MINUTES OF MEETING

OF

NORTHERN COMMITTEE

October 8, 1955
San Francisco

PRESENT

Members

Mr. Bert W. Levit, Chairman
Mr. Thomas E. Stanton, Jr.
Mr. John H. Swan

Research Consultants

Professor Edward Barrett
Professor Edward Hogan
Mr. Harold Marsh
Professor Lowell Turrentine

Staff

Mr. John R. McDonough, Jr.
Mrs. Virginia B. Nordby

The Committee discussed a general time schedule for all of the studies which had been assigned to it by the Chairman of the Commission and decided that its objective would be to meet the following deadlines:

June 1, 1956 -- All studies and recommendations approved by Committee and Commission.

October 1, 1956 -- All studies and recommendations ready to be sent to the printer.

This would allow the entire summer of 1956 for distribution of the studies and recommendations to interested persons and for consideration of any suggestions which might be received.

The Committee decided that each of its members would assume primary responsibility for three of the studies assigned to the Committee. The following assignments were made:

Mr. Levit

Study No. 6 -- CCP § 660
Study No. 12 -- Written copy of instructions in jury room
Study No. 17(L) -- Inheritance and Gift Tax

Mr. Stanton

Study No. 1 -- Restraints on Alienation
Study No. 5 -- Probate Code § 201.5
Study No. 18(L) -- Fish and Game Code

Mr. Swan

Study No. 2 -- Judicial notice of foreign law
Study No. 15 -- Costs in divorce or annulment actions
Study No. 16 -- Legislative bodies acting as planning commissions

STUDY NO. 1 -- RESTRAINTS ON ALIENATION

Professor Lowell Turrentine distributed to the members of the Committee copies of a preliminary memorandum outlining what he thought the general scope of Study No. 1 should be. He explained that the outline was based on the theory that the specific question presented by Topic No. 1 in the Commission's 1955 Report was only a part of a larger problem and that the study should consider the broader problem and not be limited to the rule against suspension of the absolute power of alienation. The study, as outlined by Professor Turrentine, would consider three major questions:

1. Whether the rule against suspension of the absolute power of alienation should be repealed or modified.

2. Whether the restrictions on remainders contained in Civil Code Sections 774, 775, and 777 should be repealed.

3. Whether California should liberalize the rule against perpetuities in a manner similar to that recently adopted in Massachusetts.

As to the first question, Professor Turrentine pointed out that the rule against suspension of the absolute power of alienation is unnecessary in regard to legal future interests because the rule against perpetuities achieves the same result. In regard to trust interests, however, the rule against suspension operates to strike down interests which would be valid under the rule against perpetuities. Furthermore, in regard to trust interests, the California courts have been considerably stricter than the courts of other states in applying the rule against suspension. Professor Turrentine explained that other states have developed judge-made rules

respecting the length of time that interests in trust may be inalienable, which are similar to the California rule against suspension. These rules have been rationalized as necessary to effectuate the general policy of the rule against perpetuities. However, the courts of other states have not applied these rules so as to totally invalidate a trust which violates them only in part. The general procedure is to strike down restrictions on alienation which last too long, thus converting the interest from an inalienable one to an alienable one, or in some other manner to eliminate the part which violates the rule against suspension, but at the same time preserving the remainder of the trust. In California, however, the courts view the interest which violates the rule as invalid and have consistently held that the invalid portion is not separable from the remaining interests. The result is that the trust is almost always declared to be invalid in toto. Moreover, the California courts have been much stricter than the courts of other states in determining which interests violate the rule against suspension. The committee decided that Professor Turrentine's study of the rule against suspension of the absolute power of alienation should examine the judge-made rules which have been developed by other states to limit the duration of trusts and should consider whether, if the rule against suspension should be abolished, other provisions should be enacted to incorporate the safeguards apparently deemed necessary by the courts of the other states.

With regard to the second problem discussed in his outline -- whether the restrictions on certain remainders contained in Civil Code Sections 774, 775, and 777 should be repealed -- Professor Turrentine explained that these

restrictions were placed in the code at a time when no one suspected that the rule against perpetuities existed in California. At the present time they are stricter than the rule against perpetuities, but are unnecessary because the rule against perpetuities alone would now afford sufficient protection against the type of restraints which they were designed to prohibit.

The Committee decided that it would like to have Professor Turrentine's study cover both of the first two problems referred to in his preliminary memorandum and also examine the California rule against perpetuities and consider whether it would be desirable to modify the rule in a manner similar to that recently adopted in Massachusetts. However, the Committee told Professor Turrentine that it was not imperative that his study cover this last point should he find that he did not have sufficient time to do so.

It was agreed that Professor Turrentine would submit the first draft of his final report by April 1, 1956, that the Committee would meet to consider the first draft sometime before May 1, 1956, and that the final draft and committee recommendations would be ready for presentation to the Commission by June 1, 1956.

