Agenda Item #6

MEMORANDUM NO. 1

SUBJECT: STUDY NO. 25 - PROBATE
CODE SECTIONS 259-259.2

This matter, I believe, is ready for final action by the Commission at the November 1 and 2 meeting.

Attached are: (1) Professor Horowitz's research study (please note that the footnotes will eventually have to be renumbered); (2) The recommendations of the Southern Committee as reported in the minutes of its meeting on September 21; (3) A draft, prepared by the staff, of legislation designed to effectuate the Committee's recommendation, i.e., a new article of the Probate Code, providing for impoundment of a nonresident alien's share of an estate or interest under a testamentary trust in certain circumstances; and (4) A memorandum by Mr. William B. Stern commenting on our earlier draft of Professor Horowitz's study and recommending certain amendments of Probate Code Section 259.

It seems to me that the following questions will be presented for determination by the Commission at the November meeting:

1. Should the principle of reciprocity embodied in Probate Code Sections 259-259.2 be retained as a part of the law of California? Professor Horowitz recommended

that Sections 259 - 259.2 be repealed (Study, p. 34), presumably for the reasons set forth on pages 25-28 of his Study. The Southern Committee disagreed.

2. If Sections 259 - 259.2 are to be retained, should they be amended, as suggested by Mr. Stern, to require as a condition of inheritance here not only that there be no discrimination against U.S. citizens in the foreign country involved, but also that the country accord substantially the same rights of inheritance as does California? Both Professor Horowitz and the Southern Committee thought not.

3. If Sections 259 - 259.2 are to be retained, should they be amended for purposes of clarification? The following might be considered:

(a) Professor Horowitz has suggested that Section 259 might be amended to require that reciprocity exist on the date of distribution to the nonresident alien as well as on the date of death, as is presently required. (Of course, date of distribution might be substituted for date of death.) The Southern Committee did not make a specific recommendation on this point; the impounding statute may make it unnecessary.

(b) Should the burden of proof on the existence of reciprocal inheritance rights be shifted from the foreign heir to the other interested parties,

as was done in 1945, and reversed at the instance of the Attorney General in 1947? The Southern Committee considered this possibility but did not recommend such a change.

(c) Should provision be made for notice to the Attorney General of all probate proceedings to which Sections 259 - 259.2 might be applicable? If so, what should be the mechanics?

4. Should the "special circumstances" basis of impoundment be included in the new statute? Professor Horowitz recommended against it on the ground that it is too vague. The Committee favored the "special circumstances" clause in order to empower the courts to act in situations which cannot now be clearly forseen. Even if the clause should be made the basis of impoundment, should it also be made the basis of permanently cutting off a person's right to inherit property? Professor Horowitz thinks not; hence, he did not include the "special circumstances" provision in that part of his statute which deals with the right of various persons to petition for withdrawal of deposited funds. Although the Committee did not pass on this matter, the provision is included in Sections 3 and 4 of the statute which we have drafted. In a letter to me Professor Horowitz comments as follows:

"It seems to me to be one thing to impound a beneficiary's share because of special circumstances, but something else again to cut him off completely in favor of other heirs for such a reason. Indeed, this comment applies also to the benefit or use or control language, or that of being in a country on the Secretary of the Treasury's list."

5. Will the Commission recommend an impounding statute as recommended by both Professor Horowitz and the Southern Committee? If so, is the draft prepared by the staff satisfactory?

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

9/24/57

MINUTES OF MEETING

OF

SOUTHERN COMMITTEE

September 21, 1957
Los Angeles

Members

Mr. Stanford C. Shaw
Mr. John D. Babbage

Research Consultants

Harold W. Horowitz
James H. Chadbourn
Hill, Farrer & Burrill by Messrs. Nibley, Day and McLaurin

Staff

Mr. John R. McDonough, Jr.

STUDY NO. 25 - PROBATE CODE SECTION 259 et seq.

The Committee determined that Professor Horowitz's study should be accepted by the Commission, with the understanding further minor revisions may be made therein, and that he should be paid for the study.

The Committee recommends that the Commission recommend that Probate Code Sections 259-259.2 be continued in substance as a part of the law of California, with such amendments as may be necessary to clarify their meaning and to fit them in with the other statutes recommended by the Committee. Professor Horowitz agreed to draft such amendments for the Commission's consideration.

