Date of Meeting: October 8-9-10, 1958
Date of Memo: October 2, 1958

Memorandum No. 3

Subject: Study #25 - Probate Code Section 259, et seq. - Nonresident Alien Heirs

At its meeting on September 29, which I attended, the Northern Section of the Committee on Administration of Justice had before it the recommendation of the Commission relating to the Right of Nonresident Aliens to Inherit, a copy of which is attached hereto. Attached also are copies of a C. A. J. staff memorandum on this matter dated September 8, 1958 and the minutes of a meeting of the Northern Section held on September 11, 1958.

As will appear from the last two documents enclosed, the C. A. J. staff and the Northern Section have raised a number of questions concerning this Recommendation, at least some of which I believe are substantial enough to require careful study by the Commission.

In the course of the discussion at the September 29 meeting the following occurred:

(1) I stated that I thought that the Commission would probably not be particularly resistant to the suggestion that a severability clause be added to the bill (See page 1, Section Minutes).

(2) With respect to adding a section to the bill specifying its effective date (Section Minutes, page 2):

a. All present agreed that the matter of effective date should be covered one way or the other.

b. It was also agreed that there are two separate constitutional problems involved -- one with respect to the proposed repeal of Section 259 and the other with respect to the proposed enactment of the new impounding statute.

c. Several members of the Committee felt quite strongly that it would be unconstitutional to make the act retroactive in either of its aspects.

3. There was little discussion of the point made regarding Probate Code Section 1026 (Section Minutes, page 2). At least some members of the Section apparently feel quite strongly about this.

4. Regarding the proposal to enact a converse presumption in Section 1044 (Section Minutes, page 2), I stated that I did not believe that the Commission would see any strong objection to doing so.

5. Re the proposal to amend Section 1045 to empower the personal representative to file a petition for impounding (Section Minutes, page 3): The position was taken that this would be consistent with the representative's general obligation to protect the interests of all persons involved in a probate proceeding and to bring to the attention of the court matters which it ought to take into account in such a proceeding. It was also stated that such an amendment would be consistent with the present language of Probate Code Section 1080.

6. It was agreed all around that the questions raised with respect to the phrase "claim to a present interest" in Section 1045 was well taken and raises a most serious problem with respect to the whole notion of impounding

a foreign heir's share of the estate. The following suggestions were made as to how the problem might be solved:

a. Provide that the estate be distributed by the Probate Court, including future interests to foreign heirs, but that the court be given some kind of continuing jurisdiction to determine the status of foreign heirs having future interests when the interests become possessory.

b. Provide that future interests to foreign heirs not be distributed and that the estate be kept open until such interests become possessory at which time the question of the status of the foreign heir be determined, the Public Administrator being charged with responsibility of administration in the interim.

c. Provide that where future interests of foreign heirs are involved the property be liquidated and all interests in the property involved be given a present value through use of the annuity tables and either distributed immediately or impounded.

d. Provide that when future interests of foreign heirs are involved the court shall be empowered to create a trust in order to defer the determination of the foreign heir's status until his interest becomes possessory.

It was recognized that all of these are merely possibilities and that it will be difficult to work out a satisfactory solution to the problem.

7. I am not entirely clear as to what the Section has in mind with respect to "the gap left as to the effect of a decree of final distribution in probate" (Section Minutes, page 3). In the course of the discussion I stated that I should have thought that if no person who might have filed a petition under Section 1045 had done so and the estate were distributed in a way in which it would not have been had such a petition been filed, the decree would be res judicata and it would be too late then for anyone to propose impounding. I do not believe there was any disagreement from this view but the suggestion was made that the statute should perhaps spell out when a petition for impoundment may be filed. In this connection the statement was made that the situation should be thought of as substantially similar to that of a petition to determine heirship.

8. I stated that the Commission would look into the necessity of making specific provision in the statute for such sales of property as would be necessary to effect a conversion of the estate or a part thereof into cash. (Section Minutes, page 3).

9. I said that I thought the Commission would probably not be resistant to the notion of providing that rights arising later in time under the statute should be made subject to final disposition made under earlier filed petitions. (Section Minutes, bottom page 3, top page 4)

10. With respect to the meaning of "escheat" as used in Section 1048 (Section Minutes, page 4), I stated my belief that the Commission had in mind an automatic and permanent escheat at the end of ten years and that probably the best way to provide for this would be to empower the Attorney General to make a motion in the probate proceeding to have the property disposed of in that way.

11. As for attorney's fees (Section Minutes, page 4): in the course of the discussion various questions were raised as to what attorneys should receive fees and when the fees should be paid. If the whole question is to be re-examined, perhaps the best way to do it would be to try to figure out what the basis for the payment of fees is (e.g., is it that the attorney has contributed to the creation and preservation of the res?) and then determine whether there is any reason for delaying the payment of fees to particular attorneys until long after the services have been rendered.

12. With respect to the deletion of "by the facts existing" from Section 1050 (Section Minutes, page 4) I doubt that the point is particularly well taken; on the other hand I doubt that it is important enough to warrant resistance on the part of the Commission.

13. The members of the Section seemed to be divided in sentiment at the end of our discussion of the question of the date as of which the status of a foreign heir should be determined. It was recognized that a relatively late date is desirable but it was pointed out that this would justify an authorization of an appellate court to act on the basis of a change in the controlling facts which occurs even after the date of the order. It seemed clear that there were some present who were unhappy about the possibility of a trial court's holding a matter under submission pending a possible change in the relevant laws and practices of a foreign country; on the other hand, some seemed to think that this might be desirable. I should say that the consensus probably was that the time specified in the statute should be the date of hearing.

14. I stated that the Commission would give careful consideration

to the suggestions made concerning the procedural provisions of Section 1050.5 (Section Minutes, pages 4 and 5).

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

September 8, 1958

MEMORANDUM

Re: New Agenda No. 1 (1957-58 Agenda No. 32)
Law Revision Commission Proposal--Probate Code 259 et seq. and New Probate Code 1044 et seq.

This Law Revision Commission recommendation, to be submitted to the 1959 Legislature, is 1) for the repeal of present Sections 259, 259.1, 259.2; and 2) enactment of a new Article 4.5 of the Probate Code providing (a) for impounding of the share of a non resident alien when it appears that he will not have the substantial benefit, use or control of money or other property due him; (b) for eventual escheat of the alien's share, to the State of California, after ten years, if no petition is filed by such alien, etc. or the owners of the next eventual estate, and a showing made that the claimant is not a "disqualified" alien, within such ten year period, as provided in the proposed new sections.

The basic research study was made by Professor Harold W. Horowitz of the School of Law, University of California at Los Angeles.

Background.

The Committee on Administration of Justice of the State Bar, after a considerable amount of study, recommended that the Law Revision Commission be asked to study the subject matter. The Commission, at Board request, did undertake such a study. The present measure is the result of such study.

In its 1956 Report, (July-August, 1956) the C. A. J. reported that because of the introduction of a bill in the Legislature on the subject, it felt that it was imperative that the committee's conclusions be reported to the Board. Accordingly, the C. A. J., in its said report, recommended 1) that Sections 250 et seq. be repealed; and 2) that a statute be substituted, based upon a temporary impounding principle, and ultimately escheat to the State if "qualified" claimants did not file petitions for distribution of the share within 10 years. A draft statute was prepared. See St. 58-125 appearing in the material under Item 32, 1957-1958 Agenda. The Board referred the draft statute to the Commission.

General Comparison Between Proposals.

The Commission measure and the C. A. J. draft appear to be identical, in principle. Such differences as exist result mainly

from more precise drafting detail by the Commission and changes in style or wording.

Hence, unless some real objection is now found to the principle, already recommended by the C. A. J., it would appear to follow that the principle of the Commission measure is to be approved.

Constitutional Questions.

As a matter of completeness, it should be now pointed out that, if adopted, the measure will probably be subjected to constitutional attack, particularly as to the "escheat" and "gift over" provisions of law. By the latter is meant those provisions which provide that if the first heir does not claim or cannot "qualify" within five years of the impounding order, the next eventual heir, if qualified, may claim.* In short, neither of the proposals is a mere "impounding" proposal for the protection of the "owner." Rather, each is an "impounding" statute, with "gift over" after five years, and "escheat" after ten years.

It has been recognized by the courts of this State that the Legislature may provide, in case of intestacy, that the estate vests in the non resident alien heir as a conditional estate, "subject only to the contingency that if he fails to appear and claim the same within five years his right ceases, and the property then vests in the state, not strictly by escheat for want of heirs, but by virtue of the statute." See Estate of Sorensen, 44 C. 2d 306, 308 (1955); Estate of Caravas, 40 C. 2d 33, 37 (1952)-- time to claim suspended by Trading with the Enemy Act.

The question of interference with federal conduct of foreign relations may also be raised, as it was raised (unsuccessfully) in Clark v. Allen, 331 U. S. 503 (1947).

The Legislature of the State, however, has broad power in the matter of laws relating to intestacy and testimentary dispositions. Speaking generally, it would appear that the general principles of the measure are within the power of the state Legislature, subject, however, to the paramount provisions of treaties that provide for rights of aliens in conflict with the limitations herein involved. (See Estate of Romaris, 191 Cal. 740--treaty).

It is believed the prime interest of the Bar in legislation of this type is not in the "escheat" provisions, but in provisions which will aid in carrying out the expressed or presumed intent of the decedent. For this reason, and also because particular features might be held invalid (for example, the "presumption"

*Section 1046.5 provides for the heirs, legatees and divisees of the first heir.

provisions re "blocked" countries), it is believed a broad "severability" section would be appropriate. (See infra.)

Effective date and pending estates.

