A G E N D A

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Sacramento April 17-18, 1959

1. Minutes of March meeting (To be sent).

2. Report re schedule of interviews of candidates for Assistant Executive Secretary position.

3. Report on 1958-59 printing program.

4. Matters relating to 1959 legislative program:

   A. Report on status of bills (enclosed).

   B. Report on status of 1959-60 budget.

   C. S.B. 160 - Right of Nonresident Aliens to Inherit (See Memorandum sent to you on April 6)

   D. A.B. 405-410 - Claims (Memorandum to be sent)

5. Further consideration of studies heretofore considered:

   A. Study No. 21 - Confirmation of Partition Sales. (See Memorandum No. 1 sent April 9)

   B. Study No. 33 - Survival of Tort Actions. (See Memorandum No. 2, sent April 9)

   C. Study No. 38 - Inter Vivos Rights in Probate Code § 201.5 property (See material sent to you prior to the JANUARY meeting)

   D. Study No. 32 - Arbitration (See Memorandum No. 3, to be sent)

6. New Studies:

   A. Study No. 42 - Trespassing Improvers (Sent to you prior to the FEBRUARY meeting).

   B. Study No. 48 - Right of Juveniles to Counsel (Sent to you prior to the FEBRUARY meeting).

   C. Study No. 51 - Alimony after Divorce (Sent to you prior to the FEBRUARY meeting).

MINUTES OF MEETING

of

April 17 and 18, 1959

SACRAMENTO

Pursuant to the call of the Chairman, there was a regular meeting of the Law Revision Commission on April 17 and 18, 1959, in Sacramento.

PRESENT: Mr. Thomas E. Stanton, Jr., Chairman
Mr. John D. Babbage, Vice Chairman
Honorable James A. Cobey (April 17)
Honorable Clark L. Bradley (April 17)
Mr. Frank S. Balthis
Mr. Leonard J. Dieden
Honorable Roy A. Gustafson
Mr. Charles H. Matthews
Professor Samuel D. Thurman (April 18)
Mr. Ralph N. Kleps, ex officio

Messrs. John R. McDonough, Jr., Glen E. Stephens, and Miss Louisa R. Lindow, members of the Commission's staff, were also present.

The minutes of the meeting of March 13 and 14, 1959, were unanimously approved after the following minor changes were made:

(1) Page 6. Add the word "to" after the word "prior" on the tenth line from the bottom of the page.

(2) Page 20. Substitute the word "if" for the word "it" which follows subsection (2) on line seven from the top of the page.

I. ADMINISTRATIVE MATTERS

A. Amendment to the February 13 and 14 meeting Minutes: The Commission considered (1) a copy of an excerpt from the minutes of the February 13 and 14 meeting as originally prepared reporting certain comments and views of Mr. Gustafson relating to Rule 25 of the Uniform Rules of Evidence and (2) a proposed revision of this portion of the February minutes prepared by Mr. Gustafson. (A copy of each of these items is attached.) After the matter was discussed it was agreed to substitute the proposed revision for this portion of the minutes as originally written.

B. Personnel - Assistant Executive Secretary: The Executive Secretary reported that the interviews of the candidates for the position of Assistant Executive Secretary are scheduled for May 26, 27 and 28 in Sacramento; June 3 in Los Angeles and June 9, 10 and 11 in San Francisco. He stated further that the State Personnel Board had asked the Commission to suggest the names of persons who might be willing to serve as the interview board's public member. During the discussion Mr. Dieden suggested that Mr. Leon Warmke of Stockton might be willing to serve as the public member of the Board. After the matter was discussed it was agreed that Mr. Dieden should ask Mr. Warmke if he would serve on the Board and to notify the Executive Secretary of Mr. Warmke's decision.

C. Budget Status: The Executive Secretary reported that he had been advised that the Department of Finance has recommended to the Senate Finance Committee and the Assembly Committee on Ways and Means that the Commission's request for the augmentation of its 1959-60 budget in the amount of approximately $8,500 for the Condemnation study be approved.

D. West Code Sets: The Executive Secretary reported that on checking the correspondence files it had been ascertained that the sets received by the original members of the Commission were given to the members individually as a gift by West Publishing Company, although some members had accepted the set for their office as Commissioners. However, the subsequent sets received by the newly appointed members were given with the understanding that they were to be accepted for the office. During the discussion Mr. Dieden stated that he would not avail himself of a set of the West Codes at this time. After the matter was discussed it was agreed that Mr. Stanton would write to Mr. Holper of the West Publishing Company to advise him of the new appointments to the Commission.

II. LEGISLATIVE MATTERS

A. Status Report on the 1959 Bills: The Commission had before it the Status Report on the 1959 Bills as of April 10, 1959 (a copy of which is attached hereto). The Executive Secretary reported that he had been advised by Senator Cobey that Senate Bills No. 164 (Time for Making New Trial Motion) and No. 165 (Suspension of Absolute Power of Alienation) have passed the Senate. He also reported that A.B. 400 (Taking of Vehicles) failed to get out of the Assembly Committee on Criminal Procedure. During the ensuing discussion Mr. Gustafson took the position, in which the other members concurred, that the Commission should hold A.B. 401 over to the next legislative session thus giving the Commission time to educate those persons opposing the bill as to its merits and to improve the bill. Mr. Gustafson suggested in the latter connection that the Commission might give consideration to making a distinction between a single act of temporary taking and a series of acts of temporary taking.

B. Study No. 3 - The Dead Man Statute: The Commission considered a copy of the letter to the Executive Secretary from Mr. Lewis C. Teegarden, President of the Lawyers' Club of Los Angeles County (dated 4/14/59), requesting on behalf of the Lawyers' Club authorization for the Executive Secretary to appear before the Senate Judiciary Committee hearing in support of a bill which the Club is sponsoring to repeal the dead man statute. During the discussion Mr. Stanton pointed out that Government Code Section 10308 provides that no member or employee of the Commission may appear before a committee of the Legislature except at the invitation of the chairman or of the committee. After the matter was discussed a motion was made by Mr. Bradley and seconded by Senator Cobey (1) to direct the Executive Secretary to respond to Mr. Teegarden's request stating that he has been authorized to appear at the Senate Judiciary Committee hearing relating to the repeal of the dead man statute providing he is invited by the chairman or the committee; (2) to direct the Executive Secretary to explain to the Committee if he does appear before it that the Commission did not reintroduce its bill at the 1959 Session for the following reasons: (a) the Commission is currently engaged upon a study of the Uniform Rules of Evidence in the course of which it will have another opportunity to formulate and express its views on this matter and (b) the Commission has had several changes in personnel since 1957 and has not

re-addressed itself to this matter; (3) the Executive Secretary was directed to answer any questions which he can about this proposed legislation and the reasons which induced the Commission to introduce it in 1957; and (4) that the Executive Secretary should offer to furnish Mr. Teegarden copies of the Commission's 1957 Recommendation and Study on this subject. The motion carried:

Aye: Babbage, Balthis, Bradley, Cobey, Dieden, Gustafson, Matthews, Stanton.

No: None.

Not Present: Thurman.

C. Study No. 20 - Guardians for Nonresidents: The Commission considered A.B. 401 and Memorandum No. 5 (4/16/59) containing excerpts from the minutes of the meetings of the Northern and Southern Sections of the Committee on Administration of Justice. (A copy of each of these items is attached hereto.)

After the various suggestions for revision to A.B. 401 proposed by the subcommittees of CAJ were discussed the following action was taken:

(1) It was agreed that service of the citation on the alleged insane or incompetent person at least 10 days before the hearing (as provided in A.B. 401) does allow sufficient time to obtain representation at the hearing.

(2) A motion was made by Mr. Babbage and seconded by Mr. Matthews to add "by the petitioner" after the word "mailed" in the third paragraph of Section 1461 of the Probate Code. The motion carried:

Aye: Babbage, Balthis, Dieden, Gustafson, Matthews, Stanton.

