7/30/57

Memorandum No. 8

Subject: Study No. 25 - Probate Code Sections 259 et. seq. (Inheritance rights of nonresident aliens)

We have received a report from our research consultant on this study, Professor Harold Horowitz of U.S.C. Professor Horowitz recommended that present Probate Code Sections 259-259.2 be repealed, thus abandoning the principle of reciprocity, and that new legislation be enacted providing for the impoundment of an inheritance here if the person entitled to it will not have the benefit of it due to confiscatory governmental policies of the country in which he lives. The study was discussed preliminarily by the Northern Committee of the Commission on July 26. No final committee action was taken at that time for two reasons:

1. We had received a communication from Assistant Attorney General Henry Dietz expressing interest in the study and it was felt that Professor Horowitz should discuss the report with him and report his views to the committee before it acts.

2. Professor Horowitz had received a communication from Mr. William Stern, Foreign Law Librarian of the Los Angeles County Law Library, commenting on a copy of the report which Professor Horowitz had sent him and expressing strong disagreement with the recommendation that the principle of reciprocity embodied in present Probate Code Sections 259-259.2 be abandoned. A copy of Mr. Stern's communication is attached. (Mr. Stern is the gentleman who expressed disagreement in an article in the California Law Review with the Commission's recommendation respecting judicial notice of the law of foreign countries.)

The committee desires to have Mr. Stern's communication discussed by the Commission at the August 1957 meeting.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

JRM:fp

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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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