No doubt if enacted, there will be substantial litigation if the matter of application to pending estates is not clarified.

It would seem to be dangerous to attempt to make the repeal of Section 259 et seq. and enactment of new Section 1044 et seq. expressly applicable to pending estates. Generally speaking, at least in case of intestacy, title to property vests in the heirs as of the date of death (e.g. Estate of Romaris, 191 Cal. 740 (1923). Repeal of Section 259 will apparently change heirship, as "reciprocity" is a different question from "substantial control," etc. So also, it would seem that the "gift over" and "escheat" features of Section 1044 et seq. might be deemed a retroactive change in heirship. However, this view is expressed without the benefit of extended research.

The question is raised: Would it be profitable to attempt to work out some form of suggested provisions that would ease the task of the courts, in application, or endeavor to give greater scope to some of the new provisions as to pending estates, than would be the case if the entire legislation were to be deemed applicable only where the decedent died after its effective date. (See infra.)

Drafting detail.

As the Commission and the Committee have been in apparent agreement in principle, the present task of the Committee appears to be the making of suggestions upon the two points mentioned above and upon various detailed provisions. Such suggestions, it is to be recognized, may involve considerations of drafting policy and any improvement resulting from further thought may or may not be deemed of significance in the overall picture.

A check list follows for the consideration of the Committee.

Suggestion No. 1. Sec. 1044.

Add to present subpar. (b):

"Beneficiary" includes an equitable remainderman."
Comment: This is perhaps unnecessary, but will eliminate technical contentions. Section 1045 refers to the claimant of a "present interest" and seemingly adds to uncertainty as to the intention of "beneficiary."

Suggestion No. 2 Sec. 1044.

Add a new sentence to the end of Section 1044:

"There is a disputable presumption to the contrary if the person does not reside in such a country."
Comment: The C.A.J. draft (St. 58-125), in the first paragraph, adopted the same test but seemingly as a "conclusive," rather than "disputable presumption." Sec. 1044 makes no provision for the burden of proof, or of going forward with evidence. If no affirmative provision is made, as suggested, a scintilla of evidence may impose practical burdens of expense and difficulties of proof upon the claimant, this being one of the factors which it was hoped could be avoided.

As to the "disputable" nature of the presumption, probably the Commission concluded that it would be safer not to attempt a "conclusive" presumption, based upon findings of federal officials, etc.

Suggestion No. 3. Section 1045

In the first clause, the words "claim to a present interest" seem to carry a heavy burden and clarification may be desirable.
Comment: An explanation as to the intended function of "present" would be of assistance. Also see comments under Suggestion 4.

Suggestion No. 4. Section 1045

Add after the second sentence, appropriate provisions empowering the probate court to withhold distribution, and to retain jurisdiction where it appears that the distributee is "disqualified" at the time of distribution and the interest is a future interest. The problem of remainders, vested and contingent, legal and equitable, was not considered by C. A. J. The sale of a contingent or even vested future interest, particularly with a "disqualified" alien as owner, is apt to be sacrificial. It would seem from the word "present" that the draftsmen may contemplate that in case of a legal remainder to a disqualified person, the issue of "qualification" is to be postponed until the interest vests "in possession." Under the present procedure, absent a trust, the probate court would not have continuing jurisdiction under normal concepts. Is the critical time to be probate distribution where the remainder is a legal one and termination of trust (which may be many years later) if the remainder is equitable? The solution suggested above is a tentative one. The writer is not familiar with the various considerations.

Suggestion No. 5. Section 1045.

Add to Section 1045 provisions amplifying the method of "converting" such interest into cash. For example,

"whenever it is ordered that the interest of such person be converted into cash, it shall be the duty of the executor or administrator to sell such interest, at one or more sales, in the same general manner, method of procedure and with the same force and effect as provided by this code for sales of property of estates of deceased persons, except as may be otherwise modified, limited or directed by order of court."

Comment: Foregoing adapted from Pro. Code Sec. 294 (estate of person missing more than 7 years). The critical problem is whether such provisions will be deemed sufficiently detailed to give insurable title to a purchaser.

Suggestion No. 6. Section 1045.

Change the first sentence to provide for the situation where an order distributing such interest has already become final, etc. For example:

"Whenever <u>it appears that</u> a person asserting a right ...in all or any part of a decedent's estate <u>being</u> probated...or of a testamentary trust <u>being</u> administered...is a disqualified non resident alien, <u>and no final order distributing such interest free of trust has been made in the decedent's estate or, if such interest is in a testamentary trust, that the trust assets have not theretofore been validly distributed free of trust</u>, the court shall, upon petition, etc.