No: None.

Not Present: Bradley, Cobey, Thurman.

(3) A motion was made by Mr. Balthis and seconded by Mr. Babbage to delete the phrase "or person interested in his estate in expectancy or otherwise" from both Sections 1461 and 1570 of the Probate Code. The motion carried:

Aye: Babbage, Balthis, Gustafson, Matthews.

No: Dieden, Stanton.

Not Present: Bradley, Cobey, Thurman.

It was agreed (1) that the staff should check the cases and legislative history to find out if there is any reason that the phrase "or person interested in his estate in expectancy or otherwise" should be retained in either section and (2) that if this research indicates that this language should be retained the Chairman and the Executive Secretary are authorized to act accordingly.

(4) It was agreed that the other proposed suggestions fall within the policy adopted by the Commission at its January meeting that suggestions not raising important issues of substance will not be accepted after the Commission has published its Recommendation and Study and introduced a bill.

D. Study No. 25 - Probate Code Sections 259 et seq. -- Nonresident Alien Heirs: The Commission considered a Memorandum (4/6/59) relating to the conversation the Executive Secretary had with Messrs. Benjamin Dreyfus and Francis J. McTernan of the San Francisco law firm of Garry, Dreyfus, McTernan & Keller relative to S.B. 160; a copy of a letter to the Executive Secretary from Mr. Edward Mosk (dated 4/13/59); a copy of a letter to Professor Horowitz from Mr. John K. Carlock, Acting General Counsel (dated 5/16/59); Memorandum No. 6 (4/16/59) relating to the conversation the Executive Secretary had with Professor Harold Berman; and S.B. 160. (A copy of each of these items is attached hereto.)

The Commission discussed the objections raised to the portion of S.B. 160 which provides that "there is a disputable presumption that a person would not have the substantial benefit or use or control of money or other property due him under an estate or testamentary trust if he resides in a country which is designated by the Secretary of the Treasury of the United States, pursuant to Section 123 of Title 31 of the United States Code ... as being a country as to which there is not a reasonable assurance that the payee of a check or warrant drawn against funds of the United States will actually receive such check or warrant and be able to negotiate the same for full value." Messrs. Dreyfus, McTernan and Mosk contend that the Secretary's list is not made up on the basis

of objective findings with respect to receipt and negotiability for full value of United States checks and that they personally know of instances in which Russian citizens have received the full benefits of their American inheritances. Professor Berman in his conversation with the Executive Secretary stated that his experience leads him to conclude that ordinarily a Russian heir will receive and have substantial benefit of the American inheritance with two possible exceptions (1) the Russian who is persona non grata with the government and (2) the one who receives a large inheritance.

During the discussion of whether reference to the Secretary's list should be deleted thus placing the burden of proof on the contestant that the nonresident alien heir would not receive substantial benefit, use and control of his inheritance, Mr. Stanton stated that in his opinion action by the Commission at this time to delete the disputable presumption would jeopardize passage of S.B. 160. He stated further that any action for such an amendment should be taken by the Senate Judiciary Committee.

After the matter was discussed a motion was made by Mr. Gustafson and seconded by Mr. Dieden to direct the Executive Secretary to state to the Senate Judiciary Committee when S.B. 160 is heard that the Commission considered the evidence submitted by Messrs. Dreyfus, McTernan and Mosk with respect to Russian citizens receiving the full benefit of their

American inheritances despite the fact Russia is on the Secretary's list but concluded that the evidence was not of sufficient weight to overcome the presumption that his official duties are properly performed by the Secretary of the Treasury and the statements made in Mr. Carlock's letter to Professor Horowitz. The Secretary was also instructed, however, that the Commission would not abandon S.B. 160 if the disputable presumption were deleted therefrom. The motion carried:

Aye: Babbage, Balthis, Dieden, Gustafson, Matthews, Stanton.

No: None.

Not Present: Bradley, Cobey, Thurman.

E. Study No. 37 (L) - Claims Statute: The Commission had before it the following memoranda prepared by the Executive Secretary: No. 4-Claims (4/10/59); No. 4-A--Views of the State Bar (4/13/59); No. 4-B--Views of the County Auditors' Association (4/13/59) and a copy of a letter to the Executive Secretary from Mr. James H. Hastings, Legislative Representative of the County Auditors' Association (dated 4/7/59); No. 4-C--Views of Mr. Richard A. Del Guercio, Legislative Representative of the Los Angeles County Counsel (4/12/59); No. 4-D--Views of the City Attorney of San Francisco (4/13/59); No. 4-E and a copy of a letter to Dr. Norman B. Scharer, Superintendent of City Schools of Santa Barbara from Mr. Vern B. Thomas, District Attorney of Santa Barbara County (dated 3/25/59); Possible Changes in Time for Filing of Claims (4/15/59); Principal Points Raised by Committee on Administration of Justice (4/15/59); No. 4-F--A summary of the various objections which have been made to A.B. 405 and suggested forms which amendments to meet these objections might take if the Commission were to accede to some or all of the views which have been expressed (4/16/59), A.C.A. 16-Constitutional Amendment and A.B. 405 as amended in Assembly March 24, 1959. (A copy of each of these items is attached hereto.)

Preliminary to the discussion of the various sections of the Claims statute it was agreed to make exception to the policy adopted at the January 1959 meeting that ordinarily

bills will be introduced in the form in which they are published by the Commission and that amendments will be held to a minimum, it being recognized that the claims legislation had been sent to the State Bar and other interested parties at a relatively late date.

The Commission then considered A.B. 405 as amended and the various sections of Memorandum No. 4-F. After the matter was discussed the following action was taken:

(1) Constitutional Amendment. A motion was made by Mr. Babbage and seconded by Mr. Balthis to add the word "chartered" before the words "cities and counties" and "cities" in Section 10 of Article XI of the Constitutional Amendment. The motion carried:

Aye: Babbage, Balthis, Dieden, Gustafson, Matthews, Stanton.

No: None.

Not Present: Bradley, Cobey, Thurman.

[Comment: This amendment was made after related changes were made to Section 701.]

(2) Section 701. A motion was made by Mr. Babbage and seconded by Mr. Balthis to adopt the amendments to Section 701 proposed in Memorandum No. 4-F, substituting the word "founded" for "based" so that Section 701 as amended would read as follows:

> 701. Until the adoption by the people of an amendment to the Constitution of the State of California confirming the authority of the Legislature to prescribe procedures governing the presentation, consideration and enforcement of claims against chartered counties, chartered cities and counties and chartered cities and against officers, agents and employees thereof, this chapter shall not apply to causes of action founded on contract against a chartered city and county or chartered city while it has an applicable claims procedure prescribed by charter or pursuant thereto.

The motion carried:

Aye: Babbage, Balthis, Dieden, Gustafson, Matthews, Stanton.

No: None.

Not Present: Bradley, Cobey, Thurman.

[Comment: The revisions were approved for the following reasons: "Chartered" was added at various points to clarify the meaning. The exemption of chartered counties from the new claims statute was eliminated upon a determination that Article XI of the Constitution does not preclude the application of the statute to any claims against such entities, their status not being equivalent to that of chartered cities. "Causes of action founded on contract" was inserted to limit the exemption given to chartered cities to that area as to which there is doubt about the present constitutional power of the Legislature to regulate the filing of claims. Both of the last changes noted were made in the interest of making the new claims statute as broadly applicable as possible upon its enactment.]

(3) Section 703. A motion was made by Mr. Babbage and seconded by Mr. Matthews to add the following to Section 703 as Subsection (k):

> (k) Claims for the recovery of penalties or forfeitures made pursuant to Article 1 of Chapter 1 of Part 7 of Division 2 of the Labor Code (commencing at Section 1720).