It was agreed that Professor Turrentine will submit a detailed outline before he begins the actual writing of the report.

STUDY NO. 2 -- JUDICIAL NOTICE OF FOREIGN LAW

Professor Edward Hogan presented an oral report to the Committee outlining the historical development and present state of the law relating to judicial notice of foreign law. He stated that under the early English practice foreign law could never be shown. The court could not take judicial notice of it and it could not be proved as a fact because the jury was originally required to have personal knowledge of the facts in issue. In America, in the absence of statute, the common law courts have said that foreign law is a fact to be pleaded and proved. An appellate court must accept a finding by the trial court if it is supported by substantial evidence. Sometimes, in the absence of proof of the foreign law, it will be presumed to be the same as the law of the forum. These common law rules were changed in California in 1927 by the passage of the Uniform Judicial Notice Act which authorizes the court to take judicial notice of the law of sister states.

Professor Hogan stated that this Act has two major weaknesses. (1) It is not mandatory. The statute merely authorizes the court to take judicial notice; it does not require it to do so. In Estate of Moore the trial court disregarded the statute and assumed that the law of Texas was the same as the law of California. This case was refused hearing by the Supreme Court. (2) The statute does not require the parties to plead the foreign law. Professor Hogan stated that when the parties do not plead the foreign law the burden of determining what the foreign law is rests entirely with the court. This tends to result in the court's merely assuming that the foreign law is the same as the law of California. Professor Hogan

suggested that the Act be amended to require the parties to plead the foreign law and to require the courts to take judicial notice of it.

The Committee pointed out that the major question involved in Study No. 2 was intended to be whether the California courts should be authorized to take judicial notice of the law of foreign countries. Although the inadequacies of the present law relating to judicial notice of sister-state law should be considered by the study, the study should be focused on foreign country law, rather than sister-state law. The Committee therefore suggested that Professor Hogan examine in detail the present procedure in California for establishing the law of a foreign country. It further suggested that the study consider the general differences in pleading, proof, reviewability, etc. between facts which are judicially noticed and facts which are established in the ordinary way, and that the study discuss the desirability of altering or modifying some of these differences in the case of judicial notice of the law of foreign countries. The Committee also suggested that the study consider the inadequacies of the present law relating to judicial notice of sister-state law, so that the experience in that area may be taken into account in proposing revision of the closely related area of foreign country law.

It was agreed that Professor Hogan would submit the first draft of his final report by January 15, 1956, that the Committee would meet to consider the first draft sometime before February 5, 1956, and that the final draft and committee recommendations would be ready for presentation to the Commission by March 15, 1956.

It was agreed that Professor Hogan will submit a detailed outline before he begins the actual writing of the report.

STUDY NO. 5 -- PROBATE CODE § 201.5

The Committee considered a preliminary outline of Study No. 5 prepared by Mr. Harold Marsh which had been distributed to the members of the Committee prior to the meeting. This outline suggested that Study No. 5 consider the broad problem of how California deals with property originally acquired by a married person while domiciled in another state, which later becomes subject to the jurisdiction of California because the owner of the property moves his domicile to California or the property is exchanged for land in California. In examining this broad problem, several different types of property would be considered: (1) movable property acquired by nonresident spouses prior to removal of their domicile to California; (2) movable property acquired by nonresident spouses prior to removal of their domicile to California and thereafter exchanged for immovable property in California; (3) immovable property acquired in California by nonresident spouses.

Mr. Marsh's outline suggested that the study examine how California deals with these different types of property in a variety of contexts, such as inter vivos transfers, divorce, death of non-acquiring spouse prior to that of acquiring spouse, death of acquiring spouse, and death of non-acquiring spouse subsequent to that of acquiring spouse after receiving property by gift, devise or inheritance.

Mr. Marsh pointed out that this outline contemplated a study considerably broader than the two questions presented in the Commission's 1955 Report. The Committee decided that, although the Commission may determine not to recommend revisions which are broader than the questions

presented in its Report, Mr. Marsh's study should nevertheless consider the broader problems described in his preliminary outline so that the Commission's recommendation may be made with the total picture in mind.

Mr. Levit pointed out that Mr. Marsh's outline did not mention immovable property acquired by nonresident spouses prior to removal of their domicile to California and thereafter exchanged for immovable property in California. Mr. Marsh explained that such property would be treated the same as movable property later exchanged for immovable property under the same circumstances. Mr. Stanton raised the question whether these various types of property would ever present problems in connection with the State income tax. Mr. Marsh said that he would check that point. Mr. McDonough suggested that it might be argued that Estate of Thornton should have been decided differently and would, if presented as an original matter, be decided differently today. He suggested that Mr. Marsh consider whether Estate of Thornton did, or could, hold Civil Code § 164 unconstitutional for all purposes and whether § 164 is likely to be applicable in some situations at the present time.