Comment: As to a non trust situation, the C. A. J. draft contemplated that the impound order would be made before distribution. Present Section 1045 is silent. The Attorney General could conceivably take the position that the estate in probate may be re-opened (subject to the rights of innocent third parties) to force an impound, despite a final decree. As to the trust situation, the matter is compounded by uncertainty as to a cut off date, for asserting the disqualification in case of trust interests. The suggested draft above is not satisfactory as to trust features. Must the Attorney General and others (or the court of its own motion) raise the point <u>before</u> the trust is distributed in probate? See Suggestions 3 and 4 above.

Suggestion No. 7. Section 1047.

Add to the first clause:

"At any time after the expiration of five years ... and subject to rights claimed in any pending petition pursuant to Section 1046 or 1046.5 ...

Comment: This may be unnecessary.

Suggestion No. 8. Section 1047.

There seems to be an overlap between Section 1046.5 and Section 1047 in certain cases. This probably can be resolved by construction and no specific amendments are now suggested.

Comment: Section 1046.5 embodies a feature not found in the C. A. J. draft in that within five years an heir, legatee or devisee of the "owner" if not disqualified may petition.

This probably is a better expression of presumed intent than the C. A. J. draft. However, in certain cases, for example, children of the "owner," it would appear that they could qualify both under Section 1046.5 and 1047 (5 and 10 year period, respectively).

Suggestion No. 9. Section 1048.

Insert in this sentence, appropriate provisions for the case where a petition may be pending under Section 1046, 1046.5 or 1047.

Comment: See Suggestion No. 7 above.

Suggestion No. 10. Section 1048.

Clarify whether the "escheat" is intended to be a "permanent escheat" or an "escheat" requiring a further judicial proceeding.

Comment: The C. A. J. draft did not go into this problem. Section 1049 refers to an order for "escheat." C. C. P. 1300 defines "escheat" generally as property which has vested, as to title, in the State, subject, however, to the right of claimants to appear and claim the escheated property or any portion thereof, as "provided in this title."

"Permanent escheat" is defined as property which has "vested absolutely" in the State, pursuant to a proceeding (C. C. P. 1410 et seq.) or "operation of law."

It may be that "escheated property" as used in Section 1048 is a term of art. It would not do any harm to add: "as 'escheated property' is defined in Article 1, Chapter 1, Title 10, Part 3 of the Code of Civil Procedure," if the intent is not for a permanent escheat.

If the intent is for a permanent escheat, should not the expression be "permanently escheated" property. Is it intended 10 years be the "cut off" date?

Suggestion No. 11. Section 1049.

Does the present wording permit an attorney's fee to the Attorney General's office where an escheat order is made?

This could be cured by adding to "payment is made," the words "pursuant to Section 1046, 1046.5, or 1047."

Comment: Probably a minor point.

Suggestion No. 12. Section 1050.

Change "shall be determined by the facts existing as of the date of the order," to "shall be determined as of the time of hearing on a petition pursuant to this article. For good cause shown, the court may set aside a submission and order a further hearing."

Comment: It seems difficult to find any apt expression. Consideration might be given to omission of statutory provisions on this subject, on the theory that essentially the statute is an impounding and not an inheritance statute.

In any event, a reference to "facts" is at variance with the concept of judicial notice of foreign law; and the time of "order" as the critical time does not allow for cases where the order may follow the hearing by 30 or 60 days.

Suggestion No. 13. Section 1050.5.

Should the second sentence be revised to provide for mailing of a copy of any petition only to the Attorney General and non petitioning personal representative? This would require textual changes in the third sentence.

Comment: Generally speaking, the concept that a copy of a petition shall be mailed to those requesting special notice is at variance with Section 1200. Why should not answers also be mailed? A proposal of this type for probate practice generally has not met with favor in the past.

Suggestion No. 14. Section 1050.5.

Add appropriate provisions requiring notice to be given by mail to the heirs of the decedent and devisees and legatees named in the will in the manner specified in Section 328 or to the heirs of the decedent in the manner specified in Section 441.

Comment: While it is true that the court may direct notice to persons other than the Attorney General, the personal representative and those who have requested special notice, this is not mandatory. It is notorious that many persons interested do not request special notice. In a matter of this type, where escheat may result, it would seem that the policy should favor widely mailed notice.

Effective Date, etc. The following draft is submitted for consideration:

Section _____. This Act shall apply to estates of decedents dying after its effective date. Nothing herein shall be construed to limit the power of a court sitting in probate to make appropriate orders in pending estates, to protect the interests of heirs, legatees, devisees or beneficiaries of testamentary trusts who are entitled to inherit and take under the laws of this State as they existed prior to the effective date of this Act.

Severability.

Section _____. If any provision of this article or the application to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this article which can be given effect without the invalid provision or application and to this end the provisions of this article are declared to be severable.

Comment: See C. C. P. 170.6. This would seem to cover treaty situations.

Probate Code 1026.

An inconsistency may well exist between Section 1026 and the new Act; at least, confusion is indicated. The following amendment to Section 1026 is submitted for consideration:

Section 1026. A non resident alien who becomes entitled to property by succession must appear and demand the property within five years from the time of succession; otherwise his rights are barred and the property shall be disposed of as escheated property: provided, if an order is made pursuant to Section 1045, the provisions of Article 4.5, Chapter 16, Division 3, and not of this section, shall be applicable.