The motion carried:

Aye: Babbage, Balthis, Dieden, Gustafson, Matthews, Stanton.

No: None.

Not Present: Bradley, Cobey, Thurman.

[Comment: Subsection (k) was added because the causes of action to which reference is made must be brought within 90 days. In such cases the entity is given adequate notice by the filing of the complaint.]

(4) Section 704. The Commission considered the suggestion made that the claims statute should be given a delayed effective date -- e.g. January 1, 1960, January 1, 1961 or 90 days after the 1961 Session. After the matter was discussed a motion was made by Mr. Gustafson and seconded by Mr. Dieden to authorize Mr. Bradley to amend A.B. 405 to give it a delayed effective date if it appears necessary to secure its passage. The motion carried:

Aye: Babbage, Balthis, Bradley, Dieden, Gustafson, Matthews, Stanton.

No: None.

Not Present: Bradley, Cobey, Thurman.

(5) Section 705. A motion was made by Mr. Babbage and seconded by Mr. Gustafson to substitute the word "inolude" for the words "authorize the inclusion" in the first sentence of Section 701 and to add the following sentence to Section 705:

> The written agreement may incorporate by reference claim provisions set forth in a specifically identified ordinance or resolution theretofore adopted by the governing body.

The motion carried:

Aye: Babbage, Balthis, Dieden, Gustafson, Matthews.

No: Stanton.

Not Present: Bradley, Cobey, Thurman.

[Comment: "Include" is substituted for "authorize the inclusion . . . of" to avoid any possibility that Section 705 would be construed to permit a public entity to adopt an ordinance which would make a local claims filing procedure a part of its contracts as a matter of law even though the procedure was neither set forth in the written agreement nor expressly incorporated by reference therein. The new second sentence is added to clarify the right of the entity expressly to incorporate claims filing provisions by reference in written agreements.]

(6) Section 710. The Commission considered the objection raised by the CAJ to the claims statute insofar as it prohibits suit for 80 days after a claim has been presented. After the matter was discussed it was agreed that no change should be made to Section 710.

(7) Section 711. The Commission first considered whether Section 711 should be revised to include the requirement that the presented claim shall show the mailing address of the claimant as well as the address to which notices are to be sent. After the matter was discussed a motion was made by Mr. Babbage and seconded by Mr. Dieden to revise Section 711 (a) and (b) as follows:

> 711. . . .
> (a) The name and post office address of the claimant;
> (b) The address to which the person presenting the claim desires notices to be sent.

The motion carried:

Aye: Babbage, Balthis, Bradley, Cobey, Dieden, Matthews, Stanton.

No: None.

Pass: Gustafson.

Not Present: Thurman.

The Commission then considered whether the claims statute should have a provision requiring the claim to be verified. After the matter was discussed it was agreed that it was not necessary to require verification. It was also agreed that if the Senate Judiciary Committee believes that the presented claim should be verified the Executive Secretary should suggest that the following language could be substituted in Section 711 for "The claim shall be signed by the claimant or by some person on his behalf.":

> The claim shall be signed by the claimant or by some person on his behalf and shall either be verified or bear substantially the following statement:
>
> I certify (or declare) under penalty of perjury that the foregoing is true and correct. [Form of statement is taken from Section 2015.5 of the Code of Civil Procedure.]

After action was taken adopting amendments to Section 717 to permit the governing body to continue to consider and act upon claims, other than claims for physical injury to the person or death, after the 80 day period, a motion was made by Mr. Gustafson and seconded by Mr. Dieden to delete the phrase "within eighty (80) days" from the last paragraph of Section 711. The motion carried:

Aye: Babbage, Balthis, Bradley, Dieden, Gustafson, Matthews, Stanton.

No: None.

Not Present: Cobey, Thurman.

(8) Section 712. A motion was made by Mr. Stanton and seconded by Mr. Bradley to change the time for the governing body's giving notice of defects or omissions from 60 days to 50 days and change the period of the suspension of its power to act on a claim from 10 days to 20 days as provided in Section 712. The motion carried:

Aye: Babbage, Balthis, Bradley, Dieden, Gustafson, Matthews, Stanton.

No: None.

Not Present: Cobey, Thurman.

[Comment: These changes were made in order to give the claimant sufficient time to amend his claim after notice.]

(9) Section 713. It was agreed that Sections 712 and 713 should be revised to reflect the amendments made to Section 711 (a) and (b) with regard to the addresses the presented claim must include.

(10) Section 714. The Commission first considered whether the definition of the date of accrual should be deleted from Section 714 thus leaving the matter to the courts. After the matter was discussed it was agreed that the definition of the accrual date should be retained in the claims statute.

The Commission then considered the proposed revised draft of Section 714. After the matter was discussed a motion was made by Mr. Babbage and seconded by Mr. Balthis to adopt the proposed revisions of Subsection (1) of Section 714 deleting, however, the word "personally" which follows the word "claim" and the phrase "or to his deputy or assistant if he has one" which precedes the words "auditor thereof." The motion carried:

Aye: Babbage, Balthis, Bradley, Dieden, Gustafson, Matthews, Stanton.

No: None.

Not Present: Cobey, Thurman.

A motion was then made by Mr. Babbage and seconded by Mr. Balthis to adopt the proposed revisions of Subsection (2) of Section 714. The motion carried:

Aye: Babbage, Balthis, Bradley, Dieden, Gustafson, Matthews, Stanton.

No: None.

Not Present: Cobey, Thurman.

Section 714 as revised reads as follows:

> 714. A claim may be presented to a local public entity (1) by delivering the claim to the clerk, secretary or auditor thereof within the period of time prescribed by Section 714.1 or (2) by mailing the claim to such clerk, secretary or auditor or to the governing body at its principal office not later than the last day of such period. A claim shall be deemed to have been presented in compliance with this section even though it is not delivered or mailed as provided herein if it is actually received by the clerk, secretary, auditor or governing body within the time prescribed.

[Comment: "Personally" was eliminated because of apprehension which had been expressed that as originally drafted Section 714 would not permit delivery of a claim to a deputy or assistant of a person designated.

The Provisions relating to time for filing are incorporated in proposed new Section 714.1.

It was agreed that reference to "post marked" would not be satisfactory, both because the envelope bearing the post mark may often not be saved and, because, where it is saved it will be in the possession of the public entity rather than the claimant who has the burden of proving that the claim was mailed within the presentation period.]

The Commission then considered alternative forms Nos. 1 and 2 of a new Section 714.1 which provide for different filing times for tort and contract claims. After the matter was discussed a motion was made by Mr. Gustafson and seconded by Mr. Babbage to adopt Alternative No. 2 which reads as follows:

> 714.1. A claim relating to a cause of action for physical injury to the person or death shall be presented as provided in Section 714 not later than the one hundredth day after the accrual of cause of action. A claim relating to any other cause of action shall be presented as provided in Section 714 not later than one year after the accrual of the cause of action.
>
> For the purpose of computing the time limit prescribed by this section, the date of accrual of a cause of action to which a claim relates is the date upon which the cause of action would be deemed to have accrued within the meaning of the statute of limitations which would be applicable thereto if the claim were being asserted against a defendant other than a local public entity.

The motion carried:

Aye: Babbage, Bradley, Dieden, Gustafson, Matthews, Stanton.

No: Balthis.

Not Present: Cobey, Thurman.

It was agreed that Section 714.1 should be renumbered Section 715 and that the other sections affected thereby should be renumbered.

A motion was then made by Mr. Babbage and seconded to authorize the Executive Secretary to suggest Alternative No. 1 which reads as follows for proposed new Section 714.1 if too much opposition is raised against the new section:

Alternative 1.

714.1. A claim based on contract shall be presented as provided in Section 714 not later than one year after the accrual of the cause of action to which the claim relates. A claim not based on contract shall be presented as provided in Section 714 not later than the one hundredth day after the accrual of the cause of action to which the claim relates.

