

Revised February 2, 1968

<u>Time</u>	<u>Place</u>
February 15 - 7:00 p.m. - 10:00 p.m.	State Bar Building
February 16 - 9:00 a.m. - 5:00 p.m.	601 McAllister Street
February 17 - 9:00 a.m. - 4:00 p.m.	San Francisco, California

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

San Francisco

February 15, 16, 17, 1968

February 15 - 7:00 p.m.

1. Approval of Minutes of December 1 meeting (sent 12/21/67)
2. Administrative Matters
 - (a) Future Meetings

Scheduled meetings

March 14, 15, 16 (three full days)	San Francisco
April 7 (evening), 8, 9 (morning)	Tahoe Alumni Center

Suggested dates and places for subsequent meetings

May 16, 17, 18 (three full days)	Los Angeles
June 20 (evening), 21, 22	San Francisco
July 18 (evening), 19, 20	Los Angeles
August	No meeting

- (b) Handbook of Practices and Procedures

Memorandum 67-65 (sent 12/21/67)
Handbook (sent 12/21/67)

Note: This will be discussed only if a member of the Commission wishes to bring it up for discussion.

- (c) Disposition of Sets of California Codes

Memorandum 67-66 (sent 12/21/67)

- (d) Advance Sheets for California Cases

Memorandum 67-67 (sent 12/21/67)

- (e) State Driver Training Program

Memorandum 67-77 (sent 12/21/67)

(f) Five-Year Project Schedule

Memorandum 68-3 (sent 12/21/67)
Memorandum 68-1 (sent 12/21/67)
First Supplement to Memorandum 67-70 (sent 1/26/68)

(g) Relationship with State Bar

Memorandum 67-76 (sent 12/21/67)

(h) Research Contracts

(1) Index for Volume 8

Memorandum 68-23 (sent 1/26/68)

(2) Inverse Condemnation

Memorandum 68-24 (sent 1/26/68)

(i) Personnel

Memorandum 68-25 (sent 1/26/68)

(j) Report on 1968 Legislative Program

Annual Report (December 1967) (enclosed)
Bills introduced to effectuate recommendations to
1968 Legislature (sent 1/29/68)
Memorandum 68-15 (enclosed)

3. Study 26 - Escheat

Memorandum 68-14 (sent 12/21/67)
First Supplement to Memorandum 68-14 (sent 1/26/68)
Second Supplement to Memorandum 68-14 (sent 1/29/68)
Third Supplement to Memorandum 68-14 (enclosed)

4. Study 63 - Evidence

Memorandum 68-19 (sent 1/26/68)
Memorandum 68-22 (sent 1/26/68)

February 16 - 9:00 a.m.

5. Study 52 - Sovereign Immunity

Memorandum 68-11 (sent 12/21/67)
First Supplement to Memorandum 68-11 (enclosed)
Memorandum 68-12 (enclosed)

6. Study 65 - Inverse Condemnation

Special Order of Business
at 9:30 a.m.

General Approach to Study :

Memorandum 67-73 (sent 12/21/67)
Research Study
Part I (Reprint of article from 19 Stanford Law
Review 727 (1967)(attached to Memorandum))
Part II (attached to Memorandum)

Revised February 2, 1968

Deliberately Inflicted Physical Injury or Destruction

Research Study - Part III (sent 12/21/67)

Denial Destruction and Requisitioning in Emergencies

Memorandum 68-4 (sent 12/21/67)

Exploratory Surveys and Investigations

Memorandum 68-5 (sent 12/21/67)

Destruction of Health and Safety Menaces

Memorandum 68-6 (sent 12/21/67)

Building and Safety Code Enforcement

Memorandum 68-7 (sent 12/21/67)

Confiscation, Forfeiture, and Destruction to Enforce Regulatory Policies

Memorandum 68-8 (sent 12/21/67)

7. Study 50 - Abandonment or Termination of a Lease

Memorandum 68-13 (enclosed)

Tentative Recommendation (attached to Memorandum)

February 17 - 9:00 a.m.

8. Study 69 - Powers of Appointment

Special Order of Business
at 9:00 a.m.