Comment: The foregoing is not too satisfactory, but points up the problem.

Alternatively, it would be possible to provide that in the cases covered thereby, Article 4.5 and not this Section 1026 shall apply.

It may, of course, be argued that Section 1026 should remain in effect, so that compliance with both Section 1026 and Article 4.5 would be required. Undoubtedly there would be confusion where an impound order had been made.

ADDENDUM

Section 1045.

A personal representative should have the right to ask for an impounding order, etc. as provided in Section 1045. The present wording is "any party in interest or the Attorney General." Thus, present wording might be construed (undesirably) to exclude the personal representative.

Garrett H. Elmore

MINUTES OF MEETING

NORTHERN SECTION

COMMITTEE ON ADMINISTRATION OF JUSTICE

SEPTEMBER 11, 1958

A meeting of the Northern Section of the Committee on Administration of Justice was held on Thursday, September 11, 1958 at 4:00 p.m. in the offices of the State Bar, 2100 Central Tower, San Francisco, California.

PRESENT: Arthur H. Connolly, Jr., Chairman
Brent M. Abel
James K. Koford
John B. Lounibos
Courtney L. Moore

NOT PRESENT: Forrest A. Cobb, Sr.
Kenneth R. Malovos
Duncan Oneal
Samuel H. Wagener

ALSO PRESENT: Garrett H. Elmore
Vernon M. Smith
Karl E. Zellmann

AGENDA NO.

1 (Old No. 32) Probate Code 259 - Rights of Non resident alien heirs and beneficiaries - Law Revision Commission Measure.

The Section had before it the staff memorandum of September 8, 1958 (St. 58-372). This committee has heretofore favored the repeal of Section 259 et seq. and the substitution of provisions similar to those now recommended by the L. R. Commission. (See 1956 Report, July-Aug. 1956 State Bar Journal pp. 310-311. The Section approves the Commission measure in principle. Such suggestions as it has to offer deal with specific provisions. The Section is quite cognizant that some of these suggestions are directed to the Committee's own 1956 draft, but further study indicates the need for amendment.

(1) Severability. As treaty provisions may conflict and the primary interest of the Bar appears to be for impounding, it is believed highly desirable, if not imperative, that a liberal severability section be added. Otherwise, the invalidation of particular features, for example, the secondary taker or escheat provisions may give rise to difficult questions of legislative intent. Is probate Code Section 259 to be reinstated automatically? It would appear that the proponents would favor a liberal interpretation as to severability. Approve the form on page 7 of St. 58-372.

(2) Effective date. To avoid litigation involving expense and delay, it is recommended that the following section be added:

> This Act shall apply to estates of decedents dying after its effective date. Nothing herein shall be construed to limit the power of a court sitting in probate to make appropriate orders in estates pending at said effective date, to protect and safeguard the interests of heirs, legatees, devisees and beneficiaries of testamentary trusts who are entitled to inherit or take under the laws of this State as they existed prior to the effective date of this Act.

The second sentence is intended to recognize the inherent power of the court to make protective orders. We understand that such orders have been made by some probate judges. As to the first sentence, it seems likely to the Section that an attempted retroactive change of law would be held invalid, as presently the right of heirship is determined as of date of decedent's death under Section 259.

(3) Probate Code 1026. If enacted, the measure will provide a means of impounding the non resident alien's share and impose a 5-year period from the date of the order within which to make claim. Should not a non resident alien whose share is so impounded, without appearance by him, be entitled to rely on these provisions? Otherwise, inadvertent escheats may occur, under Section 1026, requiring appearance within 5 years from decedent's death. The Section does not have any particular solution, but believes that Section 1026 should be amended. Reference is made to page 7 of St. 58-372 for possible solutions.

Comments on Particular Sections of the Act:

SEC. 1044. - The word "beneficiary" appears adequate. No change is suggested.

SEC. 1044. - It is vital that the converse presumption be affirmatively stated; otherwise, certain of the objectives of remedial legislation will be lost. The 1956 C.A.J. draft while stating the matter in terms of a conclusive presumption made express provision for a foreign heir resident in a "non blocked" country. Absent a presumption in his favor (disputable or otherwise), the foreign heir will be confronted with the expense of proving matters affirmatively, if there be a petition by the Attorney General, another heir, or other contestant. The insertion of an affirmative presumption for the benefit of the foreign heir is deemed of great importance.

Form: The Section did not approve the form of an amendment to this effect but calls attention to the staff suggestion that there be added at the end of Section 1044: "There is a disputable presumption to the contrary if the person does not reside in such a country."

SEC. 1045.

