legislature in 1969 enacted the Power of Appointment Act, CAL. CIV. CODE § 1380.1 *et seq.* (West Supp. 1973), which provides that:

> Except to the extent that the common law rules governing powers of appointment are modified by statute, the common law as to powers of appointment is the law of this state.

Id. § 1380.1.

The California Supreme Court has recently suggested that, in determining whether an instrument executed before the effective date of the Power of Appointment Act (July 1, 1970) created a valid power of appointment, the definitions in the Act provide "relevant indicia" as to what the common law was. Estate of Rosecrans, 4 Cal. 3d 34, 39, 480 P.2d 296, 299, 92 Cal. Rptr. 680, 683 (1971).

In any event, the question remains unsettled as to precisely what is the common law of powers of appointment. Specifically, between 1874 and 1969, there exist neither legislative enactments nor judicial decisions articulating the California common law rule with respect to the revocability of the exercise of the power of appointment. Comment, *Powers of Appointment in California: Revocability of an Appointment*, 8 CAL. WESTERN L. REV. 439, 441 (1971-72) [hereinafter cited as Comment, *Revocability*].

a power of appointment;[6] and (3) whether the requirements of the creating instrument must be specifically satisfied before an exercise of the power of appointment thereunder is valid.[7]

To permit liberal revocation of the exercise of the power of appointment seems today to be the better reasoned view,[8] and is codified in California Civil Code section 1392.1, subdivision (b).[9] However, this section did not become effective until July 1, 1970, some time after Mrs. Wood executed her first two appointments.[10] Hence, the court in *Wood* was compelled to look to the common law[11] to determine whether Mrs. Wood's presently exercisable power was revocable.

In dealing with the issue of donee revocation, the English courts, as well as a substantial number of American authorities, have relied upon precedent which distinguished between appointing instruments as deeds or wills.[12] It appears that as to an appointment by deed, the weight of authority considers the common law rule—embodied in the *Restatement of Property* section 366[13]—to be that a donee's power to appoint beneficiaries is ex-

6. The author has found no California cases dealing with this aspect of the exercise of the power of appointment. *See* CALIFORNIA CONSERVATORSHIPS § 1.26, at 13 (California Continuing Education of the Bar 1968).

7. Of the twenty cases decided prior to July 1, 1970, the effective date of the Power of Appointment Act (CAL. CIV. CODE §§ 1380.1-1392.1 (West Supp. 1973)) which established general rules governing powers of appointment, none involved the issue of whether the validity of the exercise hinged on strict compliance with the creating instrument's formal requirements. *See* Powell, *Powers of Appointment in California*, 19 HAST. L.J. 1281, 1284-87 (1967-68) [hereinafter cited as Powell].

8. *See* note 19 *infra*.

9. CAL. CIV. CODE § 1392.1(b) (West Supp. 1973) provides in pertinent part:

> Unless made expressly irrevocable by the creating instrument or instrument of exercise, an exercise of a power of appointment is revocable . . . so long as the interest to the appointive property, whether present or future, has not been transferred or become distributable pursuant to such appointment.

10. It seems clear that Civil Code sections 1380.1 through 1392.1 are meant to apply to the exercise or release of a power, or the assertion of a right under these sections which occurs after the July 1, 1970, effective date, even though the power was created before that time. CAL. CIV. CODE § 1380.2 (West Supp. 1973); 9 CALIFORNIA LAW REVISION COMMISSION, REPORTS, RECOMMENDATIONS, AND STUDIES 312 (1969). *Cf.* Comment, *Revocability, supra* note 5, at 441 & n.18.

11. Because of the decisional and legislative hiatus between 1872 and 1969 (*see* note 5 *supra*), the tortuous path of the development of common law principles governing revocation of an exercise of a power of appointment must be retraced to find the applicable rule. Powell, *supra* note 7, at 1287.

12. *Compare* Hatcher v. Curtis, 22 Eng. Rep. 1058 (Ch. 1680) (the donee was required to expressly reserve a power to revoke when the exercising instrument was a deed), *with* Lisle v. Lisle, 28 Eng. Rep. 1282 (Ch. 1781) (an exercise by will is revocable). *See generally* Comment, *Revocability, supra* note 5, at 442-47.

13. RESTATEMENT OF PROPERTY § 366 (1940) declares:

hausted by its exercise unless the power of revocation is reserved by inserting an express provision in the exercising instrument.[14] However, when a donee employs a will to exercise his power of appointment, reservation of the power to revoke is not essential to effect a valid revocation,[15] since a will by its very nature is revocable until the death of the testator.[16]

Because the exercising instrument required to be used in *Wood* technically could be neither a deed nor a will, but rather "a written instrument other than a will,"[17] the court was confronted with the additional obstacle of having to define the nature of Mrs. Wood's exercising document in terms of whether its characteristics more closely approximated those of a will or those of a deed—a question the courts have yet to resolve.[18] Eschewing facile categorization, the *Wood* court properly focused on and sought to give effect to both the intent of the donor in creating the power of appointment and the intent of the donee in exercising it.[19]

An appointment may be revoked by the donee if, and only if, (a) the power is general, or, the power being special, the donor does not manifest an intent that appointments shall be irrevocable; and (b) the *donee manifests an intent to reserve to himself the power of revocation.* (emphasis added).

14. *E.g.*, Hatcher v. Curtis, 22 Eng. Rep. 1058 (Ch. 1680); *accord*, Rice v. Park, 223 Ala. 317, 135 So. 472 (1931).

15. Lisle v. Lisle, 28 Eng. Rep. 1282 (Ch. 1781).

16. RESTATEMENT OF PROPERTY § 366, Comment (a) (1940). Although the general theory of implied revocation is not recognized in California (CAL. PROB. CODE § 74 (West 1956)), a special type of implied revocation is contemplated by the Probate Code, in providing that a prior will is not revoked by a subsequent will unless the latter contains provisions wholly inconsistent with the terms of the former (CAL. PROB. CODE § 72 (West 1956)). On the other hand, a prior will is superseded by a later will which expressly states that the former is revoked. *Id.*

17. By its terms, the creating instrument compelled the use of a so-called "other-written-instrument." *See* note 1 *supra.* Although the distinction drawn between a deed and an "other-written-instrument" is elusive, it is supported by recent case precedent and continues to serve as a convenient analytical tool for the courts in dealing with powers of appointment. *See* Comment, *Revocability*, *supra* note 5.

18. Although the *Wood* court treats the 1970 writing as a testamentary instrument for purposes of determining Mrs. Wood's competency, it does not resolve the question of whether such an "other-written-instrument" is to be so characterized when deciding its revocability.

19. The mechanical application of the "one-exercise" rule (*see* notes 13 and 14 and accompanying text *supra*) purportedly embodied in the *Restatement of Property* has progressively given way to a more flexible approach based primarily upon the notion that giving effect to the donor's intent in creating the power is the predominant consideration in determining the effectiveness of an exercise of that power. For example, in State Street Trust Co. v. Crocker, 306 Mass. 257, 28 N.E.2d 5 (1940), a case cited with approval in *Wood*, the court, refraining from applying the "one-exercise" rule, remarked:

> [The rule] plainly defeats the intention of the settlor . . . and is therefore so far opposed to the present trend that it ought not to be extended by analogy or otherwise to new situations not within its established scope.

Id. at 263, 28 N.E.2d at 8. Indeed, there is some evidence of a desire to dis-

While recognizing the *Restatement of Property*'s profound effect upon the development of the law of property in California, and generally throughout the United States,[20] the *Wood* court nonetheless correctly found the *Restatement*'s "one-exercise" formula[21] not binding upon it.[22] Thus, the court was free to rely upon numerous cases[23] which, although factually distinguishable from the present situation, support the contemporary position—reflected in Civil Code section 1392.1, subdivision (b)—that the intent to reserve the power of revocation may be implied.[24] In fact, a close reading of section 366 of the *Restatement of Property*, upon which is based much of the case law in this area, shows that by its terms such a conclusion is not foreclosed.[25] As such, the court's rejection of the *Restatement*'s teaching seems unnecessary.