Memorandum 68-10 (sent 1/2/68)

Research Study (attached to Memorandum)

9. Study 44 - Fictitious Business Names

Memorandum 68-2 (sent 12/21/67)

Research Study (attached to Memorandum)

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

FEBRUARY 15, 16, AND 17, 1968

San Francisco

A meeting of the California Law Revision Commission was held at the State Bar Building, San Francisco, on February 15, 16, and 17, 1968.

Present: Sho Sato, Chairman
Hon. F. James Bear (February 16 and 17)
Thomas E. Stanton, Jr.
Lewis K. Uhler
William A. Yale

Absent: Joseph A. Ball, Vice Chairman
Hon. Alfred H. Song
Roger Arnebergh
Richard H. Wolford
George H. Murphy, ex officio

Also present were the following members of the Commission's staff: John H. DeMouly, Executive Secretary; Clarence B. Taylor, Assistant Executive Secretary (February 15 and 16); Gordon E. McClintock, Junior Counsel.

Professor Richard Powell, the Commission's consultant on Powers of Appointment, was present on February 17.

Also present were the following observers:

Edwin G. Neubarth, Office of State Controller	(Feb. 15)
Samuel J. Cord, Office of State Controller	(Feb. 15)
Robert F. Carlson, State Department of Public Works	(Feb. 16)
Norval Fairman, State Department of Public Works	(Feb. 16)
Willard Shank, Office of State Attorney General	(Feb. 16)

ADMINISTRATIVE MATTERS

Minutes of December 1967 Meeting. The Minutes of the meeting held on December 1, 1967, were approved as presented.

Future Meetings. Future meetings are scheduled as follows:

March 14 (evening), 15, 16	San Francisco
April 7 (evening), 8, 9 (morning)	Tahoe Alumni Center
May 16, 17, 18 (three full days)	Los Angeles
June 20 (evening), 21, 22	San Francisco
July 18 (evening), 19, 20	Los Angeles
August	No meeting

Handbook of Practices and Procedures. The Commission briefly discussed the Handbook of Practices and Procedures. No suggestions were made for change.

New York Law Revision Commission Reports

The Executive Secretary was directed to contact the Department of Finance and determine whether any state agency could use a set of the New York Law Revision Commission Reports. If the sets cannot be disposed of in this manner, he should contact the California law schools and determine whether they can be sent to California law schools. If the law schools do not want them, other means should be taken to dispose of the volumes.

West's Annotated California Codes

The Commission discussed the disposition of the sets of annotated codes. Mr. Uhler indicated he would like a set of the codes. Mr. Yale indicated he could use a set at home if one is available.

Advance Sheets for California Cases

Mr. Stanton indicated that he no longer receives advance sheets at Commission expense. Mr. Yale and Mr. Uhler indicated that they did not desire to receive advance sheets. Professor Sato indicated he wished to continue to receive the advance sheets. The concensus was that the advance sheets should be continued for those who wish to continue to receive them for the balance of the fiscal year and new members should be given to opportunity to receive the advance sheets for the balance of the fiscal year if they wish to receive them

State Driver Training Program

The Driver Training Program for the Commission was approved as presented by the staff.

Five-Year Project Schedule

General philosophy as to proper Commission activities. The Commission briefly discussed Memorandum 68-3 but took no action to make any changes in the approach the Commission has taken in the past to the types of studies and activities it engages in. The Commission did, however, determine that important cases and law review articles on governmental liability should be considered by the Commission in the same manner as cases and articles on the Evidence Code are considered.

The Commission also determined that an attempt should be made to ascertain whether the Commission should study a few new topics of narrow scope. The Executive Secretary was directed to write to the California

law reviews and to the law schools to determine whether the law reviews or members of the law school faculties are familiar with topics covered by published articles that indicate a need for revision of California law in fairly narrow areas. It was the concensus of those present that it would be desirable to include a few small topics on the agenda so that recommendations could be made to future sessions during the period the Commission is occupied with major topics.

It was agreed that (after the new Commissioners have had an opportunity to become familiar with Commission work) the Commission should again discuss the general philosophy as to proper Commission activities.

Five-year project schedule. The Commission tentatively decided to consider submitting bills on the following subjects to the 1969 legislative session:

- (1) Powers of appointment.
- (2) Rights upon abandonment or termination of a lease.
- (3) Fictitious business names.
- (4) Marital privileges under the Evidence Code.
- (5) Commercial Code revision to conform to Evidence Code.