(a) Provisions should be inserted to make clear that the personal representative may file a petition for impound. The theory of impound procedure is that the court is protecting the interests of the heir. Absent an express provision it might be held that the executor or administrator was not a "party in interest." Even in the case of heirship, it is now provided by amendment to Pro. Code 1080 that the personal representative may petition, changing the former case law.

(b) Upon further consideration (after the 1956 draft), the Section is most concerned as to the possibility of sacrificial sales of future interests and life estates. The only procedure provided is that the share shall be converted into cash. Further information from the L. R. Commission is desired, as to the intent of the Act, particularly the intended effect of "claim to a present interest." Is it intended that future interests be distributed, subject to a condition subsequent? Or are they to be converted into cash? The Section would oppose the latter, as destructive of the rights of foreign heirs. What is to be done with life estates? Will they bring anything upon sale? Are the words "present interest" to be interpreted by reference to right of present enjoyment and possession thereby delaying the question until such interests vest in possession?

Will the probate court have jurisdiction at some future date, if there is no trust? Hold for further information.

(c) The Section is also concerned with the gap left as to the effect of a decree of final distribution in probate. While the 1956 draft was probably inadequate, it did contemplate that the issue of impound be determined before distribution in probate. This involves questions raised under (b) above, as to intent of the Act. The Section does not approve the text of Suggestion No. 6, page 4, St. 58-372, but such draft calls attention to the need for clarification.* In principle, the Act should provide for the effect of such a decree and indicate clearly some cut off date or dates, for the filing of a petition to impound. Tentatively, it would seem that the issue should be raised before distribution is made in probate. Hold for further information.

(d) Absence of detailed provisions re conversion into cash: There are here problems of (1) who shall have the duty to sell, (2) mechanical provisions such as notice and higher bids; and (3) protection to purchaser at sale. The suggested solution (Suggestion No. 5, page 4, St. 58-372) perhaps should be discussed with title company attorneys. Hold for further information.

SEC. 1047.

(a) It is suggested the following be added "and subject to rights claimed in any pending petition pursuant to Section 1046 or Section 1046.7." This is not a major point, but otherwise the Act requires construction where a prior petition is pending.

(b) There appears to be an overlap between Section 1046.5 and Section 1047, particularly in case of children of the original owner. This again does not seem a major point.

SEC. 1048.

(a) An amendment similar to that suggested for Section

*In passing, it was noted that reference should be to trust assets "validly disposed of" in such draft, rather than "validly distributed."

1047 (to refer to pending petitions) is suggested, but with the same comment (not major).

(b) The word "escheat" is a word of art and, if not amplified, may give rise to litigation. If the intent is for a "permanent escheat" (see C.C.P. 1410) by lapse of time, in the probate proceeding itself, the intent should be more clearly specified. If for an "escheat" under general law, more is required. The C.A.J. draft was similarly ambiguous. Note: Pro. Code 1026 uses "escheat" only. Decisions or practice thereunder might be persuasive to a court. However, C.C.P. 1300 et seq. was later enacted.

SEC. 1049.

(a) Attorney's fees. In limiting the time of payment to the ultimate distribution, the Act necessarily contemplates that services may have been performed years previously. If the services have been performed, and, as the Act recognizes, the attorney is to be paid out of the res, no logical reason appears for thus postponing the time of payment. The Section opposes present provisions. It suggests provisions giving the court authority "At any time after a proceeding is commenced pursuant to this article, ... to provide for the payment of reasonable attorney's fees out of the funds so deposited or the interest of the heir" etc. The precise form was not studied. However, there is a res which is being conserved or whose title is being determined. The court should have continuing jurisdiction to make proper and reasonable awards.

(b) Is it intended that the office of the Attorney General be eligible for an award of attorney's fee? Is clarification desirable? (Minor)

SEC. 1049.5.

(a) The Section believes that it understands the reasons behind these provisions, but desires to inquire as to the status of an assignee for value and in good faith. (Minor)

SEC. 1050.

(a) Reference to "facts" should be deleted. The question may or may not be one of law. However, the word appears unnecessary. Its present may affect recent judicial notice amendments.

(b) Reference to determining the issue as of the date of the order does not allow for the submission of cases, or other delay between the order and hearing. It is suggested that it is sufficient to provide "shall be determined as of the time of hearing on a petition pursuant to this article."

SEC. 1050.5.

(a) The Section does not favor the requirement that a copy of the petition accompany each required notice, but approves such requirement in the case of notice to the Attorney General. The usual practice should prevail, subject to this exception.

(b) In view of the important nature of the procedure, with property rights possibly affected, it is recommended that wording be added, to require, in all cases that notice be given by mail to the heirs of the decedent and devisees and legatees, in the same manner as upon petition for probate of a will; or to the heirs, in the same manner as upon petition for letters of administration. This, in addition to the court's power to order notice. It seems too much to assume that each probate judge, occupied with many matters, will order wide spread notice. Traditionally, this committee has favored wide "notice" provisions, as a matter of fairness, where rights are to be affected. It would be well to follow the will pattern, that failure to give notice shall not be jurisdictional.

