September 10, 1968

Time	Place
September 19 - 7:00 p.m. - 10:00 p.m.	Hilton Inn - Parlor D
September 20 - 9:00 a.m. - 5:00 p.m.	International Airport
September 21 - 9:00 a.m. - 4:00 p.m.	San Francisco, California

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

San Francisco — September 19, 20, 21, 1968

SEPTEMBER 19

1. Approval of Minutes of July 18-20 (sent 8/30/68)

2. Administrative Matters

Meeting Arrangements

Memorandum 68-91 (enclosed)

Future Meetings

October 18 and 19	Los Angeles
November 21 (evening), 22, and 23 (morning)	Berkeley Big Game
December 20 and 21	Los Angeles

Yale
Special order of business at 7:30 p.m.

3. Study 50 - Leases

Memorandum 68-74 (sent 8/6/68)
First Supplement to Memorandum 68-74 (to be sent)

4. Study 55 - Additur and Remittitur

Wolford

Memorandum 68-75 (sent 8/6/68)
First Supplement to Memorandum 68-75 (to be sent)

5. Study 63 - Evidence Code

Ball

Psychotherapist-Patient Privilege Revision

Memorandum 68-76 (sent 8/6/68)
First Supplement to Memorandum 68-76 (to be sent)

SEPTEMBER 20

Stanton
Special order of business at 9:00 a.m.

6. Study 69 - Powers of Appointment

Memorandum 68-77 (sent 8/6/68)
First Supplement to Memorandum 68-77 (to be sent)

Yale

7. Study 45 - Mutuality of Remedies in Suit for Specific Performance

Memorandum 68-78 (sent 8/6/68)
First Supplement to Memorandum 68-78 (to be sent)

Wolford
Special order of business at 1:30 p.m.

8. Study 44 - Fictitious Business Name Statute

Memorandum 68-79 (to be sent)
Tentative Recommendation (attached to Memorandum)

Stanton

9. Future Activities and Annual Report for 1968

Program Budget - Five-Year Schedule of Projects

Memorandum 68-80 (enclosed

Future Activities

Memorandum 68-81 (to be sent)
Memorandum 68-82 (enclosed)
Memorandum 68-83 (enclosed)
Memorandum 68-84 (enclosed)
Memorandum 68-92 (enclosed)

Annual Report

Mrmorandum 68-90 (enclosed)

SEPTEMBER 21
Arnebergh
Special Order of
Business at 9:00 a.m.

10. Study 52 - Sovereign Immunity
Statute of Limitations

Memorandum 68-86 (to be sent)
First Supplement to Memorandum 68-86
(to be sent)

Arnebergh
Special Order of
Business at 10:00 a.m.

The Collateral Source Rule

Memorandum 68-85 (to be sent)

Uhler

Prisoners and Mental Patients

Memorandum 68-88 (to be sent)
Tentative Recommendation (attached to
Memorandum)

Uhler

11. Study 36 - Condemnation Law and Procedure

The Right to Enter and Survey

Memorandum 68-87 (to be sent)
Tentative Recommendation (attached to
Memorandum)

Uhler

Condemnation of "Byroads"

Memorandum 68-89 (to be sent)
Tentative Recommendation (attached to
Memorandum)

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

SEPTEMBER 19, 20, AND 21, 1968

San Francisco International Airport

A meeting of the California Law Revision Commission was held at the San Francisco International Airport on September 19, 20, and 21, 1968.

Present: Sho Sato, Chairman
Joseph A. Ball, Vice Chairman (September 19)
Thomas E. Stanton, Jr.
Lewis K. Uhler
Richard H. Wolford
William A. Yale

Absent: Alfred H. Song, Member of the Senate
F. James Bear, Member of the Assembly
Roger Arnebergh
George H. Murphy, ex officio

Messrs. John H. DeMoully, Executive Secretary, Clarence B. Taylor, Assistant Executive Secretary, Jack I. Horton, Junior Counsel, and John L. Cook, Student Legal Assistant, of the Commission's staff also were present.