[Same second paragraph as above]

The motion carried:

Aye: Babbage, Balthis, Bradley, Dieden, Gustafson, Matthews, Stanton.

No: None.

Not Present: Cobey, Thurman.

(11) Section 715. The Commission considered and rejected the suggestion that "during all of such time" in subsections (a) and (b) of Section 715 should be revised to read "during a substantial portion of such time."

(12) Section 716. A motion was made by Mr. Babbage and seconded by Mr. Balthis to add the phrase "rejecting a claim in whole or part" to the second paragraph of Section 716 after the word "section." The motion carried:

Aye: Babbage, Balthis, Bradley, Dieden, Gustafson, Matthews, Stanton.

No: None.

Not Present: Cobey, Thurman.

During the discussion of proposed revisions to Section 717 it was agreed that the first phrase of Section 716 "Within

eighty (80) days after a claim is presented," should be deleted since the 80 day provision is to be incorporated in Section 717.

(13) Section 717. The Commission considered two alternative substitute provisions (similar to Government Code Sections 29714 and 29714.1) for Section 717. After the matter was discussed a motion was made by Mr. Babbage and seconded by Mr. Matthews to adopt the following substitute (Alternative No. 2) with minor revisions:

> 717. If the governing body of the local public entity fails or refuses to act on a claim relating to a cause of action for physical injury to the person or death within eighty (80) days after the claim has been presented the claim shall be deemed to have been rejected on the eightieth day. If the governing body of the local public entity fails or refuses to act on a claim relating to any other cause of action within such period specified in Section 716 the claimant may, at his option, treat the failure or refusal to act as rejection of the claim on the eightieth day.

The motion carried:

Aye: Babbage, Balthis, Bradley, Dieden, Gustafson, Matthews, Stanton.

No: None.

Not Present: Cobey, Thurman.

[Comment: Revision of Section 717 was adopted to meet the objections raised that 80 days is not a sufficient period of time for a public entity to act on complex contract claims and that to require negotiations between a claimant and an entity to be terminated on the eightieth day would be undesirable.]

(14) Section 718. A motion was made by Mr. Dieden and seconded by Mr. Matthews to add the phrase "against such entity" after the word "maintained" in subsection (c) of Section 718. The motion carried:

Aye: Babbage, Balthis, Bradley, Dieden, Gustafson, Matthews, Stanton.

No: None.

Not Present: Cobey, Thurman.

(15) Section 719 and 720. A motion was made by Mr. Bradley and seconded by Mr. Gustafson to delete Section 719 from the claims statute. The motion carried:

Aye: Babbage, Balthis, Bradley, Dieden, Gustafson, Matthews, Stanton.

No: None.

Not Present: Cobey, Thurman.

A motion was then made by Mr. Balthis and seconded by Mr. Matthews to delete Section 720 from the claims statute. The motion carried:

Aye: Babbage, Balthis, Bradley, Dieden, Gustafson, Matthews, Stanton.

No: None.

Not Present: Cobey, Thurman.

It was agreed that the Commission's legislative history of A.B. 405 should show that Sections 719 and 720 were deleted on the theory that it would be better to leave these matters to the courts to avoid the inference that the Commission by deletion of these sections is rejecting the principles they express.

(16) Section 721. The Commission considered whether Section 721 should be retained or whether to provide that the ordinary statutes of limitation should apply for the time of filing suit against a public entity. After the matter was discussed a motion was made by Mr. Babbage and seconded by Mr. Stanton to revise Section 721 to provide that a suit brought against a public entity on a cause of action for death or for physical injury to the person must be commenced within six months after the date of rejection or within one year from the date on which the cause of action would be deemed to have accrued and that a suit brought against a public entity on a cause of action founded on any other cause of action must be commenced within one year after the date of rejection. The motion carried:

Aye: Babbage, Balthis, Bradley, Gustafson, Matthews, Stanton.

No: Dieden.

Not Present: Cobey, Thurman.

[Comment: The change made with respect to the time for filing actions for death and for personal injury to the person arises out of the fact that vigorous objection was made by some public entities to former Section 721 insofar as it would have permitted a public entity to be sued on a personal injury claim more than one year after the cause of action accrued. This would have treated local public entities differently

than other defendants which would have been a particular hardship in cases in which both a public entity and a person other than a public entity were joint tort feasors. The six month provision assures that the public entity can in no event be sued later than one year after the cause of action arises (100 days for filing plus 80 days for consideration, plus six months). On the other hand, to avoid shortening the claimant's time to sue unduly (and thus putting the public entities in a better position than other defendants) in a case in which the claim was promptly filed and rejected provision is made that the plaintiff may, in any event, bring his action within a year of the occurrence of the accident.]

The Commission then considered Memorandum 4-E and the letter to Dr. Norman B. Scharer from Mr. Vern B. Thomas which suggests an amendment to subsection (a) of Section 703. After the matter was discussed it was agreed that Mr. Gustafson should talk to Mr. Thomas and explain that the amendment he proposes is not necessary. It was also agreed that if Mr. Thomas and Senator Hollister are still convinced of the merits of the proposed amendment a separate provision can be added to A.B. 405.

The Commission then agreed to the following: (1) that the Executive Secretary should send copies of the revised claims statute to the members of the Board of Governors of the State Bar stating that the Commission has considered and acted on the various objections and suggestions made to A.B. 405

and is now intending to present the bill as revised, and (2) that the Executive Secretary should attend the scheduled meeting of the Board of Governors to consider the Commission's legislation of the claims statute if he is invited.

III. CURRENT STUDIES

A. Study No. 21 - Confirmation of Partition Sales:

The Commission had before it Memorandum No. 1 (4/9/59); the revised research study prepared by the staff (4/7/59) and Appendix B, an excerpt from the original research study prepared by the staff (6/5/58). (A copy of each of these items is attached hereto.)

The Commission first considered whether in view of the findings of further research it should reconsider its action taken at the December meeting amending Section 775 of the Code of Civil Procedure to provide that confirmation of private partition sales is governed by the applicable provisions of the Code of Civil Procedure. After the matter was discussed a motion was made by Mr. Balthis and seconded by Mr. Babbage that it is the view of the Commission that Section 775 of the Code of Civil Procedure does make Sections 784 and 785 of the Probate Code applicable to private partition sales. The motion carried:

Aye: Babbage, Balthis, Dieden, Matthews, Stanton, Thurman.

No: None.

Pass: Gustafson.

Not Present: Bradley, Cobey.

A motion was then made by Mr. Babbage and seconded by Mr. Balthis that it is the view of the Commission that Sections

760, 761 and 761.5 of the Probate Code (sections relating to commissions of agents or brokers) are made applicable to a private partition sale by Section 775 of the Code of Civil Procedure. The motion carried:

Aye: Babbage, Balthis, Dieden, Matthews, Stanton, Thurman.

No: None.

Pass: Gustafson.

Not Present: Bradley, Cobey.

The Commission then considered how the ambiguity in the existing statutes should be removed. After the matter was discussed a motion was made by Mr. Babbage and seconded by Mr. Dieden to repeal Section 784 and the last sentence of Section 775 of the Code of Civil Procedure and enact sections in the Code of Civil Procedure similar to Probate Code Sections 760, 761, 761.5, 780, 782, 783, 784 and 785 and to direct the staff to draft a legislative bill which would accomplish these objectives and submit it to the Commission for its consideration. The motion carried:

Aye: Babbage, Balthis, Dieden, Gustafson, Matthews, Stanton, Thurman.

No: None.

Not Present: Bradley, Cobey.

Mr. Balthis then stated that some lawyers in Los Angeles are of the view that Section 785 of the Probate Code does not and should not apply to sales at public auctions.