For the 1970 session, consideration will be given to submitting a bill on the right to take. Student notes are also being written by the Hastings Law Journal on various other small topics and these may permit legislation to be introduced in 1970 on other topics.

Relationship with State Bar

The Executive Secretary was directed to write a letter to the President of the State Bar suggesting that a special committee be appointed by the State Bar to work with the Commission on three closely

related topics: Inverse Condemnation; Governmental Liability; and Eminent Domain. The President should be advised that these studies are substantial studies that will require from three to eight years to complete. The members of the special State Bar committee will be required to devote a substantial amount of time to committee work. The special committee work would probably demand more time of its members than the special committee of the State Bar on evidence did. Probably one or two days each month would be required to review and evaluate the Commission's tentative conclusions on particular aspects of these three related topics. The President would also be advised that the Commission's staff would be available to the extent time permits to provide the special committee with information concerning alternatives to the Commission's tentative conclusions that the special committee is seriously considering.

Research Contracts

Index for Volume 8. The Commission considered Memorandum 68-23 and approved the indexing contract as set out in that memorandum:

Contract with Professor Van Alstyne. The Commission considered Memorandum 68-24 and approved a supplemental contract with Professor Van Alstyne for \$5,000 to cover a research study indicating the disposition of all California statutes relating to inverse condemnation as outlined in the memorandum. The amount of travel expenses under the new contract is to be limited so that it will not exceed \$500 per year.

Contract with John N. McLaurin. The Commission approved a new contract with John N. McLaurin on the same terms as the one now in existence. The amount of travel expenses provided in the new contract is to be limited so that it will not exceed \$500 per year.

Execution by Executive Secretary. The Executive Secretary was authorized to execute the contracts on behalf of the Commission.

Personnel

The Commission discussed the procedure for determining the person who should be selected as Junior Counsel to replace the Senior Attorney who recently resigned. Applicants who appear to be well qualified should be interviewed by the Executive Secretary and one member of the Commission designated by the Chairman.

STUDY 26 - ESCHEAT

The Commission considered Memorandum 68-14, three supplements thereto, and the pamphlet containing the Commission's recommendation on this subject. The following actions were taken. (Page references below are to the printed recommendation.)

Section 1300 (page 1018)

The Commission considered a suggestion from the Bank of America that subdivision (g) of Section 1300 be revised to add, at the end of the subdivision, ", or in the case of a national banking association, the place where such association has its principal place of business."

After discussing the suggestion, the Commission determined that it would be undesirable to change subdivision (g). Subdivision (g) codifies the rule to the extent declared in Texas v. New Jersey merely for convenience, but does not attempt to go beyond the rule as declared in that case. The determination of the meaning of "domicile" in other situations will be simple in the case of a national banking association doing business only in California but may be a difficult problem with respect to some types of entities. Since the determination of "domicile" for the purposes of applying Texas v. New Jersey is a matter of federal rather than state law, it was concluded that it would be undesirable to attempt to interpret the meaning of "domicile" in cases not dealt with in Texas v. New Jersey.

Section 1510 (page 1028)

The Commission considered a suggestion from the Bank of America that the bill not apply to funds held only in foreign nations. The Commission determined that some change in the bill is needed to take care of this problem. The Commission determined that subdivision (e) of Section 1510 should not be deleted, but instead a specific exemption should be added to proposed new Section 1502 to take care of the problem. The language dealing with this matter contained in existing Section 1502 should be adopted. A possible wording of the exemption might be:

1502. (a) This chapter does not apply to:

 * * * * * * * * *

(3) Any instrument held only outside the limits of the United States, nor to any funds held only in a foreign country.

If this language does not meet the problem, consideration should be given to inserting the language deleted from existing Section 1502. The Executive Secretary is to discuss this matter with the representatives of the Bank of America and to work out a solution to the problem. If essential, the deleted language is to be restored.

Section 1515 (page 1033)

The Commission considered the comment of the Life Insurance Association of America that the Comment to Section 1515 is not accurate. The Commission approved the revised Comments to Sections 1515, 1516, and 1518 (attached as Exhibit I to First Supplement to Memorandum 68-14), after the word "incorporates" was substituted for "restates" in the first line of the revised Comment to Section 1515.

Section 1516 (page 1034)

The Commission considered the suggestion of the Attorney General relating to escheat of stock of companies that have not paid any dividends.