The Committee recommends that the Commission recommend that the statute proposed in Professor Horowitz's report be enacted, with such amendments, if any, as might be necessary to adjust it to the

continued existence of Probate Code Sections 259-259.2.

The Committee recommends that the Commission not recommend that Probate Code Section 259 be amended as suggested by Mr. William B. Stern in his communication to Professor Horowitz, in effect suggesting that California establish, in addition to its present provision against discrimination against Americans, certain minimum standards which foreign inheritance laws must meet if the citizens of such countries are to have a right to inherit in California.

STATUTE PROPOSED BY STAFF

Article 000 (of the Probate Code)

Section 1. As used in this article, "disqualified nonresident alien heir" means a person:

(a) Who is an heir, legatee, devisee or distributee of an estate probated under the laws of this State, or a beneficiary of a testamentary trust administered under such an estate; and

(b) Who is an alien who does not reside in the United States or any of its territories; and

(c) As to whom a probate court finds any of the following to be true:

(1) That the person would not have the benefit or use or control of the money or other property due him under the estate or testamentary trust; or

(2) That the person is a resident of a country which at the time he would otherwise receive the money or other property due him is designated by the Secretary of the Treasury of the United States, pursuant to Title 51, U.S.C. Section 123, or any other provision of law or by any other department, agency or of-

ficer of the United States pursuant to law as being a country in which there is not a reasonable assurance that the payee of a check or warrant drawn against funds of the United States would actually receive such a check or warrant and be able to negotiate the same for full value; or

(3) That there are other special circumstances which make it desirable that he should not immediately receive the money or other property due him.

Section 2. Whenever a person asserting a right or claim to all or any part of a decedent's estate probated under the laws of this state or of a testamentary trust administered thereunder is a disqualified nonresident alien heir, the probate court shall, on the motion of any party in interest or of the Attorney General, or on the court's own motion, order that such person's interest be converted into cash and, less such reasonable fees, if any, as the court may fix and allow for the services of such person's attorney, be deposited to the credit of such person in a savings bank or banks in the State at interest. The passbook or other evidence of such deposit shall be delivered to the clerk of the court.

A bank in which such a deposit is made shall not permit withdrawal to be made therefrom except pursuant to a court order made pursuant to the provisions of this article.

Section 3. At any time before the expiration of five years from the date of entry of an order made pursuant to Section 2, the person for whom the deposit was made may file a petition in the probate court which made the order alleging that he is no longer a disqualified nonresident alien heir. If the court finds that the petitioner is not then a disqualified nonresident alien heir and that he is not precluded from inheritance rights in this State by Section 259 of this code, the court shall make an order authorizing the petitioner to withdraw the funds deposited and authorizing the clerk of the court to deliver the bank book or books to the petitioner or to his attorney-in-fact.

If the person on whose behalf an order for deposit of funds was made pursuant to Section 2 is deceased, the petition authorized by this section may be filed by his heir, legatee or devisee provided that such petitioner is not himself a disqualified nonresident alien heir and that he is not precluded from inheritance rights in this State by Section 259 of this code.

Section 4. At any time after which a petition may be filed pursuant to Section 3 and before the expiration of ten years from the date of entry of an order made pursuant

to Section 2, any person who would have been entitled to the property distributable to the disqualified nonresident alien heir had the latter predeceased the decedent, may petition the probate court to order the deposit made pursuant to Section 2 to be paid over to the petitioner. The petition shall be granted unless the petitioner is himself a disqualified nonresident alien heir or is precluded from inheritance rights in this State by Section 259 of this code.

Section 5. After the expiration of ten years from the date of entry of an order made pursuant to Section 2, the deposit, if not disposed of by an order made pursuant to Section 3 or Section 4, shall be disposed of as escheated property.

Section 6. A copy of any motion made by a party in interest pursuant to Section 2, or of a petition filed pursuant to Section 3 or Section 4 shall be served on the Attorney General and upon all other parties in interest. If the probate court acts on its own motion pursuant to Section 2, the court shall notify the Attorney General thereof.