Also present were the following observers:

Study 44 - Fictitious Business Name Statute

Michael B. Dorais, California Newspaper Publishers Assn. (Sept. 19)
Wilfred J. Kumli, McCord's Daily Notification Sheet (Sept. 19)
Ralph R. Patterson, Dun & Bradstreet, Inc. (Sept. 19)
Fred Weybret, California Newspaper Publishers Assn. (Sept. 19)

Study 50 - Leases

Ronald P. Denitz, Tishman Realty & Construction Co. (Sept. 18, 19)
Marvin L. Ferenstein, United States Leasing Corp. (Sept. 18)
Eugene Golden, Buckeye Realty Management Corp. (Sept. 18, 19)
John H. Wallace, United States Leasing Corp. (Sept. 18)

Minutes
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Study 52 - Sovereign Immunity

Robert Carlson, State Dept. of Public Works (~~September 20~~) (Sept. 20)
Don Clark, Office of San Diego County Counsel (~~October 20~~) "
Norval Fairman, State Dept. of Public Works (~~October 20~~) "
Jim Merkle, State Dept. of Water Resources (~~October 20~~) "
George P. Rading, Butte County County Counsel (~~October 20~~) "
Willard Shank, Office of Attorney General (~~October 20~~) "
Terry C. Smith, Los Angeles County Counsel (~~October 20~~) "

Study 69 - Powers of Appointment

William I. Groth, California Bankers Association (~~October 19~~) (Sept 19)
Philip P. Martin, Jr., California Bankers Association (~~October 19~~) "

ADMINISTRATIVE MATTERS

Minutes of July Meeting. The Minutes of the meeting held on July 18, 19, and 20, 1968, were approved as presented.

Future Meetings. Future meetings were scheduled as follows:

October 17 (evening), 18, and 19	Los Angeles
November 21 (evening), 22, and 23 (morning)	Berkeley (Big Game)
December 20 and 21	Los Angeles

Meeting Arrangements. The Commission briefly discussed Memorandum 68-91. The Commission expressed a strong preference for meeting at the State Bar facilities whenever possible. Meetings are not to be held at the San Francisco or Los Angeles airports. Meeting facilities in Los Angeles or San Francisco should provide adequate room at a table to seat the members of the Commission and staff and a sufficient number of chairs (not located around the table) to seat approximately 10 observers. It was felt that the inadequate facilities for the meeting at the San Francisco Airport resulted in a poor atmosphere for the meeting.

General agreement was expressed with the past practice of rescheduling meetings when necessary to obtain better attendance or for other good reasons. Meetings should never be cancelled without first attempting to change the place or time of the meeting when necessary to obtain a satisfactory meeting facility or good attendance at the meeting.

Minutes
September 19, 20, and 21, 1968

STUDY 44 - FICTITIOUS BUSINESS NAMES

The Commission considered Memorandum 68-79 and the preliminary staff draft of the recommendation relating to fictitious business names. No action was taken but the problem of whether the requirement of publication of fictitious business name statements should be continued in the revision of the law in this area and, if so, what improvements in the procedure could be realized was examined at some length. In making this examination the Commission received the assistance of the persons listed on page 1 of the Minutes, each of whom advocated retention of publication generally, subject to some modification to better accomplish the purposes they feel it serves. The reasons advanced in support of publication were: (1) The requirement of publication discourages some persons from doing business under a fictitious name who desire to avoid publicity, perhaps because of a conflict in interest or unsavory reputation; (2) publication, particularly in some areas of the state where an entire locality is served by a single newspaper, provides notice to the general public as to whom they are doing business with; (3) publication furnishes a source of information for certain financial institutions and credit associations concerning persons starting and doing business under a fictitious name; (4) publication may alert established businesses to the creation of new businesses competing under an identical or similar name; early notice may permit the persons to resolve the conflict amicably and relatively inexpensively at the earliest possible point.

The existing form of publication was criticized both for containing unnecessary verbiage(e.g., acknowledgement of notary) and for sometimes omitting some essential or helpful information (e.g., owners' residence addresses). The desire to have "locality" publishing, i.e., publication in a newspaper serving the same segment of the general public to be served by the business, was expressed. The possibilities of authorizing publication in a single newspaper in each county and of requiring all publications on a certain day of the week were also discussed, but the persons advising the Commission expressed the view that neither would be desirable.

STUDY 45 - MUTUALITY OF REMEDIES

The Commission considered Memorandum 68-78 and the attached Tentative Recommendation Relating to Mutuality of Remedies.

The Executive Secretary reported that the recommendation had been distributed for comment and all comments received had been favorable.

The Commission revised Section 3386 as follows and approved the recommendation for printing:

> Specific performance may be compelled, whether or not the agreed counterperformance is or would have been specifically enforceable, if:
>
> (1) Specific performance would otherwise be an appropriate remedy; and
>
> (2) The agreed counterperformance has been substantially performed or its concurrent or future performance is assured or can be secured to the satisfaction of the court.

STUDY 50 - LEASES

The Commission considered Memorandum 68-74, the attached Tentative Recommendation, and the First Supplement to Memorandum 68-74, which reviews the comments received after distribution of this recommendation. Each of the comments was considered separately and the following actions were taken by the Commission.

Section 1951

This section was approved as drafted. The suggestion that examples of "charges equivalent to rent" be included in the statute was rejected. It was believed that such examples could not hope to be all inclusive and that inclusion of some but not others could result in the restriction of the broad language existing.

The addition of a definition of "reasonable expenses of reletting" was rejected as being unnecessary. It was felt that Section 1951.2 and the Comment thereto adequately covered the issue of what damages the lessor is entitled to, and the term itself was deleted from Section 1951.2, the only place where it previously appeared.

Section 1951.2

The following drafting changes were made in Section 1951.2: (1) In subdivision (a) two sentences were created by placing a period after "the lease terminates," striking "and," and inserting at that point the phrase "Upon such termination." (2) In paragraph (2) of subdivision (a), the word "judgment" was changed to "award." (3) The last sentence of subdivision (b) was amended to read:

> If the lessor relets the property after the lease terminates under this section, he is not accountable to the lessee for any rent received or to be received from the reletting except to the extent provided in subdivision (a).

These changes involved no significant change in policy but simply clarified the intent of the statute and eliminated in paragraph (3) a possible interpretation that would provide a double deduction of expenses for reletting.

The staff was further directed to draft appropriate language fixing a statutory discount rate incorporating the Federal Reserve Bank discount rate plus one percent. The rate so fixed is to be given presumptive effect in determining the proper discount as a presumption affecting the burden of producing evidence.

The issue whether the measure of damages should be the worth of the unpaid rent as of the time of termination or as of the time of award was considered again. The Commission reaffirmed its earlier decision that the time of judgment or award is the proper point to start discounting the lessor's damages because this is the point at which he will actually receive his award. Up to this point, the lessor should receive not only the full difference between the unpaid rent and the rent the lessee proves could have reasonably been obtained from another, but to this amount should be added interest to reflect the fact that the rent was unpaid for a period.

The different, although related, issue concerning the proper discount rate to be used was answered as indicated above by setting the rate at one percent higher than the Federal Reserve Bank discount rate, subject to either party's showing that the proper rate in the circumstances should be otherwise. This solution, it was felt, provided a full measure of flexibility yet established a bench mark

for the court and parties to use if they so desired. Allowing the parties to predetermine the rate in the lease was rejected as being subject to abuse where a disparity in bargaining power existed.

With respect to mitigation of damages under Section 1951.2, the Commission reaffirmed their decision that the general principles of damages should apply to leases. To demonstrate such applicability the following language was placed in the Comment to Section 1951.2 following the first full paragraph on page 17 of the tentative recommendation:

> The general principles that govern mitigation of damages apply in determining what constitutes a "rental loss that the lessee proves . . . could be reasonably avoided." These principles were recently summarized in Green v. Smith, 261 A.C.A. 423, 427-428 (1968):
>
> > The plaintiff cannot be compensated for damages which he could have avoided by reasonable effort or expenditures. . . . The frequent statement of the principle in the terms of a "duty" imposed on the injured party has been criticized on the theory that a breach of the "duty" does not give rise to a correlative right of action. . . . It is perhaps more accurate to say that the wrongdoer is not required to compensate the injured party for damages which are avoidable by reasonable effort on the latter's part. . . .
> >
> > The doctrine does not require the injured party to take measures which are unreasonable or impractical or which would involve expenditures disproportionate to the loss sought to be avoided or which may be beyond his financial means. . . . The reasonableness of the efforts of the injured party must be judged in the light of the situation confronting him at the time the loss was threatened and not by the judgment of hindsight. . . . The fact that reasonable measures other than the one taken would have avoided damage is not, in and of itself, proof of the fact that the one taken, though unsuccessful, was unreasonable. . . . "If a choice of two reasonable courses presents itself, the person whose wrong forced the choice cannot complain that one rather than the other is chosen. . . . The standard by which the reasonableness of the injured party's efforts is to be measured is not as high as the standard required in other areas of law. . . . It is sufficient if he acts reasonably and with due diligence, in good faith. [Citations omitted.]

The suggestion that the statute provide that the lessor never be required to expend money for reletting or to relet to a tenant of lesser repute or for different purposes was rejected. The general principles that govern mitigation of damages will produce this result where appropriate; where expenditures would merely increase the lessor's loss they will not be required. However, certain expenditures in a given situation may reasonably be required and a rule permitting arbitrary and unreasonable refusal to make such expenditures was thought to be unwise. Similarly, reletting to a tenant of lesser, but still excellent repute, or for different,but unobjectionable, uses may in given circumstances be required. Having in mind that "the standard by which the reasonableness of the injured party's efforts is to be measured is not as high as the standard required in other areas of the law," the Commission felt that the present test adequately protects the lessor but still provides a desirable measure of flexibility.

In keeping with general contract principles the Commission felt that attorney's fees should be recoverable only if so provided in the lease. To clarify this point, the staff was directed to redraft the last sentence of the first paragraph of the Comment on page 18 of the tentative recommendation to read: "However, attorney's fees may only be recovered if they are recoverable under Section 1951.6."

Liquidated damages. No final accord was reached with respect to the handling of the problem of liquidated damages. The Commission felt that

a major overhaul of the law in this area would be beyond the scope of this topic. The staff was, however, directed to prepare a statutory provision that would insure that Civil Code Sections 1670 and 1671 would be applicable and liquidated damages would be available in the proper circumstances. A simple code provision as follows was suggested: "Civil Code Sections 1670 and 1671, relating to liquidated damages, apply to leases of real property." The Commission noted that CREA had concluded that a staff draft based on a provision of the Commercial Code was "uncertain" and concluded that adoption of the law applicable to contracts generally would avoid such uncertainty.

Section 1951.4

Subdivisions (a) and (b) were divided into three subdivisions and revised to read in substance:

> (a) The remedy provided in this section is available only if the lease provides for this remedy.
>
> (b) A lease of real property continues in effect after the lessee has breached the lease and abandoned the property for so long as the lessor does not terminate the lessee's right to possession, and the lessor may enforce all his rights and remedies under the lease, including the right to recover the rent as it becomes due under the lease, if the lease permits the lessee to do any of the following:
>
> (1) Either to sublet the property or to assign his interest in the lease, or both.
>
> (2) Either to sublet the property or to assign his interest in the lease, or both, subject to standards or conditions and the lessor does not require compliance with any unreasonable standard for, nor any unreasonable condition on, such subletting or assignment.
>
> (3) Either to sublet the property or to assign his interest in the lease, or both, with the consent of the lessor and the lease provides that such consent shall not unreasonably be withheld.
>
> (c) Nothing in subdivision (b) affects any right the lessor may have to terminate the lessee's right to possession.

Subdivisions (c) and (d) were renumbered "(d)" and "(e)" respectively. Commissioner Uhler proposed alternative language to that above, which is to be included for comparison in the memorandum for the next meeting.

The purpose of the revisions made above was to clarify: (1) that the remedy provided in this section is available only if the lease specifically so provides; (2) that the lessor must permit the lessee to take all reasonable steps to minimize his loss.

The staff was further directed to explain in the Comment that with respect to paragraph (2) of subdivision (b) that the standards or conditions referred to must be set forth in the lease, the lessor may not unilaterally later require compliance with standards not contained in the lease, though he may waive compliance with standards that are unreasonable in the light of existing circumstances. His failure to make such waiver would constitute a breach on his part and prevent his recovery of damages.

As to the reasonableness of any restriction on the acceptability of a new tenant, the Commission felt that this must be largely dependent upon the facts of the situation. Predetermined statutory guidelines would be either unduly confining or too broad to be meaningful. The staff was, however, directed to redraft the Comment to discuss this issue and to indicate some of the factors relevant in determining whether a restriction was reasonable or not. The general question of the applicability of this entire statutory scheme to residential leases was also discussed at this point. The Commission felt that it would be uncommon for the remedy provided by Section 1951.4 to be incorporated

into a lease of residential property. In view of the underlying policy that property should not be left vacant and that damages must be mitigated where possible, the Commission felt that the recommendation provided more than adequate remedies for the lessor and yet retained some protection for the rights of the lessee.

§ 1951.8.

The Commission directed the staff to revise subdivision (b) to clarify their intention that the lessor should be permitted to retain advance payments, insofar as the amount retained does not constitute a forfeiture and what constitutes a forfeiture would be the amount in excess of what would be reasonable as a liquidated damages provision. It should be made clear that the advance payment is not necessarily merely offset against the lessor's damages. The section contemplates judicial supervision to prevent forfeitures, but seeks to eliminate judicial decisions based merely on labels.

Code of Civil Procedure Sections 337.5 and 339.5

These sections were revised to include references to causes of action under Civil Code Section 1951.8.

Civil Code Section 3308

Time did not permit the Commission to consider specific changes in this section. The staff was, however, directed to revise the Comment and the section, if necessary, to insure that this section worked no major changes in the law of personal property, but that it conformed where applicable to Section 1951.2.

STUDY 52 - STATUTE OF LIMITATIONS

The Commission considered Memorandum 68-86, the tentative recommendation attached thereto and the First Supplement to Memorandum 68-86 containing the comments received relating to this recommendation. Although some unfavorable reaction was reported, including that of the State Bar, it was felt that most of the specific criticisms would be met by the revised recommendation and that it would be desirable therefore to submit the recommendation to the Legislature subject to the following action:

Section 913

The Commission adopted in substance and directed the staff to draft language amending subdivision (a) to include reference to a failure to act on a claim which is deemed to be a rejection as a form of "action" of which notice must be given.

The Commission approved the addition of the substance of the following language at the end of subdivison (a):

The written notice may be in substantially the following form:

> "Notice is hereby given you that the claim which you presented to the (insert title of board or officer) on (indicate date) was (indicate whether rejected, allowed, allowed in the amount of $____ and rejected as to the balance, rejected by operation of law, whichever is applicable)."

Finally, the last sentence of the "warning" form in subdivision (b) was revised by substituting "immediately" for "within six (6) months from the date of this notice."

Section 915.4

Subdivision (c) of Section 915.4 was deleted.

Section 950.4

The amendment suggested in the recommendation was deleted and the existing language of Section 950.4 was left unchanged.

The remaining sections of the recommendation were approved as drafted and the entire recommendation was approved for printing subject to distribution to and final review and approval by the individual Commissioners prior to delivery to the printer.

STUDY 55 - ADDITUR AND REMITTITUR

The Commission considered Memorandum 68-75 and the attached Tentative Recommendation Relating to Additur and Remittitur which had been distributed for comment. No adverse comments were reported and the Commission approved the Tentative Recommendation for submission to the 1969 Legislature.

STUDY 63 - EVIDENCE CODE (PSYCHOTHERAPIST-PATIENT PRIVILEGE REVISIONS)

The Commission considered the First Supplement to Memorandum 68-76 and the Recommendation relating to the application of the psychotherapist-patient privilege to group therapy and school psychologists.

Section 1010

The Commission concluded that public school psychologists should be included within the definition of "psychotherapist" for purposes of the privileges article. The Commission approved the addition of a new subdivision (c) to Section 1010 to read as follows:

> (c) A person who is serving as a school psychologist and holds a credential authorizing such service issued by the State Board of Education.

It was noted that the reference to the Government Code in the Comment to Section 1010 is incorrect; the reference should be to the Business and Professions Code.