The substance of the following was substituted for subdivision (b) of Section 1516:

(b) Subject to Section 1510, any intangible interest in a business association, as evidenced by the stock records or membership records of the association, escheats to this state if (1) the interest in the association is owned by a person who for more than 20 years has neither claimed a dividend or other sum referred to in subdivision (a) nor corresponded in writing with the association or otherwise indicated an interest as evidenced by a memorandum or other record on file with the association, and (2) the association does not know the location of the owner at the end of such 20-year period. With respect to such interest, the business association shall be deemed the holder.

Section 1518 (page 1036)

In response to a suggestion from the Office of the Attorney General, Section 1518 was revised to read substantially as follows:

1518. (a) Tangible personal property located in this state and, subject to Section 1510, intangible personal property, and the income or increment on such tangible or intangible property, held in a fiduciary capacity for the benefit of another person escheats to this state if the owner has not, within seven years after it becomes payable or distributable, increased or decreased the principal, accepted payment of principal or income, corresponded in writing concerning the property, or otherwise indicated an interest as evidenced by a memorandum or other record on file with the fiduciary.

(b) For the purpose of this section, when a person holds property as an agent for a business association, he is deemed to hold such property in a fiduciary capacity for the business association alone, unless the agreement between him and the business association clearly provides the contrary. For the purposes of this chapter, if a person holds property in a fiduciary capacity for a business association alone, he is the holder of the property only insofar as the interest of the business association is concerned and the association is deemed to be the holder of the property insofar as the interest of any other person in the property is concerned.

It was noted that the Comment to Section 1518 will need to be revised to reflect this change. A reference to Section 1533 should be added to the Comment to Section 1518 and the Comment to Section 1533 also should be revised.

Section 1530 (page 1038)

In response to a suggestion from the Life Insurance Association of America, the Commission made the following changes in Section 1530:

(1) In subdivision (b)(1), changed "more than ten dollars (\$10)" to "twenty-five dollars (\$25) or more."

(2) In subdivision (b)(4), changed "of ten dollars (\$10) or less" to "under twenty-five dollars (\$25)."

The Comment to Section 1530 should be revised to conform to this change. To accomplish this, the following was substituted for the second paragraph of the Comment:

In paragraphs (1) and (4) of subdivision (b), the phrase "ten dollars (\$10)" has been changed to "twenty-five dollars (\$25)" to reduce the administrative burden and expense on holders and to conform to the notice and publication requirements of Section 1531.

Section 1532 (page 1043)

The State Controller's office suggested that sums payable on escheated travelers checks or money orders be paid at the time the report is filed. The Bank of America suggested that such sums be paid at the same time as other sums escheated are paid. The provision contained in the proposed legislation is taken from the Uniform Act. The Commission determined to make no change in the bill.

Section 1564 (pages 1051-1052)

The following paragraph was added to subdivision (b) of Section 1564:

(9) For transfer to the Inheritance Tax Fund of the amount of any inheritance taxes determined to be due and payable to the state by any claimant with respect to any property claimed by him under the provisions of this chapter.

This technical change conforms to subdivision (h) of the Code of Civil Procedure Section 1325.

Section 1570 (page 1053)

It was noted that the bill in its present form takes care of the problem that Bank of America noted existed in a former version of the bill.

Section 1571 (page 1054)

The revision to this section suggested by the State Controller was not approved.

STUDY 36 - CONDEMNATION (FEES ON ABANDONMENT)

The Commission considered Assembly Bill No. 41 relating to fees on abandonment and the letters relating to this bill which were distributed to the members of the Commission.

The Commission determined to amend the bill to revise the sentence dealing with partial abandonment to read substantially as follows

(changes indicated by strikeout and underscore):

In case of a partial abandonment, recoverable costs and disbursements shall ~~not~~ include ~~any cost or disbursement, or portion thereof~~ only those recoverable costs and disbursements, or portions thereof, which would not have been incurred had the property or property interest sought to be taken after the partial abandonment been the property or property interest originally sought to be taken.

STUDY 50 - LEASES

The Commission considered Memorandum 68-13 and the attached staff draft of a tentative recommendation on abandonment or termination of a lease.

After discussing the previous legislation and the problems that might have been created had it been enacted, the Commission turned to a discussion of the draft statute contained in the tentative recommendation and made the following decisions, comments, and suggestions.