The *Wood* court correctly found that the evolving rationales developed by previous courts move away from applying procrustean rules of interpretation when determining the validity of conveyance instruments. With respect to powers of appointment, such decisions instead focus on giving effect to the donor's intent contained in the creating instrument, thereby permitting the donee greater latitude in revoking an exercise when that power has not

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pense with the rule entirely, especially with respect to "other-written-instruments." Comment, *Revocability, supra* note 5, at 449.

20. "[T]here is almost complete concurrence of the common law of California, as expounded by its courts, and of the common law of the United States, as set forth in the *Restatement of Property*." Powell, *supra* note 7, at 1288.

21. *See* notes 13 and 14 and accompanying text *supra*. *See also* note 26 *infra*.

22. *See* CAL. CIV. CODE § 1380.1, Comment (West Supp. 1973); Powell, *supra* note 7, at 1286. It is submitted that even had the court adopted the *Restatement* as the basic embodiment of the common law rules of powers of appointment, a different result would not have been compelled. *See* note 25 and accompanying text *infra*.

23. *E.g.*, Henderson v. Rogan, 159 F.2d 855 (9th Cir. 1947); State Street Trust Co. v. Crocker, 306 Mass. 257, 28 N.E.2d 5 (1940); Re Beesty's Will Trusts, [1964] 3 All E.R. 82 (Ch.).

24. 32 Cal. App. 3d 862, 870, 877, 108 Cal. Rptr. 522, 526-27, 531-32 (1973). Section 1392.1(b) actually goes beyond implying a power of revocation. Absent distribution or transfer of the appointive assets, section 1392.1(b) presumes revocability.

25. *See* note 13 *supra*. Comment (c) to section 366 of the *Restatement of Property* suggests that even if the donor of a general power stipulates that appointments shall be irrevocable, an appointment which purports to be revocable will be "treated as an appointment by the donee to himself and a revocable transfer of the appointed property." *Id.* By extending this analysis one step further it seems logical that if the donee's intent can defeat the express wishes of the donor, when the donor is silent as to an appointment's revocability, the donee's intent, whether implied or otherwise, should be accorded even greater weight. And the donee's intent is arguably manifested simply by virtue of his exercise of a power of appointment subsequent to all prior appointments affecting the same property interests.

been expressly reserved.[26] In implying an intent upon the part of Mrs. Wood to reserve the power to revoke her 1967 and 1969 appointments, the court gave effect to both Mrs. Wood's intentions in appointing the trust assets as she did and to Mr. Wood's primary desire to insure the support of his widow during her life.[27]

Having concluded that the 1967 and 1969 instruments were revocable, the question remained whether Mrs. Wood was competent to exercise the power of appointment by the 1970 instrument, executed after a conservator had been appointed for her person and estate.[28] Appellants' contention that one who is deter-

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26. *See* note 19 *supra*. *See also* Henderson v. Rogan, 159 F.2d 855 (9th Cir. 1947). Of particular significance is the case of Re Beesty's Will Trusts, [1964] 3 All E.R. 82 (Ch.). The *Beesty's* court rejected the view that a power once executed cannot be revoked unless a power of revocation is reserved by the exercising instrument because this view was

> derived from and based on the principle that a deed is by its nature an irrevocable instrument. [As a consequence], an appointment by deed is irrevocable unless in the deed there is contained power to revoke it. It is not a necessary step . . . to extend that argument to powers which can be exercised, and are exercised, otherwise than by deed. There seems . . . to be then no reason in principle why, if a power can be informally exercised, it should not be capable of being changed in a similar manner, or why it should be a necessary condition of any such change to require that the first exercise should reserve a power to change or revoke it.

Id. at 86-87.

Initially, the *Wood* court's reliance upon *Beesty's* appears misplaced. Involved there was a special power of appointment, not, as here, a general power. It is arguable that the *Wood* court's refusal to extend the *Restatement* rule to powers which can be exercised otherwise than by deed is here inapposite. However, the creation of a general power of appointment in the donee is considered the equivalent of providing him with ownership, free of obligations to the donor and with wide discretion in distributing the relevant property interests. Estate of Rosecrans, 4 Cal. 3d 34, 40, 480 P.2d 296, 300, 92 Cal. Rptr. 680, 684 (1971). On the other hand, in exercising a special power, the donee, whose appointive powers are narrowly drawn to insure the realization of the donor's intent, is considered to be acting as an agent for the latter. Hence, if the *Beesty's* court could infer a reservation of the power to revoke in a very limited special power situation, it seems only logical that a similar reservation could be inferred in situations where, as here, the donee has almost complete control of the property covered by the power of appointment.