The staff was directed to revise the statement in the Recommendation (p. 7) relating to the plans of the Commission to continue the study of whether the "psychotherapist" privilege should be extended to other categories of manpower. Concern was expressed that there may be other well-defined and supervised categories of manpower who have access to matter which possibly ought to be privileged. The staff was directed to investigate further to determine whether such categories of manpower do exist.

Section 1012

The Commission noted that the present draft of Section 1012 of the Evidence Code failed to make clear the purpose of the proposed change.

For this reason, the Commission considered several ways to redraft Section 1012 and decided to amend the section as follows: ", including other patients present at group therapy" is to be inserted following the words "patient in the consultation." The Commission considered the effect of the proposed change and the view expressed was that the bulk of the cases affected by the proposed amendment would probably relate to divorce and employment.

Approval for printing

As corrected, the Recommendation was approved for printing.

STUDY 69 - POWERS OF APPOINTMENT

The Commission considered Memorandum 68-77 and the attached tentative recommendation and the First Supplement to Memorandum 68-77. The following actions were taken.

Preliminary portion of Recommendation

The preliminary portion of the Recommendation should be revised to avoid giving any impression that powers of appointment are not widely used at the present time in California.

Application of existing statutory provisions relating to wills to revocable inter vivos trusts with power to appoint when used as a will substitute

The Commission considered a suggestion of Professor Rabin that the existing statutory provision relating to wills should be assimilated to the revocable trust area since the revocable inter vivos trust with power to appoint is frequently used as a will substitute. The Commission instructed the staff to prepare a memorandum for a future meeting on the desirability of requesting authority to make a study of this problem. No change was made in the powers of appointment recommendation.

Section 1380.2

The Commission determined not to attempt to provide conflict of laws rules in the recommended legislation.

To clarify the meaning of Section 1380.2, the following sentence was added to the section:

> Nothing in this section makes invalid a power of appointment that was created prior to July 1, 1970, and which was valid under the law in existence at the time it was created.

The Comment was revised to add the substance of the following:

> Note that Section 1380.2 deals only with the "release" or "exercise" of a power or the "assertion of a right" given by this title. Since the section does not deal with "creation" of powers of appointment, nothing in the section makes invalid a power of appointment created prior to July 1, 1970, where such power was valid under the law in existence at the time it was created. Under Section 1380.2, for example, the rights of creditors after July 1, 1970, with respect to a power of appointment, whether created before or after July 1, 1970, are controlled by Sections 1390.1-1390.4. Likewise, after July 1, 1970, such matters as the exercise of a power of appointment are governed by this title--even though the power of appointment was created prior to July 1, 1970.

Section 1381.1

The Commission determined not to define "exercise," "appointment," "created," or "effective." The meaning of these terms will be determined by the context in which the term is used. It was noted that the other statutes do not define the term.

Section 1381.2

Whether a power to revoke is a general power is a matter to be left to judicial determination under the circumstances of the particular case. A separate study would be needed before a statutory provision dealing with this problem could be drafted.

No change was made in the general definition of a "general power," but the provisions relating to the rule against perpetuities and rights of creditors (discussed later in these Minutes) are to be revised to take into account the comments of Professor Dukeminier and Dean Halbach.

Section 1381.3

This section should be revised to make clear that a powr is not "presently exercisable" if it is postponed and that a power is

"postponed" if:

(1) The creating instrument provides that the power may be exercised only after a particular act or event takes place or a particular condition is met (such as the donee reaching the age of 25) and such act or event has not taken place or such condition has not been met; or

(2) The creating instrument provides that an exercise of the power takes effect (or that the distribution of the appointive property takes place pursuant to an exercise of the power) only on the taking place of an act or event (such as the death of the donee) or upon a particular condition being met and such act or event has not taken place or such condition has not been met.

The Comment should be revised to make specific reference to the situation that concerned the California Bankers Association. (The Comment should also contain the first sentence of the comment as set out on page 5 of the supplement.)