Receivership Problem

It was noted that in some cases a large apartment building will be leased by a person who is not in possession but collects the rents from the tenants in the building and fails to pay them to the owner of the building. Consideration should be given to inserting "including a receivership" in the last sentence of Section 1953.

Compilation of Proposed Statute

The staff should make a study to determine where the new legislation should be compiled in the California codes. It was suggested that compilation as Civil Code Section 1951 et seq. may not be appropriate.

Section 1951

The clause in subdivision (a) "subject to subdivision (b)" was deleted as unnecessary.

The question was raised as to the meaning of the phrase "without undue risk of other substantial detriment." After discussion, it was tentatively concluded that the first sentence of paragraph (1) of subdivision (a) should be revised to read:

(1) The amount by which the present worth of the unpaid rent and charges equivalent to rent provided in the lease exceeds the amount of rental loss that the lease proves could have been or could be reasonably avoided.

The staff is to check whether this is a desirable revision of the paragraph. A conforming change should be made in paragraph (2) of subdivision (a).

The Comment to the section should be revised to indicate that the landlord should have a duty of reasonably reletting the property. Consideration should be given to indicating in the Comment that reasonable standards the landlord has followed in selecting tenants in the past should be considered in determining what constitutes reasonable reletting. Thus, reasonable reletting would permit a reasonable exclusion of a tenant. However, in writing the Comment, care should be taken not to include material that would result in emotional opposition to the bill.

In the last sentence of paragraph (1) of subdivision (a), the interest rate was changed from four percent to five percent. After "installment," in the last line of paragraph (1), the following was inserted in lieu of the former language: "will equal the amount of the rental installment on the due date." The subdivision should also include a provision that the interest in no case may be less than four percent.

Subdivision (a)(2) was considered to be poorly worded. The reference to reasonable attorney's fees was deleted and the last clause was revised to read "less the amount of such damages as the lessee proves could have been or could be reasonably avoided."

Further staff consideration should be given to subdivision (b) relating to liquidated damages. For example, the following sentence might be added to subdivision (b): "The availability of a remedy under Section 1951.5 shall not be considered in determining whether a liquidated damages provision is valid." Consideration should be given to how subdivision (b) fits into the scheme of remedies. Is a liquidated damage provision an exclusive remedy if the lease contains such a provision? Is subdivision (b) an alternative remedy or cumulative remedy to subdivision (a)?

Subdivision (c) should be included in the appropriate statute of limitations sections.

The Comments to the section should be reworked.

Section 1951.5

No enthusiasm was expressed for paragraphs (3) and (4) of subdivision (a). The general conclusion was that these two paragraphs should be deleted.

Remainder of Draft Statute

The Commission did not consider the remainder of Section 1951.5 or the remainder of the draft statute.

STUDY 52 - SOVEREIGN IMMUNITY

The Commission considered Memorandum 68-11 and the First Supplement thereto.

The Commission approved the substance of Assembly Bill No. 73, 1968 Regular Session, but suggested that Assemblyman Bear check the bill to determine that the one-year statute of limitations period to be added to the law will begin to run at the same time the time period for filing the claim begins to run. (See Government Code Section 911.4.)

The Executive Secretary was directed to present the Commission's views on Assembly Bill No. 73 if requested to do so.

STUDY 63 - EVIDENCE CODE

Evidence Code Generally

The Commission considered the article: Alexander, California's New Evidence Code: Changes in the Law of Privileged Communications Relating to Psychotherapy, 1 SAN FERNANDO VALLEY L. REV. 56 (1967) and Memorandum 68-22. The Commission concluded that no changes were needed in the Evidence Code as a result of this article.

Commercial Code Revisions

The Commission considered Memorandum 68-19 and the attached material. The Commission determined that subdivision (3) of Commercial Code Section 4103 should be revised substantially as follows:

(3) Action or nonaction approved by this division or pursuant to Federal Reserve regulations or operating letters constitutes the exercise of ordinary care ~~and, in~~ In the absence of special instructions, action or nonaction consistent with clearinghouse rules and the like or with a general banking usage not disapproved by this division ~~, prima-facie~~ constitutes the exercise of ordinary care if the standards established by the clearinghouse rules and the like or by the general banking usage are not manifestly unreasonable .