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July 23, 1957

Professor Harold Horowitz
Stanford University
School of Law
Stanford, California

Dear Professor Horowitz:

Thank you very much for your letter of July 10 and a copy of your report to the Law Revision Commission concerning Probate Code Sections 259-259.2. Unfortunately I have been so busy since my two trips to the East and to Portland, Oregon in June and due to illness in my family that I cannot expect to bring my ideas to paper in the available limited time in such a way as I would like to. I have come to the conclusion that I can send you merely a preliminary draft of what I would like to say, without any citations, but based on my previous research and thinking.

While I appreciate your openmindedness, it is, of course, difficult to try to persuade a person who has arrived at his conclusions after years of thinking. However, I feel strongly about some of the points involved, and I feel that as you come to rather definite conclusions representing one side of the issues, that the other side should be represented before the Law Revision Commission, too. As you know, there is nothing more dangerous than a presentation of an issue to a law revision commission which states one view with eloquence, but omits the argument of the other side.

If the Law Revision Commission would desire that I represent my ideas at their forthcoming meeting and would request my coming, I would make every effort to be present at the meeting. If the Law Revision should desire a more detailed study, I would be glad to do whatever I can.

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My remarks will deal with the various types of foreign law problems arising under Secs. 259 et seq. and with the desirability of reciprocity legislation.

Continued on Memorandum Page 1.

MEMORANDUM

I. The meaning of Secs. 259 et seq.

It would seem that reciprocal rights under Secs. 259 et seq. presuppose that an American citizen has a right to inherit property in the foreign country involved. This statement would seem to be based on the language of Sec. 259 and has basis in Estate of Kennedy, and other decision, but is contrary to your statement on page 4 of your report and passim. If this requirement exists, it means:

(1) The law of the foreign country must have a legal system under which the decedent has the right to own and hold property during his life time.

(2) Sec. 259 provides separately for reciprocal rights of inheritance concerning real and personal property. In cases in which real estate is involved, there must exist a right on the part of the decedent to own real property; in cases in which the inheritance in California of personal property on the part of nonresident aliens is involved, there must be a right on the part of the hypothetical foreign decedent to own personal property in his country.

> Until late, e.g., real property was not subject to ownership in the Soviet Union, at least not more than one-family houses standing on state-owned real property.

(3) Sec. 259 requires that the foreign country involved has a legal system under which property owned by a decedent devolves by death to another.

> Such a legal system is usually statutory, but not always. In Israel, e.g., when the devolution of an estate is governed by Jewish law, the legal system is unwritten law. Some foreign legal systems do not provide a law of inheritance and succession, such as the early Soviet law.

(4) In the case that the California decedent dies intestate, the foreign country involved must provide for a legal system of statutory succession;

in the case that the California decedent leaves a last will, the foreign country involved must provide for a system of inheritance according to the properly expressed wish of the decedent, usually a law of last wills. These foreign legal institutions must apply under the "same terms and conditions" clause to the class of which the foreign claimant is one.

> Assume, the nonresident foreign claimant under Sec. 259 is a cousin twice removed. Under some foreign legal systems, a cousin twice or further removed (and so an American citizen who is a cousin twice or further removed) from the decedent is precluded to take under the statutory order of succession. Laws restricting succession by law to close relatives are found in the Soviet orbit and also some other countries. Some foreign legal systems have, at least for certain periods of time, not granted a right to dispose of property in case of death by last wills or similar devices.

(5) Secs. 259 et seq. require that there is a right to take from an estate in the foreign country involved. Such a right of inheritance is contrasted with the possibility to take in the uncontrolled discretion either of the foreign "probate" court or foreign administrative authorities.

> E.g., it was held in Estate of Krachler, that under National Socialism, a statute of 1938 provided that last wills could be disregarded by German courts when in the discretion of the court the last will was contrary to the duties of the decedent toward his family and the duties which a decedent who is conscious of the healthy national sentiment has. In other cases, it was held that under a German Decree of 1944 the statutory order of succession could upon application be disregarded for the same reasons.

There is a serious question whether the burden of proof of a non-resident alien claimant can be met when the foreign law of succession and inheritance is unknown.