One commentator has suggested that Civil Code § 1392.1(b)'s silence as to the revocability of "other-written-instruments" would not preclude the California courts from attributing greater significance to the donor's intent and following the approach used by the court in *Beesty's*. Comment, *Revocability, supra* note 5, at 451.

27. The use of powers of appointment in estate planning also entails substantial tax savings. INT. REV. CODE OF 1954, §§ 2041, 2514; R. STEPHENS & G. MAXFIELD, THE FEDERAL ESTATE AND GIFT TAXES § 2041, at 117 (2d ed. 1967); Powell, *supra* note 7, at 1282 n.5; Rusoff, *Powers of Appointment and Estate Planning*, 10 J. OF FAM. LAW 443, 456-58 (1971).

28. A petition for appointment of a conservator was filed on May 24, 1968, with Mrs. Wood's concurrence. Mrs. Wood's advanced age and poor health were asserted as grounds for granting the petition. However, it was also alleged that Mrs. Wood had sufficient mental capacity "to make an intelligent preference." The trial court's order making the appointment found these allegations to be true.

mined to be unable to manage her estate a fortiori lacks legal capacity to dispose of property through an exercise of a general power of appointment was found unconvincing.[29] First, although it has been held that a conservatee is not competent to make a present gift of assets of her estate,[30] the court in *Wood* properly recognized that that holding was based on the policy that a transfer of a substantial part of the conservatorship assets could not be allowed to stand because it would result in making it impossible to use such assets to raise money for the care of the conservatee.[31] Therefore, a conservatee is held powerless to effect a depletion of her estate by transferring assets necessary for her care and maintenance.[32] This was clearly not the case presented here.

Second, because the court considered the 1970 instrument to have had the same ambulatory and revocable character as a will, although not tantamount to a will, it was not unreasonable "to apply the same tests that are applied in passing upon the competency of a person to make a will to the question . . . whether the [instrument of 1970 was] validly executed."[33] In other words, since its effect was not to deprive Mrs. Wood's conservatorship estate of any asset, the court determined that the 1970 instrument's validity depended on Mrs. Wood's competency to execute an instrument testamentary in nature. Assuming, for the moment, the cogency of the court's analogy, precedent shows that in comparable circumstances such as guardianship proceedings,[34] courts have held that even an adjudication of incompetency is not equivalent to a determination that a testator is incapable of testamentary disposition.[35] Thus, if one who is adjudged incompetent (in a guardianship or conservatorship proceeding) is not necessarily incapable of executing a will, the same result should clearly

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Estate of Wood, 32 Cal. App. 3d 862, 881 n.5, 108 Cal. Rptr. 522, 534 n.5 (1973).

29. *Id.* at 880-81, 108 Cal. Rptr. at 533-34.

30. Place v. Trent, 27 Cal. App. 3d 526, 103 Cal. Rptr. 841 (1972).

31. 32 Cal. App. 3d at 880, 108 Cal. Rptr. at 534.

32. *Id.*

33. *Id.* at 881, 108 Cal. Rptr. at 534. By characterizing the 1970 instrument as testamentary in nature, the court, in contrast to its earlier hesitancy, here whole-heartedly embraces the categorization method of analysis utilized by the English courts in determining the efficacy of a purported revocation of a prior appointment. *See* note 12 and accompanying text *supra*. *See also* note 18 *supra*.

34. The conservatorship was added to California law in 1957 to provide a modern law of guardianship for individuals without characterizing them as "incompetents." CAL. PROB. CODE § 1701 *et seq.* (West Supp. 1973).