The Comment should note that the Comment to a similar standard in subdivision (3) of UCC Section 1-102 states in part: "However, the section also recognizes the prevailing practice of having agreements set forth standards by which due diligence is measured and explicitly provides that, in the absence of a showing that the standards manifestly are unreasonable, the agreement controls."

The staff was directed to prepare a tentative recommendation on revision of the Commercial Code to conform it to the Evidence Code for consideration by the Commission at a subsequent meeting. After

Minutes
February 15, 16, and 17, 1968

the comments and suggestions of interested persons on the tentative recommendation are received, the Commission will determine whether it should make a recommendation on this subject to the 1969 Legislature.

STUDY 65 - INVERSE CONDEMNATION

Publication of Research Studies

The Commission determined that the research studies on inverse condemnation should be collected for publication by the Commission in one pamphlet when all the studies are completed.

General Approach to Study

The Commission considered Memorandum 67-73 and approved the general approach to the subject of inverse condemnation as set out in that Memorandum.

Deliberately inflicted Physical Injury or Destruction

The Commission considered Memoranda 68-4, 68-5, 68-6, 68-7, and 68-8 and determined that the following areas of inverse condemnation discussed in Professor Van Alstyne's study on deliberately inflicted physical injury or destruction should be given priority as indicated below.

The matter of denial destruction and requisitioning in emergencies should be given a priority. See Memorandum 68-4.

The matter of exploratory surveys and investigations should be given a priority. See Memorandum 68-5.

Discriminatory enforcement of building code and safety code enforcement as a means of acquiring property by condemnation at a reduced compensation should be given priority. See Memorandum 68-7.

The procedural aspects of building and safety code enforcement generally should be considered if and when staff and Commission time permits. See Memorandum 68-7.

The matter of destruction of health and safety menaces (Memorandum 68-6) and confiscation, forfeiture, and destruction to enforce regulatory policies (Memorandum 68-8) should be deferred until a later time.

Suggestions of Public Agencies

Representatives of the Attorney General and Department of Public Works suggested that the following matters be given priority to take care of problems that need immediate attention:

1. The problem of interest in inverse condemnation cases. The delay in bringing such actions to trial results in a substantial amount of interest being added to judgments since the interest runs from the time of the injury. The interest factor also limits the ability of public agencies to appeal judgments in inverse condemnation cases. The problem is a very complex one. For example, interest might be given on out of pocket expenditures from time when incurred, but not on loss in market value of property.

2. The landslide case where an improvement is carefully constructed.

3. The problem that arises when land is flooded and damages are awarded but the public entity does not obtain a flowage easement. This problem should be taken up in connection with general problems arising in flood cases.

The representatives of the Attorney General and Department of Public Works were requested to send a letter to the Commission pointing out those areas that are in need of priority study.

STUDY 67 - UNINCORPORATED ASSOCIATIONS

The Commission considered Memorandum 68-15 and the First Supplement to Memorandum 68-15. The following actions were taken.

The Commission approved the revision of subdivision 2.1 which was attached to Memorandum 68-15 with the following changes. In paragraph (b) the phrase "or the general manager of the partnership" was inserted. In subdivision (c), a revision should be made so that service may be made on a member of the unincorporated association only if neither the agent for service nor a principal officer can be found in the state after diligent search. The latter revision was made in response to a suggestion from the State Bar and incorporates the substance of the bill as recommended in 1967 but not approved by the Assembly Judiciary Committee. The Executive Secretary is to discuss this change with Assemblyman Hayes.

Revised subdivision 2.1 will read substantially as follows:

2.1. If the suit is against an unincorporated association (not including a foreign partnership covered by Section 15700 of the Corporations Code):

(a) If the association is a general or limited partnership that has designated an agent for service of process as provided in Section 24003 of the Corporations Code, to the person so designated or to a general partner or the general manager of the partnership.

(b) If the association is not a general or limited partnership and the association has designated an agent for service of process as provided in Section 24003 of the Corporations Code, to the person so designated or to the president or other head of the association, a vice president, secretary, or general manager thereof.

(c) If no person has been designated as agent for service of process as provided in Section 24003 of the Corporations Code or if the person so designated cannot be found at his address as specified in the index referred to in Section 24004 of the Corporations Code and if the other persons listed in subdivision (a) or (b), as the case may be, cannot after diligent search be found in this state, to any one or more of the association's members and by mailing a copy thereof to the association at its last known mailing address.