After the matter was discussed it was agreed that the staff should look into and report on this matter insofar as it bears on the form which any legislation recommended by the Commission bearing or confirmation of partition sales should take.

The Commission then discussed and agreed that the proposed draft legislation should be sent to certain designated persons in several counties (Alameda, Los Angeles and San Francisco) for their views of the proposed legislation.

B. Study No. 32 - Arbitration: The Commission had before it the preliminary draft prepared by the Assistant Executive Secretary of the first part of a new research study. The Commission again discussed generally whether it should terminate the services of Mr. Kagel or retain him for consultation purposes. After the matter was discussed it was agreed to defer making the decision on this matter to a later date.

The Commission then considered the preliminary draft of the first part of the research study. After the matter was discussed it was agreed that the preliminary draft is adequate and that the Assistant Executive Secretary should proceed with the remaining portion in the same manner. During the discussion it was suggested that the study include a detailed discussion of labor arbitration and a careful analysis of the application of the present California Statute to labor and employment contracts.

C. Study No. 33 - Survival of Tort Actions: The Commission had before it Memorandum No. 2 (4/9/59); a memorandum (4/7/59) prepared by the Assistant Executive Secretary directed to the question whether the Commission should recommend that all "tort" actions (or "all actions arising out of a wrongful act, neglect or default") or all actions be made to survive; and Appendix (4/9/59) of Proposed Legislation re Survival of Torts.

The Commission first considered the recommendation made by the staff that legislation should be enacted to provide that "all causes or rights of action" survive. During the discussion Mr. Stanton pointed out that if the Commission were to provide (as proposed in the Appendix Alternative No. 1) that all causes or rights of action survive.the Commission is going beyond the literal scope of the study authorized it by the Legislature. After the matter was discussed it was agreed that the Commission should not be deterred in its consideration of thus extending the scope of its recommended legislation if it believes that this is the only form in which adequate legislation can be cast. It was also agreed that if the Commission does propose legislation providing that all causes or rights of action survive, thus going beyond the scope of the study, its official Recommendation should include a statement giving the reasons for this action. A motion was then made by Mr. Dieden and seconded by Mr. Thurman to adopt the principle that all causes or rights of action survive, excepting certain listed actions. The motion carried:

Aye: Babbage, Balthis, Dieden, Gustafson, Matthews, Stanton, Thurman.

No: None.

Not Present: Bradley, Cobey.

The Commission then considered Alternative No. 1 of the Appendix and the proposed revisions to Section 573 of the Probate Code. During the discussion the question was raised whether the language "this section does not apply to any cause or right of action ... the purpose of which is defeated or rendered useless by the death of any person" would except actions for support and maintenance or alimony. After the matter was discussed it was agreed that inasmuch as this provision is from the Connecticut statute the staff should see how this provision has been construed by the Connecticut courts. It was also agreed that if the Connecticut courts do hold that an action for the recovery of support or alimony does not survive under this provision the Commission's official Recommendation should contain a statement to this effect.

A question was then raised with regard to the deleted portion of Section 573 and whether the present law provides that the State presently has a cause of action against an estate for the support of minor children. After the matter was discussed it was agreed that the Staff should look into and report on this question.

A motion was then made by Mr. Babbage and seconded by Mr. Thurman to approve in principle the first paragraph of

amended Section 573 of the Probate Code proposed in Alternative No. 1 of the Appendix. The motion carried:

Aye: Babbage, Balthis, Dieden, Gustafson, Matthews, Stanton, Thurman.

No: None.

Not Present: Bradley, Cobey.

It was agreed that the words "to the extent that" should be added after the words "does not apply."

The Commission then considered whether it should recommend legislation permitting the plaintiff or his estate to recover a penalty or forfeiture against the defendant but not against his estate. After the matter was discussed a motion was made by Mr. Balthis and seconded by Mr. Babbage to except the recovery of damages for penalties from a defendant's estate. The motion carried:

Aye: Babbage, Balthis, Dieden, Gustafson, Matthews, Stanton, Thurman.

No: None.

Not Present: Bradley, Cobey.

The Commission then considered whether damages should be limited to loss of earnings and expenses sustained or incurred as a result of the injury when the injured party dies before judgment or whether there should also be recovery for pain, suffering, etc. in such cases. After the matter was discussed a motion was made by Mr. Thurman and seconded by

Mr. Babbage to allow recovery of damages for pain, suffering, etc. where the person having a cause or right of action dies before judgment. The motion carried:

Aye: Babbage, Balthis, Dieden, Matthews, Thurman.

No: Gustafson, Stanton.

Not Present: Bradley, Cobey.

The Commission then considered the two paragraphs proposed as possible substitutes for the present paragraph in draft Section 573 relating to simultaneous death. After the matter was discussed a motion was made by Mr. Gustafson and seconded by Mr. Matthews to substitute the following paragraph providing for simultaneous death for the one presently in the proposed amended Section 573 of the Probate Code:

> This section is applicable where a loss or damage occurs simultaneously with or after the death of a person who would have been liable therefor if his death had not preceded or occurred simultaneously with the loss or damage.

The motion carried:

Aye: Babbage, Balthis, Gustafson, Matthews, Stanton, Thurman.

No: None.

Not Present: Bradley, Cobey.

The Commission then considered the various other recommendations made in Alternative No. 1 of proposed legislation relating to the survival of tort actions. After the matter was discussed the following action was taken:

(1) A motion was made by Mr. Matthews and seconded by Mr. Babbage to approve the repeal of Section 574 of the Probate Code. The motion carried:

Aye: Babbage, Balthis, Dieden, Gustafson, Matthews, Stanton, Thurman.

No: None.

Not Present: Bradley, Cobey.

(2) A motion was made by Mr. Babbage and seconded by Mr. Dieden to approve the staff-proposed amendments to Section 376 of the Code of Civil Procedure. The motion carried:

Aye: Babbage, Balthis, Dieden, Gustafson, Matthews, Stanton, Thurman.

No: None.

Not Present: Bradley, Cobey.

(3) A motion was made by Mr. Babbage and seconded by Mr. Dieden to approve the staff-proposed amendments to Section 377 of the Code of Civil Procedure. The motion carried:

Aye: Babbage, Balthis, Dieden, Gustafson, Matthews, Stanton, Thurman.

No: None.

Not Present: Bradley, Cobey.

(4) A motion was made by Mr. Babbage and seconded by Mr. Balthis to approve the staff-proposed amendments to Section 707 of the Probate Code substituting "provided for in" for "arising under." The motion carried:

Aye: Babbage, Balthis, Dieden, Gustafson, Matthews, Stanton, Thurman.

No: None.

Not Present: Bradley, Cobey.

The Commission then agreed that no revision to Section 11580 of the Insurance Code is necessary.

The Commission then considered where the survival statute should be placed. Mr. Stanton stated that the logical place for the survival statute would be in the Civil Code or Code of Civil Procedure rather than in the Probate Code as recommended by the staff. After the matter was discussed it was agreed that further consideration of the location for the Commission's proposed legislation should be deferred until Mr. Kleps is present.

D. Study No. 38 - Inter Vivos Rights - "201.5 Property":

The Commission considered a copy of the relevant portion of the minutes of the May 1958 meeting and the research study prepared by Professor Harold Marsh, Jr. (A copy of each of these items is attached hereto.) After the matter was discussed it was agreed to reconsider whether 201.5 property should be treated similarly to community property with respect to the following matters:

(1) Management and control. A motion was made by Mr. Balthis and seconded by Mr. Babbage not to treat 201.5 property like community property insofar as the general right of management and control is concerned. The motion carried:

Aye: Babbage, Balthis, Dieden, Gustafson, Matthews, Stanton, Thurman.

No: None.

Not Present: Bradley, Cobey.