Section 1381.4

In response to a comment from Dean Halbach (page 6 of the supplement), the following was added to the Comment to Section 1381.4:

> Section 1381.4 does not state what constitutes a manifestation of intent that the permissible appointees be benefited even if the donee fails to exercise the power. The common law rules that determine when such an intent has been manifested will continue to apply. See Section 1380.1 and the Comment thereto.

Section 1382.2

This section was deleted. Rather than providing clarity, the section created uncertainty. See the question of the California Bankers Association (page 6 of supplement).

Section 1384.1

This section, as set out in the tentative recommendation, was made subdivision (a) and a new subdivision (b) was added to read:

> (b) Unless the creating instrument otherwise provides, a donee who is a minor may exercise a power of appointment only if:
>
> (1) He is over the age of 18 and exercises the power of appointment by a will; or
>
> (2) He is deemed under Civil Code Section 25 to be an adult person for the purpose of entering into any engagement or transaction respecting property or his estate.

The Comment should point out that subdivision (b) is a limitation on subdivision (a).

Section 1385.1

Section 1385.1 was revised to read in substance:

> 1385.1. (a) Except as otherwise provided in this title, if the creating instrument specifies the manner, time, and conditions of the exercise of a power of appointment, the power can be exercised only by meeting those requirements.
>
> (b) Unless expressly prohibited by the creating instrument, a power stated to be exercisable by an inter vivos instrument is also exercisable by a written will.

The revised section avoids any implication that a power of appointment must be exercised in writing, thus not precluding a court from finding, for example, that a power of appointment has been exercised by physical delivery of bearer bonds to the appointee. In addition, former subdivision (d) was deleted after discussion of a comment by the California Bankers Legislative Committee. Subdivision (b) was retained after considering the question raised by the Bankers Legislative Committee. If the creating instrument says "only by an instrument other than a will," subdivision (b) will not be applicable.

Section 1385.2

This section was revised to read:

1385.2. If the creating instrument expressly directs that the power of appointment be exercised by an instrument which makes a specific reference to the power or to the instrument that created the power, the power can be exercised only by an instrument containing the required reference.

Section 1385.3

This section should be revised so that when a person becomes incapable of consenting, the consent on behalf of such person may be given by his guardian or conservator. But consent would be required rather than dispensed with as under other statutes. This change was made to avoid a possible tax trap that might occur when a power is converted into a general power upon the person who has the power to consent becoming legally incompetent.

Section 860 should not be conformed to this change.

The phrase "Unless otherwise restricted by the creating instrument," was inserted at the beginning of subdivision (b).

Section 1386.2

In the fourth line of the section the word "only" was inserted before "if."

The staff is to check to determine whether "the property" should be substituted for "all of the donee's property" in the introductory portion of Section 1386.2.

In subdivision (a) the words "does not provide for a gift in default and" were deleted in response to a suggestion from Professor Rabin and after the views of the Bankers Legislative Committee were taken into account.

In subdivision (b), the phrase "donee did" was substituted for "donee's will does" so that the intent of the donee, not expressed in his will, can be shown. This changes the rule in Estate of Carter, referred to in the Comment.

The first sentence of the second paragraph of the Comment requires revision.

Section 1386.3

The Comment to this section was revised to add the following:

> Section 1386.3 requires that the power of appointment be one "existing at the donee's death." Thus, where the donor executes a will creating a power exercisable by will and the donee executes a will purporting to exercise that power and thereafter the donee dies and later the donor dies without having changed his will, the attempted exercise by the donee is ineffective because the power of appointment was not one "existing at the donee's death," since the donor could have revoked or changed his will at any time before his death.

Section 1387.1

The phrase "Unless the creating instrument clearly manifests a contrary intent," was inserted at the beginning of subdivision (a) of Section 1387.1. The staff is to check with Professor Powell on this and revise the draft accordingly and to refer to the Restatement.

Section 1387.2

The introductory clause was revised to read: "Subject to the limitations imposed by the creating instrument,".

Section 1388.2

Subdivision (c) was revised to read:

(c) A release shall be delivered as provided in this subdivision:

(1) If the creating instrument specifies a person to whom a release is to be delivered, the release shall be delivered to that person but delivery need not be made as provided in this paragraph if the circumstances are such that personal service of process could not be made on such person.