> E.g., the laws and decrees issued in Communist Hungary over several years were communicated only to high Hungarian government officials and other trusted persons and are unknown to us. The Rumanian official gazette in which statutes and decrees were published, has not been available outside of Rumania for several years. Communist Chinese laws are, on the whole, not available to outsiders; there is no regular method of publishing statutes and decrees in Communist China.

There is further a serious question whether a claimant has a right to take from an estate if there is no system of courts in the foreign country involved in which the claimant could prosecute his rights.

E.g., for many years, China had no system of courts.

The question arises further if there is a right of inheritance when the claimant cannot employ counsel for the prosecution of his rights who would be in a position to present the claimant's claims fairly.

> E.g., in some Soviet-dominated countries, attorneys take an oath to practice law in accordance with the needs of their nation; in the German Democratic Republic, the Minister of Justice has made statements according to which opposition on the part of attorneys to demands of the East German Government must cause the removal of the attorney from his office. In practically all Soviet-dominated countries, a claimant may have only an attorney who belongs to a cooperative of attorneys and who is assigned to him by the administrator of the cooperative, and the Attorney General or another political appointee may issue directives to the cooperative. Experience has shown that on the whole attorneys belonging to cooperatives in Czechoslovakia and Poland do not even answer letters of American citizens and refuse to become active for them. In the Soviet Union, the"probate" of estates is handled by Notaries Public (state officials) and legal representation of claimants before them is the exception rather than the rule.

In other words, the question arises whether the right of inheritance requires certain minimum standards of justice.

(6) Secs. 259 et seq. require that an American citizen may take from an estate in the foreign country involved.

As previously shown, there may be reciprocity concerning personal property, but not real property as regards a particular foreign country.

> In some jurisdictions, such as Finland and the Ryukyu Islands, aliens have no right to inherit real property.

(7) Secs. 259 et seq. require that all American citizens may take from an estate in the foreign country involved.

E.g., in Estate of Leefers it was held that there were no reciprocal rights with National Socialist Germany at a certain time because American citizens who were Jews or expatriated from Germany because of "anti-social conduct" (emigrants for political, religious or racial reasons) or persons who failed to return to Germany on demand of the German Government had no right to inherit. Under the law in existence in certain Mohammedan countries, only a Mohammedan may inherit from a Mohammedan. Under Soviet law, as it existed for decades, emigrants from the Soviet Union were under a disability to take from an estate in the Soviet Union. Under East German law, the property rights of an emigrant escheat to the Government of the German Democratic Republic.

(8) Secs. 259 et seq. demand that an American heir acquires more than mere title, but also the right to hold and enjoy inherited property, Estate of Arbulich.

E.g., under Hungarian and East German law, the property inherited by aliens may not be administered by the alien heirs or administrators appointed by them; rather, the property is administered by government appointed alien property custodians; in the German Democratic Republic, property of aliens with whose countries no treaty relations exist (such as the United States of America) is transferred to the Alien Property Custodian who does not administer it in segregated form, but puts it into a common fund; the sole use of these commingled funds provided by Decree is the payment of administration expenses. When a foreign country refuses admission to aliens or grants such admission only under unacceptable or undesirable conditions, the question arises whether the alien heir could transfer his inherited funds or funds derived from the sale of inherited property to other countries, Estate of Arbulich. In some countries, the transfer of funds is merely restricted by the availability thereof; in other countries, such as National Socialist Germany and Hungary, permission to transfer inherited funds may be granted or refused arbitrarily; in National Socialist Germany, a petition for the transfer of funds could be made only once and could not be repeated. In the Soviet Union, inherited funds were not transferable as a matter of right until 1956.

II. Arguments for and against Secs. 259 et seq.

(1) Courts have held that the urgency clause preceding the original enactment of Secs. 259 et seq. is not part of the statute and therefore not an aid in the interpretation of these sections.

Also, it is unknown what facts the drafters of the urgency statement had in mind. I assume you believe that the urgency statement indicates that the legislature had in mind to differentiate between "friendly" and

"unfriendly" nations. While I believe that your report indicates such a belief, it would appear that there is no such distinction in the statute.