(2) Rights of creditors. A motion was made by Mr. Gustafson and seconded by Mr. Balthis not to treat 201.5 property like community property insofar as the rights of creditors is concerned. The motion carried:

Aye: Babbage, Balthis, Dieden, Gustafson, Matthews, Stanton, Thurman.

No: None.

Not Present: Bradley, Cobey.

(3) Inter vivos gratuitous transfers of personal property. A motion was made by Mr. Gustafson and seconded by Mr. Dieden to treat

201.5 property like community property insofar as gratuitous transfers of personal property are concerned. The motion carried:

Aye: Dieden, Gustafson, Matthews, Stanton, Thurman.

No: Babbage, Balthis.

Not Present: Bradley, Cobey.

(4) Inter vivos gratuitous transfers of real property. A motion was made by Mr. Gustafson and seconded by Mr. Dieden to treat 201.5 property like community property insofar as gratuitous transfers of real property are concerned. The motion carried:

Aye: Dieden, Gustafson, Matthews, Stanton, Thurman.

No: Babbage, Balthis.

Not Present: Bradley, Cobey.

(5) Inter vivos transfers for value of personal property. A motion was made by Mr. Stanton and seconded by Mr. Gustafson to treat 201.5 property like community property insofar as transfers for value of personal property are concerned. The motion carried:

Aye: Balthis, Dieden, Gustafson, Stanton, Thurman.

No: Babbage.

Not Present: Bradley, Cobey, Matthews.

(6) Inter vivos transfers for value of real property: A motion was made by Mr. Thurman and seconded by Mr. Dieden to treat 201.5 property like community property insofar as transfers for value of real property are concerned. The motion carried:

Aye: Balthis, Dieden, Gustafson, Stanton, Thurman.

No: Babbage.

Not Present: Bradley, Cobey, Matthews.

(7) Division on divorce. A motion was made by Mr. Thurman and seconded by Mr. Stanton to treat 201.5 property like community property for purposes of division on divorce. The motion carried:

Aye: Dieden, Gustafson, Matthews, Stanton, Thurman.

No: Babbage, Balthis.

Not Present: Bradley, Cobey.

(8) Gift tax. A motion was made by Mr. Thurman and seconded by Mr. Dieden to treat 201.5 property like community property for purposes of gift tax. The motion carried:

Aye: Babbage, Dieden, Gustafson, Matthews, Stanton, Thurman.

No: None.

Pass: Balthis.

Not Present: Bradley, Cobey.

It was agreed that the staff should draft legislation to effectuate the above action taken and submit the drafted provisions for its consideration.

It was also agreed to reaffirm the Commission's decision of May, 1958 that 201.5 property should be treated like community property for purposes of declaration of a homestead.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

ROY A. GUSTAFSON
DISTRICT ATTORNEY

BRUCE A. THOMPSON
ASSISTANT DISTRICT ATTORNEY

APR 15 1959

DISTRICT ATTORNEY
VENTURA COUNTY
COURTHOUSE
VENTURA, CALIFORNIA
MILLER 3-6131

CHIEF CIVIL DEPUTY
JULIEN G. HATHAWAY
CHIEF CRIMINAL DEPUTY
WOODRUFF J. DEEM
DEPUTIES
JAMES C. BASILE
ELWOOD R. WALLS
STANLEY E. COHEN
MAURICE L. MUEHLE
ROBERT J. SOARES

April 13, 1959

Miss Louisa R. Lindow
California Law Revision Commission
School of Law
Stanford, California

Dear Louisa:

In response to your letter of April 7, 1959, I am enclosing my proposed revision of the February minutes. The enclosure is in substitution for the part beginning with "During the . . ." on page 20 and ending with "agencies." on line two of page 21.

Very truly yours,

ROY A. GUSTAFSON

RAG/arb
Enclosure

During further discussion of the opening paragraph of Rule 25 Mr. Gustafson took the position that "public official . . . or any governmental agency" should be deleted from Rule 25 inasmuch as the Uniform Rules of Evidence are, by definition, concerned only with matters of evidence in proceedings conducted by courts and do not apply to hearings or interrogations by public officials or agencies. As an example, he cited the case of a person accused of a crime by a police officer. The Uniform Rules of Evidence should not be concerned with what the police officer may ask the person nor with what rights, duties or privileges the questioned person has at the police station.

Furthermore, Mr. Gustafson argued that even if it were decided to extend the rules beyond the situation referred to in Rule 2 ("every proceeding, both criminal and civil, conducted by or under the supervision of a court"), it would be illogical to speak of a privilege to refuse to disclose when there is no duty to disclose in the first place. He believes that an evidentiary privilege exists only when the person questioned would, but for the exercise of the privilege, be under a duty to speak. Thus, he said, the person who refuses to answer a question or accusation by a police officer is not exercising an evidentiary "privilege" because the person is under no legal duty to talk to the police officer.

Whether an accusation and the accused's response thereto are admissible in evidence is a separate problem with which Rule 25 does not purport to deal. Under the present law, silence in

the face of an accusation in the police station can be shown as an implied admission. On the other hand, express or implied reliance on the constitutional provision as the reason for failure to deny an accusation has recently been held to preclude the prosecutor from proving the accusation and the conduct in response thereto (People v. Clemmons [1957], 153 Cal. App. 2d 64; People v. Abbott [1956], 47 Cal. 2d 362; People v. McGee [1947], 31 Cal. 2d 229; People v. Simmons [1946], 28 Cal. 2d 699) although other cases taking the opposite view have not been overruled. (People v. Peterson [1946], 29 Cal. 2d 69; People v. Jones [1943], 61 Cal. App. 2d 608; People v. Wilson [1923], 61 Cal. App. 611; People v. Graney [1920], 48 Cal. App. 773.) The present law is thus unclear on this point and it is conceivable that the Supreme Court will ultimately decide to go back to the rule that the failure of a person to expressly deny an accusatory statement is some evidence of its truth regardless of the reasons given by the person for refusing to answer or deny the accusation.

But, argues Mr. Gustafson, if given conduct of an accused in response to an accusation is evidence which the courts feel must be excluded because of the constitution, there is no need to attempt to define these situations in an exclusionary rule in the Uniform Rules of Evidence. A comparable situation would be where the judge orders a specimen of bodily fluid taken from a party. The rules permit this. But the draftsmen point out that "a given rule would be inoperative in a given situation where there would occur from its application an invasion of constitutional

rights . . . . [Thus] if the taking is in such manner as to violate the subject's constitutional right to be secure in his person the question is then one of constitutional law on that ground."

Status Report on

1959 Bills

as of April 10, 1959

Bill No.	Status
ACA 16	In Assembly with "Be Adopted" recommendation by Committee (I have suggested be held on third reading until we see whether claims bills will move).
A.B. 400 Taking of Vehicles	Failed to get out of Committee on March 30.
A.B. 401 Guardian Procedure	Passed Assembly; scheduled for hearing Senate Judiciary Committee April 30.
A.B. 402 Drunk Driving	Passed Assembly; scheduled for hearing Senate Judiciary Committee April 30.
A.B. 403 Sale Corporate Assets	Passed Assembly; scheduled for hearing Senate Judiciary Committee April 30.
A.B. 404 Grand Jury	Passed Assembly; scheduled for hearing Senate Judiciary Committee April 30.
A.B. 405-410 Claims	Referred to subcommittee of Assembly Judiciary Committee at request of Mr. Bradley on April 8.
S.B. 160 Nonresident Aliens	Scheduled for hearing by Senate Judiciary Committee April 30.
S.B. 163 New Trial Orders	Passed Senate; scheduled for hearing by Assembly Judiciary Committee on April 29.
S.B. 164 Time of New Trial Motion	Given Do Pass recommendation by Senate Judiciary Committee April 9; scheduled for hearing by Assembly Judiciary Committee April 29.
S.B. 165 Suspension Alienation	Given Do Pass recommendation by Senate Judiciary Committee April 9; scheduled for hearing by Assembly Judiciary Committee April 29.