STUDY 69 - POWERS OF APPOINTMENT

The Commission considered Memorandum 68-10 and the consultant's study, including the legislation recommended by the consultant. The Commission also considered a list of policy questions presented by the consultant at the meeting. The Commission directed the staff to prepare a draft of a tentative recommendation to be presented to the Commission at the March or April meeting.

Basic Policy Questions

The Commission adopted the consultant's recommended approach that the statute state the law on powers of appointment on frequently litigated issues and include a provision making clear that the courts are free to decide questions not covered by the statute on the basis of general common law principles as developed in this state and other states.

Secondary Policy Questions

1. The Commission determined that it is desirable to allow the creditors of the donee of a general power of appointment to reach the appointive assets. This departure from the common law was recommended by the consultant.

2. The Commission determined that it is desirable to change the present constructional preference for non-exclusive powers to a constructional preference for exclusive powers. This departure from the California law was recommended by the consultant.

3. The Commission determined that it is desirable to provide that a release may not be used so as to effectuate an inter vivos transfer of property under a solely testamentary power. The language in

Section 12 of the consultant's statute was approved as to policy but not as to drafting.

4. The Commission approved the language in Sections 27 and 28 of the consultant's statute insofar as it adopts the capture doctrine as developed in the three states that have considered the problem.

5. The Commission deferred action on the question of repealing or amending Probate Code Section 125 so as to eliminate the chance that a general residuary clause will exercise a power where there is a gift in default. This departure from the common law was recommended by the consultant. See Consultant's Recommended Statute Section 17(d). The Commission is to read the Wisconsin Law Review on this point and make a determination of policy at the next meeting.

Drafting Questions

Definitions. The Commission considered inserting various definitions in this statute for terms such as "creating instrument," "power of appointment," "donor," "donee," "release," and the like. The staff was directed to determine what definitions are necessary to implement the language in the statute. The general definitions contained in the Civil Code are to be investigated to determine the suitability of their application to this legislation.

Section 1. The staff was directed to redraft Section 1 in a manner similar to the following:

Except to the extent that the rules applicable to powers of appointment are not provided by statute, the common law as to powers of appointment is the law of this state.

The Comment to Section 1 is to include a reference to Civil Code Section 4 which relates to the statute in derogation of the common law and

Code of Civil Procedure Section 1899 which defines "unwritten law."

The Commission determined that the additional language found in the Wisconsin and Michigan statutes is not necessary in Section 1. (See Memorandum 68-10, p. 7.)

Section 2. The Commission directed that the meaning of the word "wholly" in Section 2 be clarified so that it is clear that both a general and special power can exist under the same limitation. The point is also to be clarified in the Comment.

The relationship of Section 2 with exceptions contained in Revenue and Taxation Code Section 13692 is to be clarified, especially with respect to joint powers. The use of the term "limited power" found in the Revenue and Taxation Code is also to be investigated with regard to the use of the term "special power" in the consultant's statute. This dichotomy is to be clearly explained in the Comment to Section 2.

Commissioner Sato asked the significance of the division of powers into special powers and general powers. The consultant replied that the primary significance was in the areas of creditors reaching appointive assets and the rule against perpetuities.

Section 3. The Commission questioned the use of the term "honor's intent" in this section because it is not used consistently throughout the statute. The consultant pointed out that the language was identical to the New York language and to the Restatement language. Commissioner Stanton felt that the statute should use commonly accepted language wherever possible. The staff was directed to investigate the use of "manifested intent" throughout the statute and the possibility

of inserting a substitute clause such as "creating instrument" in place of "donor."

Commissioner Sato raised the question as to whether Sections 3(1) and 3(3) were circular definitions. The staff is to investigate the possibility of using a positive definition for "postponed power" such as that found in the New York E.P.T.L.

Section 4. The Commission directed the staff to consider changing the word "duty" to a word more semantically correct. Commissioner Stanton asked if the statute should spell out what type of language creates an imperative or discretionary power. The consultant replied that the nature of the power must be gathered from the instrument as a whole and that such rules would not be advantageous.

Section 5. Subdivision (2) of Section 5 was revised to read: "All other powers are non-exclusive."

The staff is to investigate whether or not the terms defined in Section 5 are used elsewhere in the statute, and if not whether Section 5 should be deleted.