In any event, it would be difficult to find foreign countries to which some of the urgency reasons have applied or do apply. We know, e.g., of no foreign country in which inherited property was taken by "confiscatory taxes for war uses".

The statute achieves its purpose, however, without regard to the reasons stated in the urgency clause.

(2) On page 6 of your report you refer to the California decisions under which reciprocal rights of inheritance must exist at the time of the death of the decedent. The reason for such holdings were not indicated by the courts, but it may be assumed that this time was deemed the critical time as it is the time when under the foreign legal systems the rights of the heir vest. There are, however, a few foreign legal systems under which an estate vests only by judicial declaration and there is no decision which deals with such a situation.

It would seem that the statute should be amended to provide expressly that reciprocal rights of inheritance should exist at the time when distribution is made; this would be more fair and equitable. If it were argued that late changes in the foreign law might not be known at the time of distribution, the answer would be that under the presumption that foreign law is at a later time the same as it was previously, absent proof to the contrary (Estate of Kennedy), the court would apply the latest available foreign law.

(3) On page 8 of your report you point out that courts have held reciprocal rights to exist and not to exist with the very same countries. I believe

this statement should be supplemented by reference to the fact that at certain times certain foreign laws were not known to the expert witnesses involved or given different interpretations by them, that in quite a few of the cases mentioned by you, there was no disputed issue before the trial court concerning the applicable foreign law and that the time factor (the time of the death of the decedent) frequently made a considerable difference in the applicable law.

(4) The principle of reciprocity has from time to time been employed in American jurisdictions, e.g., concerning the acquisition of public lands, mining rights, rights to practice a profession, etc. It is a principle of self-protection and applied in many foreign countries when rights of inheritance of American citizens are involved.

(5) On pages 10 and following you make frequently reference to the alleged intent of the legislature to prevent assets from falling into the hands of unfriendly nations. I have stated above that any such intent is not a part of the statute.

(6) On page 11 you refer to the fact that the United States Government has concluded numerous treaties assuring American citizens the right of inheritance. As pointed out in Clark vs. Allen and decision cited there, these treaty guarantees are mostly quite inadequate and, one might add, invite statutory supplementation on the State level.

(7) On page 11 you doubt the educational factor of Secs. 259 et seq. That these sections and similar enactments in other states have proved educational, would seem to appear from various foreign enactments and directives issued in foreign countries within recent years.

E.g., in West Germany, alien charities were legislatively granted the right to take from an estate in Germany in 1953. In Yugoslavia, a (binding) directive was issued that the decree dealing with foreign ownership of real property could not be applied so as to preclude the right of aliens to inherit real property. In the Soviet Union, the 1956 decree providing for the transferability of inherited funds is probably directly attributable to the failure of Russian nationals to inherit in the Western states of the United States of America. In the German reciprocity adjudication, documents were presented under which "dampers" were to be applied to the execution of certain National Socialist decrees in order not to jeopardize German interests abroad.

(8) Admittedly, Secs. 259 are defective in not protecting a nonresident alien claimant against confiscation or similar measures in his own country. Bulgarian heirs, e.g., are stated to have the choice to transfer inherited funds to a State bank or to go to a "re-education camp" as wealthy owners of property. In many foreign countries, such as the Soviet Union and East Germany, an heir will receive the equivalent of inherited funds in domestic currency according to an officially established, unsound rate of exchange. I do not know of confiscatory taxation of inherited funds in foreign countries at this time. Prohibitive estate taxation (you mention Great Britain) is frequently avoided by treaties concerning the avoidance of dual taxation. A statute like the NewYork statute would therefore be desirable as an addition to, but not as a substitute for, Secs. 259 et seq.

(9) Such additional legislation might either be based on judicial knowledge or finding that the nonresident alien claimant may not enjoy or fully enjoy the inherited property rights or be based on a reference to the United States

Treasury legislation under which government funds may not be transferred to certain foreign countries. It is submitted that the latter method would create the tie between state legislation and policies concerning unfriendly foreign countries which you deplore.

(10) Secs. 259 et seq. might also be strengthened by requiring that - as is the case under the Oregon statute, see Estate of Krachler - the foreign law under which the hypothetical American claimant would take must grant substantially the same rights as California grants to an heir.

