

Agenda Item #5-

Meeting of:
January 24-25, 1958

Memorandum No. 1

Subject: Study No. 25 - Probate Code
Section 259, et seq.: Draft
of Recommendation and Proposed
Statute

Attached are:

- (1) A proposed recommendation of the Commission and proposed statute on this subject as revised at the December meeting, and
- (2) A copy of a letter from Professor Horowitz commenting on the draft recommendation and statute which was considered at the December meeting.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

JRMJ/J

12/13/57

Revised 1/9/58

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Probate Code Sections 259, 259.1, and 259.2, originally enacted in 1941 as an eve-of-war emergency measure, provide in effect that a nonresident alien cannot inherit real or personal property in this State unless the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Commission recommends that these sections of the Probate Code (hereinafter collectively designated as "Section 259") be repealed for the following reasons: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.

12/13/57

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.

12/13/57

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 decedents' 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.

12/13/57

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 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 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 by 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. Any person having an interest in funds deposited pursuant to the provisions of this article may assign his interest therein. Such an 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 non-resident 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.

Study 25 (12/26/57)

UNIVERSITY OF SOUTHERN CALIFORNIA

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Dear John:

December 22

I have the following comments on the draft of the Recommendation of the Commission:

1. Page 1, paragraph number "1"--strictly speaking it may not be accurate to say that section 259 has resulted in property being disposed of in some manner "at the expense of those persons who were the natural objects of his bounty." In many of the cases where reciprocity was not found it was the United States which lost out, having "vested" the non-resident alien's interest under the Trading With the Enemy Act. This is probably not too important an observation, but was made by Stern in his letter I think, and it might be more accurate to state that section 259 has frequently resulted in disinheritance of the natural objects of the decedent's bounty, with the property then escheating or going to remote relatives. A statement in these terms would include those cases where the United States was actually the litigating party.

2. Page 2, paragraph number "5"--I would suggest stating that if reciprocal rights exist the inheritance "may be" sent instead of "is" sent. For the heir would not receive the inheritance even with reciprocity if the Trading With the Enemy Act applied (as was so in some cases, with a finding of reciprocity and thus a judgment for the United States), or if the Foreign Assets Control Regulations applied (as was so in one case involving Communist China, with finding of reciprocity and deposit in a "blocked account").

3. Page 2, paragraph number "6"--This paragraph concludes with the observation that results reached in the cases have not infrequently been inconsistent. Isn't that point now answered by the judicial notice of foreign law provisions? If it is this part of the Commission's recommendation may carry little persuasion as far as the situation today would be concerned.

4. Section 1049.5--I believe that I have raised this question before: What if a disqualified non-resident alien beneficiary assigns interests to someone who is qualified. In the five year period can the assignee get payment if the assignor is still disqualified? I assume not, but I wanted to point out that I was not completely certain what the meaning of the assignee having only the assignor's rights is.

5. Two questions have come to mind, which I should have raised a long time ago, but I wonder if they are covered by the statute, and, if not,

From Horowitz

-2-

To: JRM

December 22

whether they are important enough to deal with:

(a) A California testator leaves his estate by will in trust to a Californian for life, remainder to a person who at the time of probate is a disqualified non-resident alien. What will happen in such a case? Will the remainderman have five years to become qualified or lose the remainder, even if the life estate continues for more than five years? Would a "deposit" of the remainder in effect be made at the time of probate? A similar problem might arise with a testamentary trust with income to go to a disqualified non-resident alien. What would be "deposited" there, the entire income interest, or just the income payments as they become due? Could that alien qualify after five years for income after that time, or would he lose all claim to his interest under the trust after five years? Though we have always talked of including the testamentary trust the statute deals most clearly just with the lump sum kind of inheritance, as distinguished from future interests or continued claims such as those of life beneficiaries.

(b) What if a decedent domiciled outside California leaves personal property in California, and there is an ancillary administration in California. Should the California court there determine who is entitled to take by applying the law of the domicile, or whatever the California choice of law rule would direct, and then apply the impounding statute with respect to distribution? Are there not some ancillary administrations which result just in ultimate transmission of assets to the domiciliary administrator? If there are will the impounding statute instead direct the California court to impound in California, instead of transmitting to the domiciliary administrator?

We have decided, at the last minute, not to go to the Association meeting, because of the press of some deadlines I have to meet. We regret not seeing all of you.

Our best wishes to Margaret and you for the holiday season.

Sincerely,

/s/ Hal--