Date of Meeting: September 5-6, 1958

Date of Memo: August 20, 1958

Memorandum No. 4

Subject: Study No. 1 - Suspension of the Absolute Power of Alienation

When we discussed this subject with the Senate Interim Judiciary Committee at the time of the March 1958 meeting it was agreed that the Commission would undertake to suggest possible changes in A. B. 249, the 1957 Commission bill on this subject to meet objections raised by some members of the Committee to the bill and that the Committee would consider the Commission's suggestions at a meeting later this year.

Since the Session is rapidly approaching it seems desirable to work out our proposals and get them to the Committee soon, with a request that the matter be included on the agenda of one of its early meetings.

A memorandum is attached which is designed to make a beginning on this endeavor.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

August 28, 1958

Memorandum to Law Revision Commission

Subject: Study No. 1 -- Suspension of the Absolute Power of Alienation.

When we discussed this matter with the Senate Interim Judiciary Committee at the time of the March 1958 meeting we encountered considerable skepticism about, if not opposition to, Section 5 of A.B. 249, the Commission bill introduced at the 1957 Session. Section 5 would have enacted the following new Section 771 of the Civil Code:

> 771. A trust is not invalid, either in whole or in part, merely because the duration of the trust may exceed the time within which future interests in property must vest under this title, if the interests of all the beneficiaries must vest, if at all, within such time.
>
> A provision, express or implied, in the terms of an instrument creating a trust that the trust may not be terminated is effective if the trust is limited in duration to the time within which future interests in property must vest under this title. But if the trust is not so limited in duration, such a provision is ineffective insofar as it purports to be applicable beyond the time within which future interests in property must vest under this title and the provision is wholly ineffective unless, consistently with the purposes of the trust, it may be given effect for some period not exceeding such time.

Some members of the Senate Committee expressed concern that this

provision would result in trusts of perpetual duration or at least which would last well beyond the period which is permissible today. We contended that this was highly unlikely to happen because under the second paragraph of proposed new Section 771 the beneficiaries could terminate the trust by their joint action at any time after the time within which future interests in property must vest -- i.e., lives in being plus 21 years. Some members of the Committee suggested, however, that this is an illusory safeguard because of the problem of getting the beneficiaries to agree upon termination, pointing out that each beneficiary would have a veto power with respect thereto.

It is impossible to say, of course, which of these views is correct -- i.e., whether the desire of the several beneficiaries to obtain their shares of the corpus free of the trust would induce them to cooperate to this end in all or nearly all cases. However this may be, the Commission's problem is that some members of the Committee appear to believe it would not.

By way of making a start on the problem of drafting a solution which might be satisfactory to the Senate Committee I prepared a draft of a memorandum to the Commission on this matter which I discussed with Professor Turrentine. I think that the best way to state the problems involved is to recount the substance of our discussion of various proposals made therein.

At the outset Professor Turrentine raised a question about

the first sentence of the second paragraph of the new Section 771 of the Civil Code which would have been enacted by Section 5 of A.B. 249. He pointed out that this sentence could be construed to prohibit termination of an inter vivos trust which will not endure longer than the permissible perpetuities period even though the settlor and all of the beneficiaries desired termination. This, he said, would be a departure from present law and would be undesirable in any event. We decided that this problem could be handled by omitting the first sentence of the second paragraph altogether and revising the second sentence. I have since drafted the following:

> If a trust is not limited in duration to the time within which future interests in property must vest under this title, a provision, express or implied, in the instrument creating the trust that the trust may not be terminated is ineffective insofar as it purports to be applicable beyond such time and the provision is wholly ineffective unless, consistently with the purposes of the trust, it may be given effect for some period not exceeding such time. A provision prohibiting termination of an inter vivos trust shall never be given effect to prevent termination by the joint action of the creator of the trust and all of the beneficiaries thereunder if all concerned are competent and if the beneficiaries are all of the age of majority.

In the original draft of this memorandum which I discussed with Professor Turrentine I suggested that the doubts of the Senate Committee would presumably be allayed if instead of the Section 771 of the Civil Code which would have been enacted by A.B. 249 there were enacted the following provision:

771. A provision, express or implied, in an instrument creating a trust which would require or permit the trust to continue in existence beyond the period within which future interests in property must vest under this title is to that extent void and the entire trust is void unless, consistently with the purposes of the creator thereof, it may be permitted to exist for some period not exceeding such time.

Professor Turrentine pointed out that such a provision would be undesirable because it would strike down both deeds of trust and business (Massachusetts) trusts insofar as they would endure longer than lives in being plus 21 years -- which many if not most of them would. (It will be remembered that the impact of the present suspension rule on the duration of trusts is limited to ordinary private trusts. Deeds of trusts and business trusts do not fall thereunder because all interests under such trusts are transferable and hence such trusts are held not to suspend the absolute power of alienation.)