Section 6. The staff is to revise Section 6 to indicate the result of doing the specified acts.

The staff is to clarify the spendthrift trust provision in subdivision (4) and reproduce Rev. Regs. 20.2056(b)-5(f)(7).

The section was partially revised to that the introductory clause states, "The donor in order to create a power of appointment . . ." In addition the conjunction after subdivision (3) was changed to "but" and the language following the last comma in subdivision (4) was deleted.

Section 7. It was suggested that the word "effectively" was unnecessary.

Section 8. The Commission considered adding a provision to Section 8 that would create a special class of appointive assets for the purpose of creditors. Such a provision would define the type of objects of a special power that would exempt it from creditors such as the provision in Wisconsin. See WIS. 1965 § 232.17(1). The Commission determined that the provision is not desirable.

Section 9. The consultant advised adding the words "and whether the power originally had been exercisable only by will" at the end of Section 9. This addition was considered desirable by the Commission.

Commissioner Sato questioned the use of the words "has" and "has not" in reference to exercise of the power as misdirecting where subsequent creditors of a donee who has appointed the assets attempt to reach the property. The staff is to redraft the section for clarity.

Section 10. The Commission determined that Section 10 should be omitted as unnecessary.

Section 11. The Commission determined that subdivision (2) of Section 11 should be omitted as unnecessary in view of the change in language in Section 9. The staff is to redraft Section 11 so it will be more concise. In addition, the staff is to consider the use of the terms "postponed or testamentary power" in place of "not presently exercisable."

Section 12. Section 12 is substantially a recodification of Civil Code Section 1060. The Commission approved it with the consultant's suggested change in subdivision (2). The staff is to redraft the section if it appears necessary.

Section 13. The Commission questioned the necessity of Section 13. The consultant answered that it should be read in conjunction with Section 14. The staff is to consider the relationship of the two sections and their relative placement in the statute.

Section 14. The Commission considered Section 14 and was satisfied with its substance and language.

Section 15. The staff is to add a subdivision to Section 15 defining the formalities which must be followed to exercise a power of appointment

Subdivision (2) was satisfactory to the Commission except that the word "deed" is to be changed to a less specific word or phrase such as "instrument other than a will," "inter vivos instrument," or "conveyance." The last five words in subdivision (2) are to be deleted.

Subdivision (3) is to be redrafted for clarity.

Subdivision (4) is to be redrafted for clarity.

Subdivision (5) was tentatively approved as to substance. The use of the term "specific reference" is to be investigated to determine whether or not a more useful test can be provided by statute.

Subdivision (6) is to be clarified as to its effect where a post-testamentary consent is sought.

Commissioner Sato questioned the need for different formalities in exercising a consent than in exercising a joint power. The consultant answered that the difference was engrained in the present law and that the formalities should be different. The staff is to investigate the problem.

Civil Code Section 860. The Commission approved the staff suggestion that Civil Code Section 860 be amended to conform it with subdivision (7) of Section 15. The Commission rejected the additional language used in the Michigan statute. See Memorandum 68-10, p. 20. Section 860 is to conform to subdivision (7) in all particulars.

Section 16. The Commission considered Section 16 and was satisfied with its substance and language.

Section 17. The Commission considered Section 17 and deferred action on it until the policy question involved is determined.

Section 18. The Commission considered Section 18 and was satisfied with its substance and language.

Section 19. The staff is to redraft Section 19 to indicate that the permissible types of appointments enumerated in that section are not exclusive.

Section 20. The Commission considered Section 20 and was satisfied with its substance and language.

Section 21. Commissioner Sato asked whether Section 21 should contain a general provision covering all aspects of fraud on a power. The

consultant answered that such a provision was impractical and not in line with the decided policy of the Commission to codify the rules on frequently litigated issues and leave unlitigated issues to the courts. The staff is to indicate in the Comment that this section is indicative of the policy to be applied to cases which arise involving other fraud issues.

Sections 27-28. The Commission considered the policy involved in Sections 27-28 and found it to be satisfactory. The language used in the sections was not considered.

Wisconsin statute Section 232.15. The Commission considered Section 232.15 of the Wisconsin statute and determined that it did not have enough material to decide its merits. The Commission is to read the discussion of the section in the Wisconsin Law Review and make a determination at the next meeting.