Bill No.	Status
S.B. 166 Doctrine Worthier Title	Sent to Governor April 7.
S.B. 167 Mortgages Future Advances	Passed Senate; scheduled for hearing by Assembly Judiciary Committee on April 29.

EDWARD MOSK

254 Yucca-Vine Building
6305 Yucca Street, Hollywood 28,
California

April 13, 1959

Mr. John R. McDonough, Jr.
Executive Secretary
California Law Revision Commission
School of Law
Stanford University
Palo Alto, California

Dear Mr. McDonough:

I am sending you this letter expressing some thoughts on the proposal of the California Law Revision Commission relating to the right of non-resident aliens to inherit, with particular reference to the proposed legislation introduced as Senate Bill 160. This letter is submitted in accordance with our conversations in Sacramento on April 9th while awaiting the hearing of the Senate Judiciary Committee.

I should say to you first that I appeared in Sacramento on behalf of the American Civil Liberties Union of Los Angeles and at the request of the Executive Board of that organization. I was asked to make this appearance by reason of the fact that I have had some experience over the past couple of years in matters relating to the application of Section 259 of the Probate Code and therefore could speak on the subject on the basis of personal court experiences, as well as experiences directly with clients in connection with these legal matters. The statement of principle, which I shall discuss in this memorandum, is therefore one expressed on behalf of the American Civil Liberties Union; the factual materials which I am presenting are based upon information which I have secured in connection with specific legal proceedings.

I should state first that the basic underlying objective of the legislation proposed in Senate Bill 160 is something with which there can be no quarrel--that is, everyone will agree that it would be most unfortunate if any heir under California probate proceedings did not in fact have the use and benefit of the properties received by him from a California estate.

Having stated this general principle however, I must indicate that the proposed legislation would appear to be: (1) Unnecessary; (2) As presently written, a denial of due process of law and equal protection of the law; (3) Unfair and discriminatory in its application; and (4) Unworkable as a practical legal matter in the probate courts of this State.

To examine these propositions, in the light of the act and personal experiences in connection with these matters, let me state the following:

While the recommendation of the California Law Revision Commission as set forth in the 32 page pamphlet discusses in great detail the theory of the law of reciprocity and some very sound objections to that theory, it then proceeds to set up an alternative program without indicating any facts establishing a need for the new legislation at this time. The only basis for such legislation appears to be found in Footnote 70 on Page 29 of the Report. The most recent of the cases cited there would appear to be 1954 and many of the cases go back to World War II. There is no indication as to the factual basis upon which those court decisions rested. There is one California Appellate Court decision, which uses similar language but the record of this case indicates that no evidence was submitted to support the dicta of the trial court thereafter adopted by the appellate court.

On the other hand, the writer of this memorandum has spoken with more than five attorneys in Southern California who have handled estates on behalf of persons living in countries covered by the Treasury Department regulations and each has had the experience of transmitting the assets of the California estate to the proper heir and being satisfied that the heir received the full use and benefit of the funds and in most cases without any taxation by the heir's Government. It would therefore appear that this complex legislation affecting the rights of American citizens to leave their property to whom they wish has no sound basis and is not calculated to fill any existing need.

Certainly we should not interfere with the basic principles of our probate law without satisfactory and overwhelming indication of a need for the legislation.

The statute as proposed sets up a disputable presumption that "A person would not have the substantial benefit or use or control of money or other property due him under an estate or testamentary trust if he resides in a country which is designated by the Secretary of Treasury of the United States....".

This presumption establishes a new and dangerous precedent in California law. It limits the right of a California citizen to dispose of his estate as he sees fit by the exigencies of the foreign policy of the United States. It also places the control of whether or not a California citizen may leave a portion or all of his estate to a father, mother, brother, sister, son, daughter or otherwise in foreign areas without any possible means of a hearing or challenge to the Treasury Department regulation. We shall show in a moment the difficulties in rebutting the presumption, but in this section shall simply discuss the problems inherent in establishing the disputable presumption in the first place.

While Federal legislation establishes a basis upon which the Treasury Department shall from time to time invoke regulations relating to the transfer of warrants drawn against funds of the United States or any agency or instrumentality of the United States to certain foreign countries--the provisions of U.S.C.A., Title 31, Section 123, provide no basis whatsoever for a challenge of those regulations by a person injured thereby. To write this kind of a regulation into a California statute becomes a denial of due process of law and the equal protection of the laws to both the testator leaving his property by Will and the

heirs who would otherwise take but for this Treasury Department regulation.

The problem is accentuated by the fact that the Treasury Department regulation refers solely to Government warrants and funds of the United States and it does not purport to determine the question of whether an heir would "actually receive such" inheritance and "be able to negotiate the same for full value". The standard referred to in the Federal statute maybe in many cases entirely different than the standard relating to inheritance.

In this connection, I attach herewith as Exhibit A, a copy of a letter over the signature of Edward L. Killham, American Vice Consul in Moscow, dated February 13, 1958, addressed to Ostroff, Anderson & Lawler, attorneys at law of Philadelphia, indicating even in the guarded diplomatic language that Soviet beneficiaries of American estates do in fact receive their inheritance at the non-official rate of 10 Rubles to the American dollar. In this connection it should be pointed out that the official exchange rate is 4 Rubles to the American dollar. Thus, not only do the beneficiaries in Russia receive the full use and benefit of their inheritance but they in fact receive 2 1/2 times the official value of the inheritance.

In this connection also, I attach herewith as Exhibit B, a copy of an order of the probate court of the Commonwealth of Massachusetts did July 31, 1958 and a copy of the report of Professor Harold J. Berman

of the law school of Harvard University made to the Court, dated October 15, 1958, in which he carried out the instructions of the Probate Court of Massachusetts. This memorandum establishes that Professor Berman was able without difficulty to transmit the sums inherited by a Russian citizen from a decedent in the State of Massachusetts.

I attach herewith as Exhibits C and D, copies of the transcript of interviews between Martin Popper, attorney at law of the State of New York, with one Abram Osipovich Salman, one of the persons who received distribution from the estate of Rosenbaum, based upon a decision in the Superior Court of Los Angeles County in Case No. 650 174. This Exhibit indicates that Popper interviewed the heir some period after receipt of the monies from the American estate and indicates that the heir did receive the full use and benefit of the monies from the California estate at the rate of 10 Rubles per American dollar and could use the monies for whatever purpose he wished. Exhibit D is a further interview by Popper with one Dora Oskarovna Einhorn, the recipient of monies from an estate in the State of New York and the same conclusions are reached in this connection. Both of these interviews were conducted in the presence of the Honorable Lewis W. Bowden, U.S. Consul in Moscow on February 16, 1959.

In addition, attached hereto, as Exhibit E is a copy of a letter received by Mr. Joseph Turchinsky, the executor in the aforementioned estate of Rosenbaum, directly from Anna Salman-Karneeb, one of the other heirs who received monies from the estate. This letter was dated March 3, 1958, prior to distribution and again indicates the intention and belief of the recipients that they would have the full use and benefit of the monies received from the estate.

The undersigned has also had personal experiences in connection with other estates which establishes clearly the fact that the heirs do in fact receive the estates. In two estates with which the undersigned is familiar, Will contests arose in which two contending sets of alien heirs competed for distribution of the estate. In one case, one group of heirs in Hungary were represented by one attorney, who made a settlement with the other contesting heirs in the United States. One heir in Roumania and one heir in Hungary refused to accept the settlement and contested the matter down to a final decision by the Court. At no time did the groups of heirs get together and agree upon a settlement. It would appear obvious from this experience that each of the groups of heirs acted in their own self-interest with full conviction that they would have the use and benefit of the results of their activities in connection with the litigation. For further information regarding this

situation, reference is made to the files of the Superior Court in Los Angeles action in the Estate of Molnar, No. 381 082.