Agenda No. 1 continued, for further information.

The meeting adjourned at 6 p.m.; the next meeting to be held at 4 p.m., Monday, September 29, 1958.

Revised: 2/24/58

RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

Relating to the Right of Nonresident Aliens to Inherit

Probate Code Sections 259, 259.1, and 259.2, originally enacted in 1941 as an eve-of-war emergency measure, provide in effect that a nonresident alien cannot inherit real or personal property in this State unless the country in which he resides affords United States citizens the same rights of inheritance as are given to its own citizens. Section 259.1 places on the nonresident alien the burden of proving the existence of such reciprocal inheritance rights. The Law Revision Commission recommends that these sections of the Probate Code (hereinafter collectively designated as "Section 259") be repealed for the following reasons:

1. Section 259 constitutes an undesirable encroachment upon the basic principle of our law that a decedent's property should go to the person designated in his will or, in the absence of a will, to those close relatives designated in our statutes of descent to whom the decedent would probably have left the property had he made a will. Section 259 has frequently caused such property either to escheat or to go to remote relatives of the decedent at the expense of those persons who were the natural objects of his bounty.

2. In the cases where Section 259 is effective it causes hardship to innocent relatives of California decedents rather than to those persons who make the policies of the countries which deny reciprocal inheritance rights to United States citizens.

3. The difficulty and expense of proving the existence of reciprocal inheritance rights is so substantial that even when such rights exist persons whose inheritances are small may be required to forego them.

4. Section 259 does not necessarily operate to keep American assets from going to unfriendly countries. The general balance of trade with the United States in inheritances is so favorable that many such countries find it expedient to provide the minimum reciprocal inheritance rights required to qualify their citizens to inherit here. Moreover, keeping American assets out of the hands of enemies or potential enemies is a function more appropriately performed by the United States Government. This responsibility is in fact being handled adequately by the federal government through such regulations as the Trading with the Enemy Act and the Foreign Assets Control Regulation of the Secretary of the Treasury.

5. Section 259 does not insure that a beneficiary of a California estate living in a foreign country will actually receive the benefit of his inheritance. If the reciprocal rights of inheritance required by the present statute exist the nonresident alien's inheritance is sent to him even though it may be wholly or largely confiscated by his government through outright seizure, taxation, currency exchange rates or other means.

6. Section 259 has led to much litigation. The Attorney General has often been involved since an inheritance not claimed by reason of the statute may eventually escheat. Most of this litigation has been concerned with whether the foreign country involved did or did not permit United States citizens to inherit on a parity with its own citizens on the critical date. As the research consultant's report, infra, shows the results reached in the cases have not infrequently been inconsistent and otherwise open to question.

Taking all of these considerations into account, the Commission has concluded that the game at stake - retaliation against the few countries which discriminate against United States citizens in the matter of inheritance rights - has not proved to be worth the candle in terms of the frustration of decedent's wishes, the denial of inheritance rights to innocent persons, and the time and expense which have been expended by both the State of California and others in the cases which have arisen under Section 259.

The Law Revision Commission also recommends that, whether or not Probate Code Sections 259, 259.1 and 259.2 are repealed, California enact a statute which will preclude confiscation of a nonresident alien's inheritance by the country in which he resides. Several states have already adopted such a policy through the enactment of legislation which provides for impounding an inheritance for the account of a nonresident alien heir when it appears that if it were sent to him he would not have the benefit or use or control of the money or other property due him. Drawing on the experience of these states the Commission has drafted an impounding statute, set forth below, which it recommends for enactment in this State. The principal features of the proposed statute are the following:

1. When it appears that a nonresident alien will not have the substantial benefit or use or control of the money or other property due him under an estate or testamentary trust the property is converted into cash and deposited to his account at interest in a California bank. At any time within five years thereafter the alien (or, if he is dead, his heir, legatee or devisee) may claim the deposit upon showing that no reason for further impoundment exists. If no such claim is made, more distant heirs of the decedent are authorized to claim the deposit within the second

five-year period after the date of impoundment. If the money remains on deposit at the end of the second five-year period it is disposed of as escheated property.

2. To simplify the determination of whether a nonresident alien heir would have the substantial benefit or use or control of the money or other property due him, the proposed statute provides that there is a disputable presumption that he will not if the country in which he resides is designated by the Secretary of the Treasury of the United States or other federal official as being a country as to which there is not a reasonable assurance that the payee of a United States check residing there would both receive the check and be able to negotiate it for full value. Such a federal official is ordinarily in a better position than a California probate court to make such a determination and keep it current. Another advantage of this coordination of state and federal policy is that, as the research consultant's report shows, the Secretary of the Treasury has thus far in practice designated the several "iron curtain" countries as countries in which there is no assurance that the payee of a United States check will have the benefit of it. So long as this practice is followed - and there would seem to be no reason to suppose that it will be abandoned - California assets will automatically be prevented from disappearing behind the iron curtain.