(11) On page 21, you refer to the expense and burden of proof in establishing the foreign law. The fee paid to expert witnesses on foreign law is usually quite moderate as they cannot be employed on a contingent basis. I agree with you, however, that the 1957 statute concerning judicial notice will not decrease the expense of ascertaining the foreign law, as it must be brought to the attention of the court by the parties or aids to the court.

(12) On page 22, it is stated that in many litigated cases reciprocity legislation has frustrated the will of the decedent and resulted in decisions in favor of more distant relatives or in favor of the State of California. I believe that this statement is incorrect. First, in some cases the American claimants were as close or closer related than the nonresident alien claimants who claimed under a will; second, your statement applies only to inheritance by last will; third, when the State of California prevailed, it prevailed over another Government agency, namely the United States government. It should also be stated that in a large number of cases, the nonresident alien claimants are merely discovered by domestic or foreign commercial heir-searchers.

Conclusion

One of the principal factors in litigation concerning Secs. 259 et seq. has been that their meaning has not been sufficiently spelled out by the Legislature. It is therefore respectfully submitted that Secs. 259 et.seq. be amended to provide in detail that they require that

(1) the foreign legal system provides for the right of the decedent to own, hold and enjoy real property; and the same as to personal property;
(2) the foreign legal system provides for the devolution of such property by succession or inheritance;
(3) the foreign legal system grants an heir the right of inheritance, subject only to judicial discretion, a right which may be prosecuted in an established court and prosecuted with the aid of independent counsel; and that the applicable foreign law must be ascertainable;
(4) the hypothetical American claimant has the right to hold and enjoy the property; and that all American citizens must be able to do so on an equal basis.

The principle of reciprocal rights, it is submitted, is a sound one and should be supplemented by the following provisions:

(5) reciprocal rights of inheritance must exist at the time of distribution;
(6) the hypothetical American must have in the foreign country involved the same rights of inheritance and succession as granted by the law of California to heirs here;
(7) when there is reason to believe that the nonresident alien would not be able to enjoy or fully enjoy the inherited property, the funds be not transferred, but paid into the State Treasury for a limited time, after the elapse of which without an order to transfer having been made in the meantime, the property escheats to the State of California.

It would seem that the unfortunate position into which the United States has been plunged in having to safeguard and defend our way of life, should cause the Law Revision Commission to study not only arguments for the repeal of Secs. 259 et seq., but also the arguments in favor of such legislation and particularly the provisions of foreign law which these Sections combat. I respectfully submit that in normal times the fight against foreign measures opposed to American

interests might well be left to the Federal Government, but that in the present fight against Communism (or in any fight against a hostile government which tries to assert itself all over the world) one should not withdraw from the situation as it exists.

Very truly yours,

SIG: Bill

William B. Stern
Foreign Law Librarian

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July 23, 1957

Professor Harold Horowitz
Stanford University
School of Law
Stanford, California

Dear Professor Horowitz:

I would like to supplement my Memorandum of today as follows.

On page 8 of your report you point out that California courts have found reciprocal rights of inheritance to exist with German-occupied Holland, but not with German-occupied France and Greece.

Actually, the courts had to deal in these cases (as many trial courts have to deal in other cases) with the question whether Sec. 259 contemplates consideration of the law of an occupying regime which is not recognized, i.e., whether Sec. 259 deals with the actual situation as it exists in the foreign country involved, or whether Sec. 259 contemplates only the theoretical legal system of a regime which is recognized by the United States Government. In Estate of Blak (your footnote 46) the court held the pre-war Netherland law to be the applicable law. Similarly, trial courts have held the pre-war Austrian law to be the decisive law in Austria during the National Socialist occupation. On the other hand in the cases dealing with occupied France and Greece courts apparently held the German-imposed law applicable.

It would seem that Sec. 259 contemplates the actual rights, rather than hypothetical rights which an American citizen may have in a foreign country and I therefore would like to add the following suggestion for clarification of Secs. 259 et seq.:

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(8) reciprocal rights of inheritance must be determined in accordance with the actual legal situation in a foreign country, regardless of whether this regime is recognized by the United States Government or not.

Sincerely yours,

SIG: Bill

William B. Stern
Foreign Law Librarian

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