It was agreed that Mr. Marsh would submit the first draft of his final report by January 1, 1956, that the Committee would meet to consider the first draft sometime before January 20, 1956, and that the final draft and Committee recommendations would be ready for presentation to the Commission by March 1, 1956.

It was agreed that Mr. Marsh will submit a detailed outline before he begins the actual writing of the report.

STUDY NO. 6 -- C.C.P. § 660

Professor Edward Barrett distributed to the members of the Committee copies of a preliminary memorandum outlining what he thought the scope of Study No. 6 should be. This memorandum pointed out that it is relevant to know the effective date of an order granting a new trial in at least three situations: (1) to determine when the time for appeal commences to run; (2) to determine when the judge has determined the rights of the parties and put it beyond his power to reconsider his decision; and (3) to know whether the judge has "determined" the motion within the sixty day limit on his jurisdiction.

Professor Barrett's memorandum pointed out that apparently all the older cases considering the matter involved appeals from orders granting a new trial and presented the question of whether the judge had determined the motion within the sixty day limit on his jurisdiction. These cases took the general position that the order is effective at the time it is pronounced. Although there have been no cases specifically repudiating this general position so far as it applies to the granting of a motion within the sixty day period, later cases involving the question of when the time for appeal commences to run have cast considerable doubt upon its present status. Rule 3 of the Rules on Appeal provides that, if a motion for a new trial is denied, the time for filing a notice of appeal from the judgment is extended until thirty days after either entry of the order denying the motion or denial thereof by operation of law. Rule 2(a) requires that notice of appeal be filed within sixty days from the date of entry of the judgment, unless the time is extended by Rule 3; and Rule 2(b) provides that "For the purposes of

this rule" the "date of entry of an order which is entered in the minutes shall be the date of its entry in the permanent minutes . . . ." In Millsap v. Hooper the court said that "The effective date of an order of denial of a motion for new trial is the date of the minute entry . . . .", not the date of an oral order, and that the thirty day extension for appeal from the judgment begins to run at the time of the entry or at the time that the motion for a new trial is denied by operation of law under C.C.P. § 660, whichever is earlier. In Pacific Home v. Los Angeles the court held that the appeal time started running only from the filing of the written order. It was said that "An order ruling on a motion for a new trial is ineffective unless filed with the clerk or entered in the minutes."

Professor Barrett stated that the Millsap and Pacific Home cases would be difficult to distinguish if the question presented by the earlier cases -- whether the judge has determined the motion within the sixty day limit on his jurisdiction -- should come up today. Yet, he pointed out, the later cases do not present the same dilemma as the grant cases where the judge cannot predict the precise date when the order will be entered in the minutes and hence cannot know how late in the sixty day period he can make an effective ruling. However, Professor Barrett said he was not certain that there was a real practical problem, and he suggested that he do some field research among clerks and judges before proceeding further. This plan was approved by the Committee. Mr. McDonough said that, if Professor Barrett felt it necessary to contact a larger number of clerks and judges throughout the State, the office of the Executive Secretary would handle the clerical aspects of such a project.

Professor Barrett also suggested that consideration be given to the possibility of drafting a statutory amendment which would in some fashion give the judge the ability to make an effective ruling granting a new trial within the sixty day period without interfering with the rules and cases which determine that appeal time shall run from the entry of the orders in the minutes. The Committee discussed the merits of this proposal. Mr. Levit expressed the view that the order should be made effective at the same time for all purposes. Mr. Stanton apparently felt that the only way to safeguard the interests of all concerned might be to have the order effective at different times for different purposes. Although no specific agreement was reached on this point, it was assumed that Professor Barrett's study would consider the various factors involved in this, as well as in other, possible solutions to the problem. However, it was agreed that both the study and the proposed solutions should be based on the assumption that the present Rules on Appeal remain unchanged.

It was agreed that Professor Barrett would submit the first draft of his final report by January 1, 1956, that the Committee would meet to consider the first draft sometime before February 1, 1956, and that the final draft and committee recommendations would be ready for presentation to the Commission by March 1, 1956.

It was agreed that Professor Barrett will submit a detailed outline before he begins the actual writing of the report.

Mr. Levit described to each Consultant the form in which the Commission would like them to submit their reports. He stated that the reports should be expository rather than argumentative in form; that the Commission did not want a brief, but an impartial analysis of the authorities, the relevant policy considerations, and possible solutions; and that the Commission would like to have the benefit of the Consultants' recommendations, but would prefer that they be set forth separately, either at the end of the report or in a separate document.

The Committee requested each Consultant to prepare an original and five carbons of his outline and first draft -- one copy to be retained by the Consultant and the others to be sent to the Executive Secretary for his files and for distribution to the members of the Committee.

Respectfully submitted,

Virginia B. Nordby
Assistant Executive Secretary

VBN:fp