Moreover, this solution of the problem with which we are confronted would be unsatisfactory because it does not obviate one of the principal defects in our present law and thus one of the principal reasons for making the suspension of alienation study in the first place. This, as is pointed out in Professor Turrentine's study, is that the present California law in respect of ordinary private trusts (which the proposal would codify) is unusually and unnecessarily restrictive in limiting the duration of such trusts to lives in being plus 21 years. The present rule puts California in a minority, if not in a unique position,

among the several states and thus at a considerable disadvantage as a state in which to create trusts. (See discussion at pp. G-18-22 and G-28-29 of research study.)

Another proposal made in my original memorandum is that we might revise new Section 771 of the Civil Code to read as follows:

[As in A.B. 249] 771. A trust is not invalid, either in whole or in part, merely because the duration of the trust may exceed the time within which future interests in property must vest under this title, if the interest of all the beneficiaries must vest, if at all, within such time.

[As revised above] If a trust is not limited in duration to the time within which future interests in property must vest under this title, a provision, express or implied, in the instrument creating the trust that the trust may not be terminated is ineffective insofar as it purports to be applicable beyond such time and the provision is wholly ineffective unless, consistently with the purposes of the trust, it may be given effect for some period not exceeding such time. A provision prohibiting termination of an inter vivos trust shall never be given effect to prevent termination by the joint action of the creator of the trust and all of the beneficiaries thereunder if all concerned are competent and if the beneficiaries are all of the age of majority.

[New] Whenever a trust has existed longer than the time within which future interests in property must vest under this title, it shall be terminated upon the request of a majority or more of the beneficiaries.

Professor Turrentine was inclined to think that this would be a workable provision, although it would not be his first choice (see below). He thought that as respects deeds of trust and business trusts the language in the last paragraph should be "majority in interest" to prevent a numerically large but sub-

stantially small number of beneficiaries from compelling termination. We both recognized, on the other hand, that as applied to an ordinary trust a "majority in interest" provision would create difficulties of calculation, although presumably these could be overcome by determining the value of all interests under the trust as of the date of the demand for termination, by resort to the mortality tables. A problem which we did not discuss but which has since occurred to me is that there could not, of course, be termination of a deed of trust unless the obligation secured thereby were paid; this seems so obvious, however, that it probably would not have to be expressly covered in the statute. If some provision to cover this problem were thought necessary, it might be supplied by adding the words "on terms which are fair and equitable to all persons affected thereby" after "terminated" in the third paragraph.

Still another proposal made in my original memorandum was that in lieu of the third paragraph suggested above the following third paragraph be added to Civil Code Section 771:

> Whenever a trust has existed longer than the time within which future interests in property must vest under this title, it may be terminated by a court of competent jurisdiction upon the petition of the Attorney General or of any person who would be affected thereby if the court finds that such termination would be in the public interest or in the best interest of a majority or more of the persons who would be affected thereby.

Professor Turrentine was inclined to favor this proposal over the others made in my original memorandum. He would, however, omit "of the Attorney General or", being of the view that the matter of

duration of private trusts is not one which should be of concern to the Attorney General. My thought, of course, is that this additional safeguard might persuade some who would otherwise oppose the bill to favor it and that the power would probably not be invoked save in extreme cases. This last proposal has all of the defects of vagueness and of leaving the matter to judicial discretion -- probably, in effect, to the discretion of the trial judge. Depending, of course, on one's view of the judiciary, this is also its strength.

If the last provision suggested were enacted termination of the trust would be by court decree. Under any of the other provisions suggested a legal action might be necessary to terminate a trust or to determine the validity of voluntary termination by a trustee. In any of these situations the problem could arise of some beneficiaries being outside of California, thus raising problems of personal jurisdiction and service of process. These could be left to the general law which the California Supreme Court appears to be inclined to interpret broadly in trust situations (Atkinson v. Superior Court 49 Cal.2d 338 (1957). On the other hand, a specific provision relating to jurisdiction and service along the following lines might be inserted at an appropriate point in the Code of Civil Procedure:

> Whenever an action is brought to effect the termination of a trust under Section 771 of the Civil Code or to determine the validity of the voluntary termination of a trust thereunder, service of process shall be made on all persons whose interests may be affected thereby and whose addresses or last addresses

are known to the party bringing the action or to the trustee. The trustee shall, upon request, furnish the names and addresses or last known addresses of such persons to any person who states that he intends to bring such an action.

Service may be made on any person required to be served hereunder by sending him a copy of the summons and complaint by ordinary mail.

If service is made in compliance with this section the judgment of the court shall be binding on all persons so served and on all other persons whose interests are affected and are not substantially adverse to those of all persons served.