35. Estate of Powers, 81 Cal. App. 2d 480, 184 P.2d 319 (1947). *Accord,* Estate of Wynne, 239 Cal. App. 2d 369, 373, 48 Cal. Rptr. 656, 659 (1966) (the fact that there is a legal guardianship does not on its face establish the incompetency of the ward to make a will).

follow when, as here, a conservatee is essentially adjudged competent.[36]

The accuracy of the court's initial premise that questions of competency with respect to powers of appointments and wills should be determined under similar standards is open to some question. Civil Code section 1384.1[37] provides that the capacity necessary to exercise a power of appointment is equivalent to the capacity required to transfer the interest in property[38] to which the power relates. One influential commentary[39] has suggested that the standard of competence to transfer property[40] is more stringent than the standard required to make a valid will. Therefore, it is argued, it would not necessarily follow that a testamentary power—or a power of a testamentary nature—was validly exercised because it was contained in a valid will.[41] However, there is a split of authority as to the relative degree of capacity required to execute a valid will as compared to that required to execute other legal instruments. In one case the court noted that the law does not require the same degree of capacity to make a will as is required to execute any other legal instrument;[42] in another decision it was determined that the rules governing capacity to execute and deliver a deed are generally identical to those governing testamentary capacity.[43] Irrespective of the relative merits of these arguments, the issue of competency would seem moot in *Wood* in light of the fact that the trial court found Mrs. Wood competent.[44] Furthermore, the principal purpose to be served by establishing a conservatorship—that of shielding the conservatee from her inability to manage her estate—was not jeopardized in any respect since the 1970 instrument was notarized,

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36. *See* note 28 *supra.*

37. CAL. CIV. CODE § 1384.1 (West Supp. 1973).

38. From the facts set forth in the court's opinion, it cannot be determined what type of property was involved in Trust "A". For the purposes of this note, it is presumed that the property was, at least in part, realty.

39. CALIFORNIA WILL DRAFTING § 13.11, at 62 (California Continuing Education of the Bar, Supp. 1972).

40. It is to be noted, however, that California Civil Code § 1384.1 makes no distinction between transfers by will and transfers by other legal instruments, thus lending some support to the Wood court's reliance upon testamentary standards in determining Mrs. Wood's competency.

41. *See* CALIFORNIA WILL DRAFTING § 13.11, at 62 (California Continuing Education of the Bar, Supp. 1972).

42. Estate of Holloway, 195 Cal. 711, 235 P. 1012 (1925).

43. Hughes v. Grandy, 78 Cal. App. 2d 555, 177 P.2d 939 (1947); *accord,* Brunoni v. Brunoni, 93 Cal. App. 2d 215, 208 P.2d 1028 (1949).

44. 32 Cal. App. 3d at 881 n.5, 108 Cal. Rptr. at 534 n.5. Where it appears that evidence as to an individual's competency to execute a deed is in substantial conflict, a finding that he was not incompetent is conclusive on appeal. Shumaker v. Foster, 129 Cal. App. 2d 216, 276 P.2d 876 (1954). In *Wood,* no evidentiary conflict existed, since the appellants failed to present any proof that Mrs. Wood was incompetent to execute the 1970 writing.

and presumably approved, by her conservator.[45] Inexplicably, both of these considerations were given scant attention by the *Wood* court. The court's treatment of Mrs. Wood's competency to execute the 1970 instrument appears deceptively simplistic and sheds little light on the already clouded question of whether a conservatee, simply because of the existence of the conservatorship, is incapable of exercising a general power of appointment.[46]

A power of appointment must be exercised in accordance with the specific requirements contained in the creating instrument.[47] Actual delivery of the exercising instrument to the trustee did not occur as required before Mrs. Wood died.[48] However, the 1970 writing was notarized by her conservator who delivered the document to Mrs. Wood's attorney for delivery to the trustee, all of which transpired before Mrs. Wood's death.[49]

It is clear that not only should the intention of the donor be respected and carried out,[50] but the intention of the donee should be given effect if reasonably possible.[51] In essence, a balance should be struck between these two possibly conflicting interests.[52] Therefore, the court correctly determined that the purposes to be served by the provision requiring the appointment instrument to be delivered to the trustee during the lifetime of the donee would not be thwarted in the present case by giving effect to the 1970

45. 32 Cal. App. 3d at 881, 108 Cal. Rptr. at 534-35.