(2) In a case where delivery is not governed by paragraph (1) and where the property to which the power relates is held by a trustee, the release shall be delivered to such trustee.

(3) In a case not covered by paragraph (1) or (2), the release may be delivered to any of the following:

(i) Any person, other than the donee, who could be adversely affected by the exercise of the power.

(ii) The county recorder of the county in which the donee resides, or has a place of business, or in which the deed, will, or other instrument creating the power is filed.

The Comment should be revised to add:

The provision of former Civil Code Section 1060 relating to recording as constructive notice has been omitted because the provision was inconsistent with the recording provisions relating to real property and the general principles of constructive notice. The constructive notice provision of Section 1060 made it extremely difficult or impossible for a purchaser from an apparent appointee to protect himself from a release unknown to him.

The staff should check to determine whether Civil Code Section 1213 is sufficient to permit recording of instruments of release.

Dean Halbach (Exhibit IV, page 3) suggested that attention be directed to the release of powers by a fiduciary, a deficiency in Civil Code Section 1060 and a problem not dealt with by the tentative recommendation. The staff was directed to contact Dean Halbach to determine exactly what he had in mind.

Section 1389.2

The staff is to prepare an analysis of what rule should be provided in this section. The Restatement should be checked. At the next meeting, this matter should be noted for Commission attention.

Section 1389.3.

The words "appointive assets" were changed to "appointive property."

Section 1389.4

The problem referred to in the First Supplement is considered an important one by the Bankers Legislative Committee.

Section 1390.3

For the next meeting, this section is to be redrafted so that assets of the donee owned outright are to be resorted to by creditors before the appointive property is to be resorted to.

Also, for the next meeting, an exception should be drafted to the provision permitting creditors to reach a general power to preclude such right where the only reason the power of appointment is considered general is that the donee may use the appointive assets to discharge his alimony or support obligations to his wife or ex-wife and children. It was suggested that Dean Halbach be contacted to determine whether such a exception would be justified and whether it would be broad enough. The revision limiting the appointive property to a secondary liability may make such an exception unnecessary.

Section 1391.1

To eliminate the problem outlined by Dukeminier and Halbach, it was determined that Section 1391.1 was revised for inclusion in the

next draft to read as follows:

> 1391.1. The permissible period under the applicable rule against perpetuities with respect to interests sought to be created by an exercise of a power of appointment begins:
>
> (a) In the case of an instrument exercising a general power of appointment presently exercisable by only one person, on the date the appointment becomes effective.
>
> (b) In all other situations, at the time of the creation of the power.

The Comment is to be revised for inclusion in the next draft to include the substance of the following:

> Subdivision (a) is limited to a case where the power of appointment is presently exercisable by only one person. Subdivision (b), rather than subdivision (a), applies to a general power held by two or more persons. This distinction between general powers held by one person and general powers held by two or more persons is consistent with the rule in most other states. E.g., In Re Morgan's Trust, 118 N.Y.S.2d 556 (1953). See also Re Churston Settled Estates, [1954] Ch. 334; Crane, Consent Powers and Joint Powers, 18 Conv. (N.S.)565 (1954). Insofar as an interest sought to be created by an exercise of a power of appointment is concerned, the rule stated in Section 1391.1 prevails over the rule stated in Civil Code Section 715.8 in cases where the power of appointment is presently exercisable by more than one person.

The Comment should further indicate that the same rule that applies to powers of appointment jointly exercisable would apply to cases where consent of another is required.

Section 1392.1

In the next draft the trust rule under Civil Code Section 2280 should apply to the exercise of a power of appointment so that the exercise is revocable so long as the title to the property has not passed or the property has not been distributed pursuant to such appointment, unless the exercise of the power is expressly declared by the creating instrument or the instrument of exercise to be irrevocable.

Suggested Corrections to Minutes of September 1968 Meeting

On page 10, line 1, the word "provide" was substituted for "provides."

On page 10, a period was inserted at the end of the first paragraph.

On page 16, a period was inserted at the end of the paragraph appearing on this page.

On page 25, after the paragraph indicating the material to be added to the Comment to Section 1388.2, the reference to Civil Code Section "1013" was changed to "1213."