It is therfore factually clear that in each and every case the heir in countries which are on the Treasury Department's list does in fact receive the money from the California estate-contrary to the presumption raised in the proposed legislation.

We then come to the problem of proof, which would be raised by writing this presumption into the California law.

How, as a matter of fact, would an heir meet the burden of proof created by the presumption in the present statute? What factual evidence could be brought forward to satisfy any probate court that the persons would in fact receive the use and benefit of the money? Would a personal letter from the person be sufficient and satisfactory? Obviously not. Such a communication in a contested action would probably be inadmissable and even if admitted would carry little weight along side of the Treasury Department regulation. What further proof could be offered? Would a statement from the consul in Washington be sufficient? Would such a statement be admissable? Would proof of the receipt of monies by other persons be admissable at all and if so for how much probative value? It could certainly be logically argued that the mere fact that one person has received the money would be no proof that another would.

It would therefore appear that the writing of the Treasury Department regulation into the law would in fact provide a nonrebuttable presumption and would in fact work as a prohibition against the receipt of monies by any alien heir in a country where the Treasury Department has placed that country on its list. This would be again a denial of due process and discriminatory. While the statute talks in terms of a rebuttable presumption, it is submitted that as presently constituted the act would become a strict prohibition without any possibility of the individual overcoming the effect of the presumption in a contested case.

It is also submitted that even if the presumption is removed from the act, many of the evils remain. While it would appear that if the presumption is removed then the burden of proof of showing that the heir would not have the full use and benefit of the monies would be on the party contending that such use and benefit would not be available--nevertheless, in practical effect, the contesting party could and would undoubtedly introduce the Treasury Department regulation and again the heir would be faced with the problem of bringing in competent evidence to overcome the effect of the regulation. While this might be possible in a very large estate where the amount of money in the estate would justify the expenditure of monies--what possibility would there be for an heir who is to receive

$700.00 or $1,000.00 or even $2,000.00 to go to the expense and secure legal counsel to present adequate and sufficient evidence to establish that he would have the use and benefit of the monies.

Under these circumstances it is submitted that the act would present undue hardships on persons who have real need for and would have the benefit of the monies from these estates.

It is therefore submitted that while the objective of the act is meritorious, the need for it does not seem to be present and the act in its present form is so unfair, discriminatory and unworkable as to suggest that its passage at the present time would be improper.

I have made this memorandum as short as I could under the circumstances. I realize that I have omitted many matters which may be of importance. I have made no effort to discuss my feelings about the present reciprocity statute. If either you or the Commission have any questions regarding the opinions expressed in this memorandum, I would be glad to amplify at a later date. It would certainly appear to be a serious mistake to press for the passage of the present legislation at this time.

Very truly yours,

EDWARD MOSK

EM:pmr
Enclosures

P. S. I am enclosing the only copy I have of Exhibits C and D. Kindly return them to me at your earliest convenience.

E. M.

25

General Counsel
Treasury Department
Washington 25

May 16, 1957

Dear Professor Horowitz:

This is in reply to your letter of May 6, 1957, requesting certain information concerning the operation of 31 U.S.C. 123.

In determining whether checks drawn against funds of the United States should be withheld from delivery to foreign countries, the Secretary of the Treasury is required by the statute to consider whether postal, transportation, or banking facilities in general, or local conditions in the country, are such that there is not a reasonable assurance that (1) the payee will receive the check and (2) if the check is received the payee will be able to negotiate the check for full value.

The Secretary of the Treasury takes into consideration all information available to him bearing on the statutory factors, including information received through the Department of State. Consideration is given to all pertinent factors, including possible physical confiscation of the check, the rate of exchange at which the check may be negotiated, and the taxes applicable to such negotiation.

Very truly yours,

S/John K. Carlock

Acting General Counsel

Professor Harold Horowitz
University of Southern California
School of Law
University Park
Los Angeles 7, California

4/15/59

Principal Points Raised by Committee on

Administration of Justice

1. Section 701 - exemption of chartered counties and cities until adoption of constitutional amendment while has claims procedure prescribed by charter or pursuant thereto.
2. Section 703 - exemption of listed claims from coverage of statute.
3. Section 710 - questions extension of statute to claims based on contract (principal concern apparently whether sufficient time for filing provided).
4. Section 710 - provision that suit may not be filed until claim rejected (either actually or by operation of law)
5. Section 711 (and other sections)
   requirement that "residence or business address" be given in claim
6. Section 712 - inadequacy of 10 day stay of action on claim; contend should be 30 days or at least 20.
7. Section 714 - concern about "delivering the claim personally"
8. Section 714 - concern about adequacy of time to file in respect of contracts (Southern Section suggests 180 days)
9. Section 714 - concern about second paragraph defining "accrued"
10. Section 715 - concern about "all of" in subdivisions (a), (b) and (c); would prefer "during a substantial portion of such time"
11. Sections 716 and 717 - query whether amendment to Section 712, if

made, will require give more time to act

12. Section 718(c) - Southern Section suggests add "against such entity" after "maintained"

13. Section 721 - concerned about shortness of time to file suit

14. Section 730 - concern about delegation of power to local entities to enact claims filing provisions re categories listed in Section 703; particular concern re "expressly"

15. General - suggestion of delayed effective date

E. Study No. 38 - Inter Vivos Rights - "201.5 Property": The Commission considered Memorandum No. 1 (a copy of which is attached to these minutes), and the research study prepared by Professor Harold Marsh, Jr. After the matter was discussed Mr. Stanton expressed an opinion that in some aspects 201.5 property should have the same incidents as community property.

It was agreed to consider whether 201.5 property should be treated similarly to community property with respect to the following matters:

(a) Management and control: No member moved to treat 201.5 property like community property for this purpose.

(b) Rights of creditors: No member moved to treat 201.5 property like community property for this purpose.

(c) Inter vivos transfers of personal property - gratuitous or for value: A motion to treat 201.5 property like community property did not carry:

Aye: Bradley, Gustafson, Matthews, Stanton.
Pass: Thurman.
No: None.
Not Present: Babbage, Cobey, Levit, Shaw.

(d) Inter vivos transfers of real property - gratuitous or for value: A motion to treat 201.5 property like community property did not carry:

Aye: Gustafson, Matthews, Stanton, Thurman.
Pass: Bradley.
No: None.
Not Present: Babbage, Cobey, Levit, Shaw.

(e) Declaration of homestead: A motion to treat 201.5 property like community property carried:

Aye: Bradley, Gustafson, Matthews, Stanton, Thurman.
No: None.
Not Present: Babbage, Cobey, Levit, Shaw.

(f) Division on divorce: A motion to treat 201.5 property like community property did not carry:

Aye: Bradley, Matthews, Stanton, Thurman.
No: Gustafson.
Not Present: Babbage, Cobey, Levit, Shaw.

A motion was made by Mr. Gustafson and seconded to treat "201.5 property" like community property in divorce cases only as to the losing party. The motion did not carry:

Aye: Gustafson
No: Bradley, Matthews, Stanton, Thurman.
Not Present: Babbage, Cobey, Levit, Shaw.

(g) Gift tax: A motion to treat 201.5 property like community property did not carry:

Aye: Bradley, Gustafson, Matthews, Stanton.
Pass: Thurman.
No: None.
Not Present: Babbage, Cobey, Levit, Shaw.

A motion was made and seconded to repeal that portion of Section 164 of the Civil Code which purports to transform "201.5 property" into community property. The motion carried:

Aye: Bradley, Gustafson, Matthews, Stanton, Thurman.
No: None
Not Present: Babbage, Cobey, Levit, Shaw.

It was agreed that the research consultant should be requested to include in the study a consideration of the rights of spouses with respect to inter vivos transfers of 201.5 property in the states in which it is acquired -- i. e., before they come to California.