46. In Tyrer v. Rogers, Civil No. 27595 (Cal. Ct. App. Jan. 27, 1965) (unpublished opinion), the court held that a conservatee is incapable of making a valid contract. *Tyrer,* however, failed to distinguish between conservatorships in which there is no adjudication of incompetency and those in which there occurred such adjudication. It further failed to distinguish guardianships, in which an adjudication of incompetency is established by definition. In any event, being an unpublished opinion and therefore devoid of precedential value (CAL. RULES OF CT. R. 977), *Tyrer* does not constitute authority for the proposition that the mere existence of a conservatorship renders all contractual arrangements entered into by the conservatee unenforceable.

Although California Civil Code § 40 removes the conservatee's power to convey or contract where incompetency is established, its proscriptions do not extend to conservatorships in which an adjudication of incompetency has not occurred. *Cf.* CAL. PROB. CODE § 1858 (West Supp. 1973) (provides, *inter alia,* that the conservator "shall pay any debts incurred by the conservatee after the creation of the conservatorship", implying that a conservatee has the capacity to contract debts); § 1910 (West Supp. 1973) (conservatee's wages or salary are specifically made subject to his control, unless the court determines otherwise). Nevertheless, the specific scope of the conservatee's capacity is not yet clearly defined.

47. CAL. CIV. CODE § 1385.1 (West Supp. 1973); RESTATEMENT OF PROPERTY § 346 (1940).

48. 32 Cal. App. 3d at 882, 108 Cal. Rptr. at 535.

49. *Id.*

50. *See* note 19 and accompanying text *supra.*

51. 32 Cal. App. 3d at 882, 108 Cal. Rptr. at 535.

52. Focusing on the donee-beneficiary relationship, especially where a general power of appointment is involved, has gained increasing support in the United States. *See* Comment, *Revocability, supra* note 5, at 447.

instrument.[53] As the court observed, its authenticity had not been questioned; the donee did all that was reasonably possible to insure its timely delivery; and the trustee had not distributed the trust's assets to the claimants "in default of the exercise of the power."[54] Given the degree of control by the widow as donee of a general power of appointment, the course of conduct she pursued reasonably complied with the conditions imposed by the creating instrument.[55]

Clearly, the court in *Wood* correctly recognized and gave further impetus to the modern trend permitting liberal revocation of powers of appointment. However, the *Wood* opinion is not entirely satisfactory. Although the court has determined that, as a matter of law, conservatees, merely because of their status as conservatees, are not incapable of exercising an effective power of appointment, its rationale is probably limited to *Wood*'s facts. As Mrs. Wood's competency was established by the trial court, the applicability of *Wood*'s reasoning is tenuous in situations where the conservatee's competency has not been decided. In this respect, further decisions will be required to clarify whether conservatees who have not been determined incompetent are nonetheless capable of executing legally enforceable instruments.

Jeffrey A. Walter

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53. 32 Cal. App. 3d at 883, 108 Cal. Rptr. at 535.

54. *Id.* at 883, 108 Cal. Rptr. at 535-36.

55. *Restatement of Property* § 347 (1949) contains a specific exception to the requirement that to be effective an exercise of the power of appointment must satisfy all formal requirements provided in the creating document. Section 347 states:

> Failure of an appointment to satisfy formal requirements imposed by the donor does not cause the appointment to be ineffective in equity if
> (a) the appointment approximates the manner of appointment prescribed by the donor; and
> (b) the appointee is a wife, child, adopted child or creditor of the donee, or a charity, or a person who has paid value for the appointment.

In view of the great weight attributed to the *Restatement* by California precedent (*see* note 20 *supra*), it is curious that the *Wood* court did not rely upon this portion of the common law rules which provides clear authority for the proposition that the donor's formal requirements need not be followed in every case. In all fairness, however, whether Mrs. Knight, the appointee of the 1970 exercise, falls within the definitions of the persons covered by section 347 is not readily discernable from the record. This may indicate one of the reasons for the court's unwillingness to apply section 347's rule to the instant circumstances. In addition, the court may have desired not to appear inconsistent in rejecting the *Restatement* with respect to a power's revocability while invoking it with regard to an appointment's compliance with the creating instrument's requirements.