3. The statute may not be circumvented by a nonresident alien heir's assigning his rights thereunder since an assignee's rights are explicitly made no greater than those which the assignor has under the statute.

4. The court is authorized, when making an order for payment or escheat of impounded funds, to provide for the payment of reasonable attorney's fees to any attorney who represented either the person on whose behalf the funds were impounded or the person to whom the payment is made.

The primary purpose of this provision is to enable the courts to protect California attorneys in those cases where impounded funds are distributed to persons residing outside the United States.

The Commission's recommendation would be effectuated by the enactment of the following measure:

An Act to repeal Sections 259, 259.1 and 259.2 of the Probate Code and to add Article 4.5 to Chapter 16 of Division 3 of said Code, all relating to the right of nonresident aliens to inherit property in this State.

The people of the State of California do enact as follows:

Section 1. Sections 259, 259.1 and 259.2 of the Probate Code are repealed.

Section 2. Article 4.5 is added to Chapter 16 of Division 3 of the Probate Code, to read:

Article 4.5. Disqualified Nonresident Aliens.

1044. As used in this article, "disqualified nonresident alien" means a person:

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

(b) Who a court finds would not, as 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, have the substantial benefit or use or control of the money or other property due him.

There is a disputable presumption that a person would not have the substantial benefit or use or control of money or other property due him under an estate or testamentary trust if he resides in a country which is designated by the Secretary of the Treasury of the United States, pursuant to Title 31, U.S.C. Section 123 or any other provision of law, or by any other department, agency or officer of the United States pursuant to law, as being a country as to which there is not a reasonable assurance that the payee of a check or warrant drawn against funds of the United States will actually receive such check or warrant and be able to negotiate the same for full value.

1045. Whenever a person asserting a right or claim to a present interest in 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, the court shall on the petition of any party in interest or of the Attorney General order that such person's interest be converted into cash and deposited at interest to the credit of such person in any state or national bank or banks in the State. The passbook or other evidence of such deposit shall be delivered to the clerk of the court. The bank in which the deposit is made shall make no payment therefrom unless authorized by a court order made pursuant to the provisions of this article.

The order herein authorized may also be made by the court on its own motion. In such case notice of the court's intention to make the order shall be given to the same persons and in the same manner as though a petition had been filed.

1046. At any time before the expiration of five years after the date of entry of an order made pursuant to Section 1045, the person for whom the deposit was made may file in the court which made the order a petition

to have the funds on deposit paid to him. If the court finds that the petitioner is no longer a disqualified nonresident alien the petition shall be granted.

1046.5. If the person authorized by Section 1046 to petition for payment of the funds is deceased, the petition therein authorized may be filed by his heir, legatee or devisee, provided that such petitioner is not a disqualified nonresident alien. If the court finds that the petitioner is not a disqualified nonresident alien and is entitled to the funds on deposit the petition shall be granted.

1047. At any time after the expiration of five years and before the expiration of ten years after the date of entry of an order made pursuant to Section 1045, any person who is not a disqualified nonresident alien and who would have been entitled to the property distributable to the person on whose behalf the order was made had the latter predeceased the decedent may petition the court to order the funds on deposit paid over to him. If a person who would otherwise have been authorized by this section to petition for payment of the deposited funds is unable to do so because he is a disqualified nonresident alien, the right of others to petition hereunder shall be determined as though such person had predeceased the decedent. If the court finds that the petitioner is not a disqualified nonresident alien and is entitled to the funds on deposit the petition shall be granted.

1048. After the expiration of ten years after the date of entry of an order made pursuant to Section 1045, any unclaimed deposit shall be disposed of as escheated property.

1049. When an order is made for the payment or escheat of a deposit made pursuant to Section 1045, the order may provide for the payment of

reasonable attorney's fees out of the deposit to any attorney who represented either the person on whose behalf the deposit was made or the person to whom the payment is made or both.

1049.5. If a disqualified nonresident alien having an interest in all or any part of a decedent's estate probated under the laws of this State or of a testamentary trust administered thereunder or having an interest in funds deposited pursuant to the provisions of this article assigns such interest, his assignee has only the rights given to the assignor by this article. No payment of funds may be made to an assignee who is a disqualified nonresident alien.

1050. Whether a person is a disqualified nonresident alien within the meaning of this article shall be determined by the facts existing as of the date of the order.

1050.5. Any petition filed pursuant to the provisions of this article shall be verified. A copy of the petition shall be mailed in the manner specified in Article 1 of Chapter 22 of Division 3 of this Code to the Attorney General, to all persons to whom notice is required to be mailed by Section 1200 of this code, and to such other persons, if any, as the court may direct. Notice of the time and place of hearing of the petition shall be given to the same persons in the form and manner specified in Article 1 of Chapter 22 of Division 3 of this code.