MINUTES OF MEETING

OF

NORTHERN COMMITTEE

September 19, 1957

San Francisco

Members

Mr. Thomas E. Stanton, Jr.
Mr. Samuel D. Thurman

Research Consultant

Mr. Harold Marsh, Jr.

Staff

Mr. John R. McDonough, Jr.

STUDY NO. 38 - INTER VIVOS ASPECTS OF PROBATE CODE SECTION 201.5 PROBLEM

The Committee discussed with Mr. Marsh what matters the study of the inter vivos aspects of the Probate Code Section 201.5 problem should cover and whether an additional study is necessary. After some discussion it was determined that the problem would involve at least the following: (1) whether the 1917 amendment to Civil Code Section 164 should be repealed; (2) division of property on divorce; (3) further inhibition of inter vivos transfers of 201.5 property; (4) whether a gift of 201.5 property by one spouse to the other should be exempt from the gift tax, either wholly or in part; (5) whether creditors of the nonacquiring spouse should be able to reach 201.5 property; and (6) whether changes should be made in the homestead laws in respect of 201.5 property. It was further agreed that a new

study is necessary. Mr. Marsh agreed to undertake such a study and to draft such legislation as he would propose for the Commission's consideration. Mr. Marsh agreed to a target date for the submission of his work of January, 1958.

STUDY NO. 23 - RESCISSION OF CONTRACTS

The Committee gave further consideration to Professor Sullivan's study. The Committee discussed again whether a new single rescission action should include a requirement that the person desiring to rescind give prompt notice thereof to the other party and offer to restore what he has received.

In the course of this discussion Mr. Stanton stated that he has great doubt about the wisdom of Professor Sullivan's recommendation that the present provision in California law for out-of-court rescission be abolished. He stated that, in his opinion, the law should continue to make it possible for a party desiring to rescind a contract to do so without having to go to court to obtain a decree of rescission in the event that the other party is not willing to engage in a mutual rescission of the contract. He stated that parties act at the present time on the assumption that a unilateral out-of-court rescission does terminate a contract and that it is undesirable to create a situation in which a party must bring a lawsuit to rescind a contract. Mr. Stanton suggested that the law should either continue to provide for out-of-court rescission as an alternative to bringing suit to obtain a rescission or that, if there is to be but a single action, it should be an action to enforce an out-of-court rescission rather than an action to obtain a decree of rescission. He stated that as he sees the matter it is one of

eliminating the problems arising out of the duality of the existing legal and equitable actions and that this could be done under either of the alternatives which he suggested just as readily as by providing a single action to obtain a decree of rescission.

Messrs. Thurman and McDonough questioned whether there is any need to retain the out-of-court rescission, other than in the form of a mutual rescission by the parties. They took the following position:

> A "unilateral out-of-court rescission" is legally meaningless and will not preclude litigation except in the rare case where the other party is willing to acquiesce in the "rescinding" party's desires even though unwilling to state his acquiescence and thus effect a mutual rescission. A law suit is always necessary when the person seeking rescission desires to get back from the other party benefits conferred under the contract. A suit is also necessary even where no recovery is sought against the other party if the person desiring to rescind wishes to have his legal rights in the matter clearly settled. If the other party announces his disagreement with the rescinding party's assertion of his right to rescind, the rescinding party is exposed to the possibility of a suit for a breach of contract until the statute of limitations has run despite the fact that he has announced that he has rescinded the contract. If such a suit is brought, the defense will be those acts of the plaintiff which were the <u>grounds</u> for the "unilateral

out-of-court rescission"; nothing is added to this defense by virtue of the fact that the defendant undertook to effect an "out-of-court rescission". Even if "out-of-court rescission" is recognized, a rescinding party must, to avoid the over-hanging risk of a breach of contract action, bring an action to obtain rescission (if this is available as an alternative remedy) or bring a declaratory judgment action to put an end to his potential liability under the contract. In either case, the plaintiff's rights will depend, not on the fact that he has purportedly effected an "unilateral out-of-court rescission", but upon whether grounds for rescission of the contract in fact existed when he acted. Thus, the "out-of-court rescission" is legally meaningless and need not be retained as a part of our law.

Messrs. Thurman and McDonough were, therefore, of the opinion that Professor Sullivan's recommendation to abolish out-of-court rescission and have a single action to obtain a decree of rescission is the sound approach to ending the existing duality in rescission procedure.

It was decided that all concerned would give the matter further consideration and that the Executive Secretary should attempt to draft statutory provisions embodying both of the alternatives suggested by Mr. Stanton in order to see whether it would be feasible to enact either or both of them if the Commission were to decide upon them.

The study was continued on the agenda of the Committee for further consideration at its next meeting.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary