February 21, 1957

Agenda for Meeting of Law

Revision Commission On

March 1-2, 1957

1. Minutes of meeting of December 21 and 22, 1956 (sent to you earlier).

2. Study No. 15 - Attorney's Fees and Costs (See Memorandum No. 1 enclosed).

3. Concurrent Resolutions involving study assignments for Commission (See Memorandum No. 2 enclosed).

4. Cooperation with State Bar (See Memorandum No. 3 enclosed).

5. Fish and Game Code revision (See Memorandum No. 4 enclosed).

6. First bound volume of Commission reports, recommendations and studies (See Memorandum No. 5 enclosed).

7. Study No. 25 - Right of nonresident aliens to inherit in California (See Memorandum No. 6 enclosed).

8. General status report (See Memorandum No. 7 enclosed).

9. Study No. 14 - Appointment of administrator in a quiet title action (See Memorandum No. 8 enclosed).

10. Study No. 12 - Taking instructions to the jury room (See Memorandum No. 9 enclosed).

11. Request by Harold Marsh to publish study as article.

12. Uniform Post-conviction Procedure Act (See Memorandum No. 10 enclosed).

13. Condemnation Law and Procedure (see Memorandum No 11)

14. Study No. 26 - Escheat (see Preliminary draft of staff report)

February 21, 1957

MATERIAL TO BRING WITH YOU TO

THE MARCH MEETING

1. Minutes of Meeting of December 21-22, 1956.

2. Printed Recommendation and Study relating to Attorney's Fees and Costs in Domestic Relations Actions.

3. Printed Recommendation and Study relating to Taking Instructions to the Jury Room.

4. A.B. 616 (Fish and Game Code revision).

5. Draft revision of the Fish and Game Code.

6. Present Fish and Game Code (blue book).

7. Regulations of the Fish and Game Commission (red book).

8. Folder of Fish and Game Code material.

9. Mr. Selvin's study of the Uniform Post-Conviction Procedure Act and the Report of the Southern Committee thereon dated December 18, 1956.

MINUTES OF MEETING

OF

MARCH 1 AND 2, 1957

Pursuant to the call of the Chairman, the Law Revision Commission met on March 1 and 2 at Sacramento, California.

PRESENT:

Mr. Thomas E. Stanton, Jr., Chairman
Mr. John D. Babbage, Vice-Chairman
Honorable Jess R. Dorsey (March 2)
Honorable Clark L. Bradley
Mr. Stanford C. Shaw
Professor Samuel D. Thurman
Mr. Ralph N. Kleps

ABSENT:

Mr. John Harold Swan

Mr. John R. McDonough, Jr., the Executive Secretary of the Commission, and Mrs. Virginia B. Nordby, the Assistant Executive Secretary, were present on both days.

The minutes of the meeting of December 21 and 22, 1956, which had been distributed to the members of the Commission prior to the meeting, were unanimously approved.

I. ADMINISTRATIVE MATTERS

A. 1957 Bound Volume: The Commission considered Memorandum No. 5 (a copy of which is attached to these minutes), raising certain questions relating to the preparation of a bound volume containing the Commission's recommendations and studies on topics completed during the year. The Commission reached the following decisions relating to the questions presented:

1. The selection of color of binding was left to the discretion of the Assistant Executive Secretary.

2. It was decided that the 1955 and 1956 annual reports, as well as the 1957 annual report, should be included in the first bound volume. It was suggested that some device such as notching the edges of the annual reports might be used to facilitate locating them in the volume.

3. It was decided that a complete topical index and a table of statutes affected by Commission recommendations should be prepared for inclusion in the bound volume. The Commission decided that no table of cases should be prepared this year, but that the question of including a table of cases would be reconsidered next year if a demand for it arose. The Commission decided that no other indexes or tables should be prepared.

4. The Commission decided that it would be desirable to include in the bound volume the legislative history of the recommendations to the Legislature contained in the volume and concluded that this should be done even though it would delay binding the volume until the legislative session is concluded if funds available this fiscal year will not thereby be lost.

B. General Status Report: The Executive Secretary presented a general status report (Memorandum No. 7 attached) on studies on which the Commission is reporting to the 1957 Session of the Legislature and studies authorized for current study. In addition to the information contained in the memorandum, he reported that, due to an oversight on the part of the staff, Study No. 13 (Bringing in New Parties in Civil Actions) had not been sent to the State Bar until February 13, 1957.

With regard to the Commission's financial situation, the Executive Secretary reported that the Subcommittee of the Assembly Ways and Means Committee which reviewed the Commission's budget had approved both the original budget and the increase of $3,438.00 requested by the Commission to take account of the high cost of printing and distributing its recommendations and studies. The Subcommittee of the Senate Finance Committee also approved the increase and approved all of the original budget except the $5,000 contingency fund for research on studies which might be assigned by the Legislature. It was agreed that an effort should be made to seek reinstatement of the $5,000 item by the Senate Finance Committee when it considers the Subcommittee's recommendations.

The Commission authorized the Chairman to make any changes in the assignments of studies to the Northern and Southern Committees needed to equalize the work load of the two Committees. The Chairman stated that he assigns to the Northern Committee the work on the Commission's Agenda and also the work on Study No. 25, right of nonresident aliens to inherit in California.

C. Cooperation with State Bar: The Commission considered Memorandum No. 3 (a copy of which is attached to these minutes) pointing out certain problems which had developed regarding the cooperation between the State Bar and the Commission. The Commission discussed this matter at length and agreed that an informal discussion with Mr. Ball, the President of the State Bar, would be the best method of proceeding. Although the question was not submitted to a vote, the sense of the meeting was that a satisfactory working procedure might be (1) to send the State Bar a copy of each study prepared by a research consultant as soon as the study is approved by a Committee of the Commission, (2) to send the State Bar a copy of the Commission's recommendation only after it has been finally approved by the Commission, and (3) to tell the State Bar that the study and recommendation will be sent to the State Printer within a specified time whether or not their views have been received. Some members expressed the view that the procedure, especially as to (3) above, ought to be left flexible and it was agreed that for the present we should not attempt to decide upon any specific time limit for State Bar consideration but should tell the Bar that the Commission intends to make every effort to give it a reasonable period of time to consider the Commission's proposals.

D. Publication of Mr. Marsh's Study in U.C.L.A. Law Review: The Executive Secretary reported that he had received a letter from Mr. Harold Marsh, Jr., requesting approval of the Commission to his study on Probate Code Section 201.5 being published in the U.C.L.A. Law Review. The Commission decided that it had no objection to such publication subject to two conditions: (1) that the Commission approve the substance and form of the reference made in the article to the fact that it is based on work done for the Commission; and (2) that the Commission approve the substance and form of any statement made in the article relating to legislative action which may or should be taken on the subject. In view of these conditions the Commission decided to request that Mr. Marsh send a copy of the galley proof of his article to the Executive Secretary so that the Commission may examine it prior to publication.

2. AGENDA

The Commission considered Memorandum No. 2 (a copy of which is attached to these minutes) relating to measures introduced at the 1957 Session giving study assignments to the Commission.

The Commission decided that on the basis of its present information it had no reason to oppose Assembly Concurrent Resolution 67, authorizing the Commission to study the law relating to bail. The Commission directed the Executive Secretary to talk with Mr. MacBride, the principal author of A.C.R. 67, to ascertain more specifically what he has in mind and then to prepare a staff report pointing out the possible nature and scope of such a study.

The Commission considered Assembly Concurrent Resolution 75, requesting it to study the advisability of a separate code for all laws relating to narcotics, with needed substantive revision from a health and law enforcement standpoint. It was decided that Mr. Bradley should speak with Mr. Crawford, the principal author of A.C.R. 75, and suggest that this is not an appropriate problem for the Law Revision Commission to study, pointing out that such a study would involve much technical investigation of the medical aspects of the narcotics problem concerning which the Commission has no expertise and no facilities for holding such hearings and hiring such expert consultants as would be necessary.

The Commission decided that it would have no objection to making the study of the doctrine of sovereign immunity directed by Assembly Concurrent Resolution 76.

The Commission considered Assembly Bill 2401 directing it to compile, consolidate and revise all laws relating to minors so that a code of laws relating thereto may be enacted. The Commission decided to request its legislative members to oppose this measure on the ground that the Commission does not believe it would be wise to set up a special code of laws relating to minors because this would involve a radical departure from the subject-matter basis on which the codes are presently organized.

The Commission decided that it had no reason to oppose Senate Concurrent Resolution 31 directing it to make a study of the provisions of the Juvenile Court Law relating to nondelinquent minors. It was agreed, however, that the Chairman should contact Senator Farr, principal author of S.C.R. 31, about changing the reporting date from the 1958 Budget Session to the 1959 General Session.

3. CURRENT STUDIES

Study No. 12 - Taking Instructions to the Jury Room: The Commission considered Memorandum No. 9 (a copy of which is attached to these minutes) relating to the recommendation of the Commission on this topic. After the Commission had discussed the matter at length, a motion was made by Mr. Thurman, seconded by Mr. Shaw and unanimously adopted that, with regard to the form of the instructions given to the jury, the Commission adhere to its present recommendation. A motion was then made by Mr. Bradley, seconded by Mr. Shaw and unanimously adopted that, with regard to the question of whether the jury should be given all of the instructions if it is given any of them, the Commission adhere to its present recommendation. The Commission decided that any questions or criticisms of its recommendation should be answered by explaining that the Commission has decided that its proposal should be limited to establishing a policy in this State on the previously unsettled question of whether and on whose motion the jury may take a copy of the written instructions with them to the jury room and that the mechanics of effectuating this policy should be left to the Judicial Council or, if abuses appear, to later legislation.

The Executive Secretary reported that when the Senate Interim Judiciary Committee had considered this topic Senator Busch had suggested that the court should be required to instruct the jury that a copy of the written instructions would be given to them if they so requested. The Commission felt that this usually would be taken care of by the attorneys, either by requesting such an

instruction or by requesting themselves that the instruction be given to the jury. The Commission decided, however, that it would have no objection to amending the bill to insert such a requirement if Senator Busch or any other member of either Judiciary Committee wanted to do so, and it instructed the Executive Secretary to prepare amendments inserting such a requirement for presentation to the Committees if they agree upon such a requirement.

Study No. 14 - Appointment of Administrator in Quiet Title Action: The Commission considered Memorandum No. 8 (a copy of which is attached to these minutes) relating to this study. A motion was made by Mr. Shaw and seconded by Senator Dorsey that the Commission abandon its study of this topic. The motion carried:

Ayes: Babbage, Bradley, Dorsey, Shaw, Stanton, Thurman

Noes: None.

It was decided that Professor Maxwell, who had been engaged as the research consultant on this topic, should be asked for his view of what a reasonable fee would be for the work and time he has devoted to date on the study, making it clear that the Commission does not wish to have him waive all claims but intends to pay him something for the work he has done.

Study No. 15 - Attorney's Fees and Costs: The Commission considered Memorandum No. 1 (a copy of which is attached to these minutes) relating to suggestions by the State Bar for amendment of the Commission's recommendation on this topic.

A motion was made by Mr. Babbage and seconded by Mr. Shaw that the Commission's bill be amended to include the second change suggested by the CAJ, except that the phrase to be inserted not be set off by commas. The motion carried:

Ayes: Babbage, Bradley, Shaw, Stanton, Thurman

Noes: None

With regard to the third change suggested by the CAJ, a motion was made by Mr. Babbage and seconded by Mr. Thurman that the Commission's bill be amended to insert, in the second sentence, after the phrase "or defend any subsequent proceeding there," the phrase "whether or not such relief was requested in the complaint, cross-complaint or answer,". The motion carried:

Ayes: Babbage, Bradley, Shaw Stanton, Thurman

Noes: None

A motion was made by Mr. Babbage and seconded by Mr. Bradley that the Commission's bill be amended to incorporate the fifth change suggested by the CAJ except that the colon after "in open court" be omitted and the phrase "on notice" be added after "shall be made by motion." The motion carried:

Ayes: Babbage, Bradley, Shaw, Stanton, Thurman

Noes: None

Study No. 18 - Fish and Game Code: Mr. Kent L. DeChambeau, Deputy Legislative Counsel, was present during that part of the meeting on March 1 when this study was discussed.

Mr. Ralph N. Kleps, Legislative Counsel, reported that since the last meeting of the Commission he and Mr. DeChambeau had met three times with the Chairman and the Executive Secretary to consider suggestions for amendment of A.B. 616, the bill incorporating the proposed Fish and Game Code. He explained in detail the amendments which had been agreed upon at those meetings. The Commission decided that A.B. 616 should be so amended. It also decided that the bill should be amended to return the provisions of Sections 309 and 1529 of the code to the present law, as had been suggested by the Senate Interim Committee on Fish and Game. The Commission reviewed several suggestions for revision which had been made by Mr. Charles Scully, attorney for the Seafarers' International Union of North America and decided that they did not appear to be necessary or desirable. A motion was then made by Mr. Babbage and seconded by Mr. Shaw that the Commission accept the work of the Legislative Counsel on the Fish and Game Code pursuant to his contract and recommend to the Legislature the adoption of A.B. 616 as amended. The motion carried:

Ayes: Babbage, Bradley, Shaw, Stanton, Thurman

Noes: None

The Legislative Counsel reported that the cost of the Fish and Game Code revision project, not including his time or that of Mr. George Murphy, was $8,877.00, and that the total cost of the project to his office probably was

between $12,000 and $15,000.

The Legislative Counsel reported that, at the request of Assemblyman Bradley, his office had prepared an analysis of A.B. 616 pointing out the changes in the present law which would be effectuated by that bill, and that a copy of the analysis had been sent to each member of the Senate and Assembly Standing Committees on Fish and Game. He also reported that it had been suggested that this analysis be printed in the House Journal. The Commission agreed that, if possible, the analysis should be printed in the Journal in order to make it widely available and to furnish a record of the changes in the law intended by an enactment of A.B. 616. Mr. Bradley stated that he would request permission to print in the Journal the Legislative Counsel's analysis and also Resolution Chapter 204 (1955) giving the Commission the assignment to revise the Fish and Game Code.

The Commission expressed its thanks and appreciation to Mr. Kent L. DeChambeau, the draftsman of the proposed Fish and Game Code, for the excellent work he had done and for his unfailing cooperation.

Study No. 25 - Right of Nonresident Aliens to Inherit: The Commission considered Memorandum No. 6 (a copy of which is attached to these minutes) relating to this study. The Commission decided that it should discontinue its work on the study pending action by the Legislature on S.B. 1062, and it instructed the Executive Secretary to ask Professor Horowitz, the Commission's research consultant on the subject, to hold up his work until further notice, unless he is almost finished with his report. The Commission agreed that if Professor Horowitz's report is close to completion he should continue with his work and submit his report as originally scheduled.

Study No. 26 - Escheat of Personal Property: The Commission considered a preliminary draft of a staff report on this study (a copy of which is attached to these minutes) and a letter from the Executive Secretary pointing out that this study is one of considerable complexity and recommending that no attempt be made to deal with the subject at the 1957 Session of the Legislature. The Commission decided that the staff should try to complete its study of this matter as soon as possible and that the Attorney General should be sent a copy of the preliminary draft and advised of the progress of the study.

Study No. 34 - Habeas Corpus: The Commission considered Memorandum No. 10 (a copy of which is attached to these minutes) relating to this study. The Commission decided that the Executive Secretary should press for replies to his letters to the Attorney General and Mr. Jay Martin and that the study should be re-referred to the Southern Committee for further consideration after those replies are received.

Study No. 36 - Condemnation Law and Procedure: The Commission considered Memorandum No. 11 (a copy of which is attached to these minutes) relating to this study. After the Commission had discussed the matter, a motion was made by Mr. Thurman, seconded by Mr. Babbage and unanimously adopted that the Commission make a contract with Mr. Burrill to study the topics of moving expense, possession and passage of title, and rules of evidence as outlined by Mr. Burrill.

The Commission also agreed that the Executive Secretary should informally report to Senator Cobey, the sponsor of this study assignment, on the Commission's progress with the study and give him a copy of Mr. Burrill's Outline of Possible Areas of Inquiry.

There being no further business the meeting was adjourned.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

February 25, 1957

Preliminary Draft of Staff Report

On Escheat

The question with which this study is concerned is whether the property of a person who dies without having made a valid will and without heirs should escheat to the state of his domicile or to some other state. In recent years California has attempted to escheat bank accounts in Michigan and New York banks upon the death of their owners intestate and without heirs while domiciled here. California has also attempted to escheat bank accounts in California banks owned by a decedent who died intestate and without heirs while domiciled in Montana. In each instance the State was unsuccessful. The Michigan and New York courts held that such a bank account escheats to the state in which the bank is located. In Estate of Nolan the District Court of Appeal held that under Section 946 of the Civil Code a bank account escheats to the decedent's domicile. These decisions suggest the need of a study of the problem with a view to possible legislative action specifying what property, here and elsewhere, shall be escheated by California.

I. Statement of the Problem

When a person dies his property becomes ownerless; in a real sense it is abandoned property. Society could refuse to concern itself with such property, leaving it to be seized by whoever might be either strong enough or fortunate enough to reduce it to possession. In fact, however, society - i.e., the state - in effect takes possession of the property and determines what shall be done

with it. This is presumably done for a variety of reasons: (1) to prevent the free-for-all which might ensue among persons who would attempt to reduce the property to possession if free to do so; (2) to prevent a windfall to persons who happen to be able to obtain possession of the property; and (3) to make the property available to persons thought to have a special claim to it. Thus, in the United States property left ownerless by virtue of the owner's death is generally distributed in about the following order of priority:

(1) Persons who perform services in connection with disposing of the property, either through probate proceedings or otherwise, are paid out of the property.

(2) Creditors of the decedent are paid out of the property.

(3) If the property is of sufficient value, the state takes a portion of it through an estate or inheritance tax.

(4) If the decedent has indicated by a valid will what disposition he wishes made of the balance of the property, his wish is given consideration; whether his will is given effect wholly or only in part depends on whether designated relatives of the decedent are given the right to take some or all of the property against his will.

(5) If the decedent has not made a valid will, the balance of the property is given to designated relatives of the decedent, if any.

(6) If the decedent has not made a valid will and is not survived by any designated relatives, the state takes the balance of the property by escheating it.

It will be noted that under this scheme of distribution of a decedent's property the state takes some of the property when there are heirs by imposing a death tax and that it takes all of the property when there are no heirs by escheating it. The state's constitutional power to do this is clear, for it

is established that a state has virtually plenary power over decedents' estates. But what is the justification for death taxes and escheat?

Insofar as estate and inheritance taxes are concerned it may be argued: (1) the state's need for revenues is great and the receipt of property by those named by the decedent or entitled thereto under the laws of intestacy is a windfall which should be subordinated to this need; (2) death taxes tend toward a more equitable distribution of wealth by preventing the transmission intact of large fortunes; and (3) the protection and benefits furnished to the decedent during his lifetime by the society in which he lives justifies the exaction of a quid pro quo out of the assets which he leaves when he dies.

But as to escheat the justification is less clear. Why should a state escheat property rather than simply add sufficient categories of persons to those entitled to take the decedent's property under the laws of intestacy to preclude any possibility of failure of heirs - e.g., his more remote relatives, his friends or neighbors, or the institutions, such as schools, churches and clubs, with which he was associated? The explanation is in part historical. The king was held to have the right to "escheat" real property because he was the ultimate liege lord in the feudal system, from whom all land was held and to whom it reverted on failure of any other claimant to appear. The king also had a right to take personal property, called "bona vacantia" rather than escheat, which was justified on the ground that the property should be taken for the benefit of the whole community rather than accruing to the benefit of whoever might seize it. Today the technical distinction between "escheat" and "bona vacantia" is generally ignored; both real and personal property are said to "escheat" upon the death of the owner intestate and without heirs and the transfer is said to occur by virtue of the sovereignty of the state. But this only states the result and little or no explanation is offered by either courts or writers as to the basis, if any, on

which the state is justified in taking such property for itself. It may, however, be suggested that escheat can be rationalized on the ground that the persons or institutions which might be added as takers on intestacy in order to preclude failure of heirs do not have a sufficiently stronger moral or equitable claim to the decedent's assets than does society as a whole to warrant a preferential position over "all-of-us." To put this rationale affirmatively, the protection and benefits conferred on the decedent by the state in which he lives during his lifetime entitle that state to take for itself any property he may leave at death after the claims of his creditors have been satisfied and when he has not made a will and is not survived by relatives sufficiently close to him to fall within existing statutes of distribution.

It is not, perhaps, necessary to be greatly concerned for most purposes about the rationale of escheat. Escheat has long been an accepted element of state policy in dealing with decedents' estates and will doubtless continue to exist whatever its justification may be. As is not infrequently the case with legal doctrines, however, it does become necessary to understand the rationale of escheat when we deal with it in a conflict of laws setting - i.e., where more than one state is involved - because the rationale must furnish the criteria for determining which of two or more states has the better right to exercise the power of escheat in such a case. Thus, one problem is presented when a man dies intestate and without heirs in California leaving a farm, an automobile, and a debtor here; in such a case we may say, without being particularly analytical about the reasons for the result, that California may properly take the farm and the automobile and require the debtor to pay the obligation to it. A considerably more difficult problem is presented, however, by cases like either of the following:

(1) A dies intestate and without heirs while domiciled in New York leaving real property, an automobile, and a bank account in California.

(2) B dies domiciled in California leaving (a) a bank account in a Portland branch of an Oregon bank which also has branch offices in California, (b) 100 shares of stock in a Delaware corporation having its principal place of business in Illinois and doing a substantial amount of business in each of the 48 states, the stock certificates being in a safe deposit box in New York City, and (c) a claim as beneficiary under an insurance policy issued in Texas by a company incorporated in Connecticut, having its principal place of business in New York, and doing business in 25 states including California.

In either of these situations or any other escheat situation involving two or more states the question arises, as to each asset in the decedent's estate, which of the states involved has the better claim to escheat it. In the United States this question arises at two levels. It arises, first, at the constitutional level - i.e., does the United States Constitution determine which state may escheat the assets in a decedent's estate where the right to do so is asserted by more than one state? The question also arises at the level of policy - i.e., assuming that a state may constitutionally escheat a particular asset, should it do so or should it voluntarily turn the asset over to another state? Whether the question of which of two or more states is entitled to escheat a particular asset in a decedent's estate is considered from the point of view of constitutional power or of sound state policy, at least three possible positions might be taken:

1. The position might be taken that a state should be constitutionally free to escheat any asset which it can reduce to possession and that as a matter of policy a state should exercise this power to its fullest extent. This view of the matter can be rationalized on the ground that when the owner of property

dies no state can be said to have a stronger moral or equitable right to such property than any other state; that any moral obligation owing by the decedent to any state by virtue of governmental benefits and protection conferred upon him during his lifetime has been satisfied by the taxes and other charges which he has paid; and that any state having the property in its possession or within its power to reduce to possession should be free to appropriate it to apply to its own need for schools, highways, social welfare, and other state programs rather than relinquish the property to some other state. Reduced to common terms, this view is simply that insofar as escheat is concerned both the constitutional view and the policy view should be "every state for itself".

2. At the other extreme, the position might be taken that only the state of the decedent's domicile should be constitutionally free to exercise the power of escheat or that, if constitutional power exists in several states, only the domicile ought to exercise it. This view could be rationalized on the ground that escheat must be based on a quid pro quo given by the escheating state; that this quid pro quo is the governmental protection and benefits conferred upon the deceased owner of the property during his lifetime; and that the state of the owner's domicile will have furnished the major part of such protection and benefits to him.

3. A third position which might be taken is a modification of the second. This view grants that there must be a quid pro quo to justify escheat but finds it in the connection between the escheating state and the property involved rather than the deceased owner. Under this view only a state which has conferred substantial governmental protection and benefits with respect to the property should have the constitutional power to escheat it or, if such power exists in several states, only a state having provided this quid pro quo ought to exercise the power.

It should be emphasized that the question of constitutional power to escheat is quite different from the question of what a state's escheat policy should be. The United States Supreme Court can strike down a state's attempt to escheat property only under the due process clause of the Fourteenth Amendment, on ground that the state action involved is arbitrary. Hence the Court may feel compelled to recognize that power to escheat exists in a variety of situations insofar as the Constitution is concerned - perhaps in any state having power to reduce the asset to possession or at least in any state having furnished a quid pro quo in terms of governmental benefits or protections with respect to either the decedent or the asset. On the other hand, the question of policy - in what situations to exercise its constitutional power of escheat - is for each state to decide for itself. Thus, for example, the Supreme Court might decide that any state which is the situs of personal property at the owner's death has constitutional power to escheat it but California might decide as a matter of policy to escheat personal property only where the owner was domiciled here at death.

In this study we shall consider, first, constitutional limitations on the power of escheat and, second, state policy with respect to escheat.

II. Constitutional Limitations on Escheat

It is a basic tenet of the Anglo-American theory of Conflict of Laws that governmental power is territorially limited. Stated generally, the accepted view is that a governmental entity - for purposes of our discussion, a state - has exclusive governmental power to deal with persons and events within its own boundaries [FN re concurrent governmental power of nation and state under federal system] and no power to govern persons and events outside. This principle of

territoriality is so firmly imbedded in American legal thought that the Supreme Court has held that a flagrant violation of it is so arbitrary as to constitute a violation of the Due Process Clause of the Fourteenth Amendment.

A familiar example of the limitation which the concept of territoriality places on governmental action is found in the established Constitutional limitations on the jurisdiction of courts. Unless there is some connection between a State and an individual, arising out of service of process on him within the State or the fact that he is domiciled, or does business, or has engaged in an act or transaction there, the state cannot enter a personal judgment against him and its attempt to do so will be struck down by the United States Supreme Court as a violation of due process. Similarly, a state court cannot constitutionally enter an in rem judgment with respect to property which is not within the state.

The principle of territoriality also limits the legislative jurisdiction of a state to persons and events with which it has a substantial connection. Thus, even though a state has acquired judicial jurisdiction over the parties to an action sufficient to give it power to enter an in personam judgment which will be immune from collateral attack, the forum state may not apply its own substantive law to determine their rights unless it had some relationship to the transaction or event giving rise to the claims and defenses asserted by the parties. If the state does apply its own law in such a case, its action will be set aside by the United States Supreme Court as a violation of due process.

Still another example of the constitutional status of the territoriality principle is found in the area of jurisdiction to tax. An attempt by a state to lay a tax on a person or property or an event with which the state does not have a substantial connection is also held by the Supreme Court to be a violation of

due process. Here, again, the fact that the state has judicial jurisdiction over the individual or property sought to be taxed does not alone give it the power to tax.

Our inquiry is to what extent, if at all, the principle of territoriality applies to the exercise by a state of the power of escheat. May a state escheat any property which it can reduce to possession or does its jurisdiction to escheat depend upon the existence of a connection between the state and the property or its former owner similar to that which the Supreme Court has said must exist to give a state judicial jursidiction, legislative jurisdiction and jurisdiction to tax?

The inquiry whether a state has power under the Constitution of the United States to escheat a particular asset in a decedent's estate involves two questions: (1) does the state have judicial jursidiction to enter a judgment in effect quieting title to the asset in itself; (2) does the state have a sufficient connection with the asset or its former owner to justify its doing so. It is believed that only if both questions are answered in the affirmative does the state have constitutional power to act.

Judicial jurisdiction is necessary before a state can enter a valid judgment of escheat. Thus, for example, it seems clear that California could not escheat an automobile permanently located in Nevada in the absence of personal jurisdiction over a person having power to transfer title to it. The state would have neither in rem nor in personam jurisdiction in such a situation and a judgment purporting to transfer title to the automobile to the state would be void.

But if judicial jurisdiction over the property or the person having power to transfer it is required, is it also sufficient, without more, to make escheat

of property permissible insofar as the United States Constitution is concerned? Suppose, for example, that an automobile which had been owned by a lifelong domiciliary of Nevada who had purchased it in that state and always kept it there, happened to be driven to California after the owner's death by the person having power to transfer title to it and that California, obtaining either in rem jurisdiction over the automobile or in personam jurisdiction over the driver, or both, should assert the right to escheat it. Such a rationale would have to be rejected if the Supreme Court were to apply in escheat cases the analysis which it has applied in cases involving the right of a state to apply its own law to or to tax property. If the Supreme Court were to treat jurisdiction to escheat as it has legislative jurisdiction and jurisdiction to tax, it would hold that California, not having any connection with either the automobile or its owner during his lifetime could not escheat it upon the owner's death. The adoption of this view would, of course, raise the question of how much connection the state must have either with the owner or the asset to give it the power of escheat.

Whether and to what extent the Supreme Court will apply the concept of territoriality as a limitation on the power of escheat is not yet clear. It has decided no case involving constitutional power to escheat either real property or tangible personal property. However, the Court has decided four cases involving escheat of intangible personal property - i.e., choses in action. We turn, then to a discussion of these cases.

Before discussing the cases, however, it is desirable to point out what the phenomenon with which we are here concerned, the "chose in action," is - and what it is not. A chose in action is, of course, merely a legally enforceable in personam right which one person (natural or artificial) has against another. It

is not a claim to any particular piece of physical property or interest therein but a claim against a person which, when reduced to judgment, may be satisfied by execution upon any and all nonexempt assets of the judgment debtor. Courts and other legal writers, however, have labelled the chose in action "intangible property", and many of them have tended, consciously or unconsciously, to talk about choses in action as though they were physical objects such as land and chattels. In this connection "intangible property" is often spoken of as having a "situs" similar to that which real property and chattels have. But a chose in action, being merely a legal concept cannot have an actual "situs" in the sense of a physical location. It may be said to have a legal situs, but this is merely to say that the chose in action may be treated for various purposes - taxation, probate administration, etc. - as though it were a physical object located in a particular place. Such a determination of the "situs" of a chose in action can only be made on the basis of the policy to be effectuated by making the attribution. One can never reason from "situs" to result; the reasoning must be from desired result to "situs". For example, in order to determine where a chose in action has its "situs" for purposes of escheat, it would be necessary to decide which state is to have the right to escheat it and then to attribute a "situs" to it there. Much confusion has arisen in the cases dealing with escheat of choses in action (as in other kinds of cases involving them) by failure to keep clearly in mind the wholly conceptual nature of the terms "intangible property" and "situs of intangible property". The tendency to think and speak when dealing with choses in action as though they were physical objects having an actual location has, to borrow a phrase, "the tenacity of original sin" - as will be demonstrated in our analysis of the cases discussed below.

There is no decision by the Supreme Court on the question of what state or states may constitutionally escheat a chose in action upon the owner's death intestate and without heirs. The decisions which we are about to discuss involve escheat of "abandoned" intangible personal property and are therefore, it is believed, directly relevant to the question under discussion.

Security Bank v. California upheld a California statute providing for escheat of bank deposits unclaimed for more than 20 years. The statute authorized a judicial proceeding to effectuate the escheat, with personal service on the bank and service by publication upon the depositors. Since one explanation of a depositor's failure to communicate with his bank for 20 years and of the bank's not having a record of his whereabouts (both of which conditions had to exist to make the California statute applicable) might be that the depositor had left the state, the case clearly involved, inter alia, the question of constitutional jurisdiction to escheat a chose in action when the obligor is in one state and the obligee in another. It is not clear from the Court's opinion, however, whether the parties attacking the statute pointed up sharply the question whether California could constitutionally escheat bank deposits whose owners were or might be nonresidents at the time of the escheat proceeding. The bank did contend that none of the depositors whose deposits were being taken could be bound by the proceeding because the court had not acquired personal jurisdiction over them but no distinction was seemingly taken, in pressing this contention, between resident and nonresident depositors. The Supreme Court rejected the contention that personal jurisdiction over the depositors was required to escheat the deposits, saying:

> The unclaimed deposits are debts due by a California Corporation with its place of business there. * * * The debts

> arose out of contracts made and to be performed there. * * * Thus the deposits are clearly intangible property within the state. Over this intangible property the State has the same dominion that it has over tangible property. * * * neither the due process clause, nor any right of the bank under the contract clause, is violated by a law requiring it to pay over the State as depository savings deposits which have long remained unclaimed. (emphasis added).

While it is difficult to say that in this case the Court really addressed itself to the question of what connection there must be between a state and intangible property sought to be escheated, it could be inferred from the language quoted above that the Court thought that escheat was justified in the Security Bank case because the bank deposits had a "situs" in California. If so, the Court's reasoning was fallacious for bank deposits are simply choses in action - i.e., in personam claims against the bank rather than claims in or to specific property - and did not have an actual situs anywhere.

The next Supreme Court decision dealing with escheat of intangible property was Anderson Bank v. Luckett which involved the validity of a Kentucky statute establishing a summary procedure for the State's taking possession of bank accounts presumably abandoned, with notice to depositors only by posting on the courthouse door a copy of a required report by all banks of accounts not claimed for a specified number of years. The statute also provided for a later judicial proceeding to determine whether the deposits were abandoned and, if so, to escheat them. The Supreme Court also upheld this statute. In this case, as in the Security Bank case, it is not clear that the question whether the Constitution limits the states' power to escheat bank deposits owned by non-

residents was squarely presented or decided. Insofar as the Court's opinion contains any language which may be pertinent to this question, it follows that of the Security Bank case, again suggesting that the Court thought that Kentucky had power to escheat the bank deposits because they had their "situs" there:

> The deposits are debtor obligations of the bank, incurred and to be performed in the state where the bank is located, and hence are subject to the state's dominion.

The third Supreme Court decision relevant to the question under discussion is Connecticut Insurance Company v. Moore. This was a declaratory judgment proceeding in which nine non-New York insurance companies challenged the validity of a New York statute insofar as it provided for escheat to that State of unclaimed insurance moneys - which are also choses in action rather than interests in specific property - accruing under policies issued by out-of-state insurers for delivery in New York on lives of residents of New York. The majority of the Court held the statute valid as applied to cases in which the insured person continued to be a resident of New York after delivery of the policy and where the beneficiary was a resident of New York at maturity of the policy but reserved judgment as to its validity as applied to other moneys due under other policies issued for delivery in New York. In this case, however, the language in the Court's opinion was markedly different from that in the Security Bank and Anderson Bank cases. In his opinion for the majority of the Court Mr. Justice Reed did not discuss whether the choses in action sought to be escheated were "in" New York; rather, he inquired whether New York had sufficient "contacts" to justify its claim to escheat them:

> [We do not] agree with appellants' argument that New York lacks constitutional power to take over unclaimed

moneys due to its residents on policies issued for delivery in the state by life insurance corporations chartered outside the state. *** to prevail appellee need only show, as he does as to policies on residents issued for delivery in New York, that there may be abandoned moneys, over which New York has power, in the hands of appellants. The question is whether the State of New York has sufficient contacts with the transactions here in question to justify the exertion of the power to seize abandoned moneys due to its residents.

* * *

Power to demand the care and custody of the moneys due these beneficiaries is claimed by New York *** only where the policies were issued for delivery in New York upon the lives of persons then resident in New York. We sustain the constitutional validity of the provisions as thus interpreted with these exceptions. We do not pass on the validity in instances where insured persons, after delivery cease to be residents of New York or where the beneficiary is not a resident of New York at maturity of the policy. (emphasis added)

This opinion is interesting in that although the Court spoke at several points of New York's "power" to escheat the moneys in question its analysis did not follow the approach which it had made in the Security Bank and Anderson Bank cases. The Court's opinions in the earlier cases seemed to suggest that, insofar as the Court was concerned with jurisdiction to escheat at all, it looked only

to whether California and Kentucky had jurisdiction to enter judgments which would be immune from collateral attack after they became final - i.e., whether the respective states had judicial jurisdiction sufficient to bind those whose interests would be affected by their judgments of escheat. There is little in the earlier opinions to suggest that the Supreme Court thought that anything more than judicial jurisdiction over the persons involved might be necessary to justify escheat - i.e., that some connection between the state and the owner of the bank deposit or the bank, some extension of benefit or protection with respect to the legal persons or the legal relationship involved, must exist before the state can seize for itself an asset found to have been abandoned. In the Connecticut Mutual case, on the other hand, the Supreme Court appeared to be concerned primarily with whether, in addition to having judicial jurisdiction sufficient to bind all who would be affected by the judgment, New York had a reasonable basis for asserting the right to require payment to it of the moneys in question. Thus, the key sentence in the excerpts quoted above appears to be:

> "The question is whether the State of New York had sufficient contacts with the transactions here in question to justify the exertion of the power to seize abandoned moneys due to its residents" (emphasis added).

This concern is demonstrated by the fact that the Court reserved judgment as to the constitutionality of the statute as applied to situations in which the insured did not stay in New York or the beneficiary was not a resident of the State at the maturity of the policy. New York's judicial jurisdiction as clearly existed in this case as in the Security Bank and Anderson Bank cases; in all three cases it rested upon the state's in personam jurisdiction over the obligor plus constructive service on the obligees involved. Moreover, New York's judicial

jurisdiction was precisely the same with respect to those cases falling within the language of the statute concerning which the Court reserved judgment as it was with respect to those cases as to which the statute was held to be constitutional. The difference taken by the Court between the two categories of cases could only have been with respect to the justification of New York's claim to escheat the insurance moneys. Where the insured had continued to live in New York and the beneficiary lived there at the maturity date of the policy the Court thought it clear that New York had a close enough connection with the situation to justify its claim; in other cases the Court was sufficiently doubtful to reserve decision.

The decision and the language of the Supreme Court in the Connecticut Mutual case would, therefore, seem to provide considerable support for the view that a state's power to escheat property depends not only on whether it has judicial jurisdiction, either in rem or in personam, sufficient to enable it to enter a judgment which will withstand collateral attack but also upon whether the state has a sufficient connection with the owner of the asset sought to be escheated or the asset itself to provide a rational basis for its claim and thus to satisfy the requirements of due process. Yet only three years later, in deciding its most recent case touching on this subject, Standard Oil Company v. New Jersey, the Court raised considerable doubt about these implications of its decision in the Connecticut Mutual case. The Standard Oil case involved the validity of a New Jersey statute providing for the escheat to that state of unclaimed stock and dividends standing on the books of New Jersey corporations in the names of persons dying without heirs, or missing for more than fourteen years. Both stock and dividends are, of course, simply choses in action. Acting pursuant to the statute, New Jersey officials asserted the right to escheat certain common stock issued by the Standard Oil Company and dividends on such stock. Standard

contended that the New Jersey statute was invalid because the stock and dividends did not have a "situs" in New Jersey, having been issued in other states; it argued that the Security Bank and Anderson Bank cases were distinguishable in that the contracts of deposit involved therein had been made in the escheating states by banks doing business there and were payable in such states. This argument was rejected by Mr. Justice Reed, writing for the majority of the Court, in the following language:

> It was not solely the fact that the contracts for bank deposits were made in California and Kentucky that gave those states power over the abandoned deposits. Had the contract been one of bailment between two individual citizens of those states who had subsequently removed to another state, the courts of the state of the contract would not have controlled, though its laws might have. The controlling fact was that the banks and the depositors could be served with process, either personally or by publication, to determine rights in this chose in action.
>
> Appellant is a corporation of New Jersey, amenable to process through its designated agent at its registered office. *** This gave New Jersey power to seize the res here involved, to wit, the "debts or demands due to the escheated estate."
>
> * * *
>
> We see no reason to doubt that, where the debtor and creditor are within the jurisdiction of a court, that court has constitutional power to deal with the debt. Since choses in action have no spatial or tangible existence, control over them can "only arise from control or power over the persons whose relationships are the source of the rights and obligations." * * * Situs of an intangible is fictional but control over parties whose judicially coerced action can make effective rights created by the chose in action enables the court with such control to dispose of the rights of the parties to the intangible. Since such power exists through the state's jurisdiction of the parties whose dealings have created the chose in action, we need not rely on the concept that the asset represented by the certificate of dividend is where the obligor is found. The rights of the owners of the stock and dividends come within the reach of the court by the notice, i.e., service by publication; the rights of the appellant by personal service. That power enables the escheating state to compel the issue of the certificates or payment of the dividends. * * * This gives New Jersey jurisdiction to act. That action, of course, must be in accord with the boundaries on legislation set by the Constitution. [Emphasis added.]

Save insofar as the last sentence quoted may be taken to suggest some qualification thereof, the Supreme Court appeared to say in the Standard Oil case that the right to escheat a chose in action exists whenever a state has power to subject the obligor thereon to an in personam judgment. So far as Mr. Justice Reed's opinion indicates, no consideration was given to whether New Jersey had sufficient "contacts" with the situation, in terms of protection or benefits conferred on the owner of the stock or otherwise, to justify its assertion of the right to seize the stock and dividends on abandonment by their owners. Had that question been discussed, the answer might have been in the affirmative because New Jersey was the state of incorporation of the Standard Oil Company. Insofar as the opinion of the court indicates, however, New Jersey would have had the right to escheat the stock and dividends in question by virtue of having in personam jurisdiction over the corporation without more - for example, if Standard had been merely doing business there.

At best, the Security Bank, Anderson Bank, Connecticut Mutual, and Standard Oil decisions are not very helpful in determining what the United States Supreme Court will ultimately hold are the Constitutional limitations, if any, on the power of escheat. In the absence of more adequate authority on the matter we must necessarily speculate as to the answer to this question. In doing so it will be helpful to consider separately real property, tangible personal property (chattels), and intangible personal property (choses in action).

A. Constitutional Power to Escheat Real Property.

The concept of territoriality has had perhaps its strictest application in the view that the state of the situs of real property has virtually exclusive judicial and legislative jurisdiction over it. Thus, it seems reasonable to conclude that if a person domiciled in New York should die leaving real property

in California, the United States Supreme Court would hold, should the question arise, that New York could not escheat such property against the wishes of California. This result would clearly be reached if New York were to purport to enter a judgment of escheat without having acquired personal jurisdiction over the person having power to transfer title to the property; Fall v. Eastin indicates that a decree entered by one state cannot operate in rem with respect to property in another. A somewhat more difficult question would be presented if New York should acquire personal jurisdiction over the person having power to make an effective conveyence of the property and order him to make a deed thereto pursuant to its escheat decree, asserting by way of justification that by virtue of the protection and benefits which it had, as domicile, conferred on the owner of the property during his lifetime New York was entitled to escheat all of his assets, wherever located, upon his death intestate and without heirs. If, in such a case, the defendant should refuse to make the deed and one were made by an officer of the New York court it would not be entitled to full faith and credit in California under Fall v. Eastin. Or suppose the defendant should make the deed under such legal duress; would California be required to give effect to it against this state's own claim of right to escheat the property? But suppose that upon the defendant's refusal to execute a deed the New York court should order him committed for contempt and the question of its right to do so should be carried to the United States Supreme Court. Either of these cases would present the question whether New York has the constitutional power to escheat real property in California. While there is no Supreme Court decision on the point, it seems most unlikely that the Court would require California to permit another state to escheat real property here by virtue of having acquired personal jurisdiction of the person having power to convey the property. Support by way of analogy for this conclusion may be found in decisions of the Supreme Court

holding that a state may not, consistently with the due process clause of the Fourteenth Amendment, impose a death tax on real property in another state.

Might the Supreme Court, on the other hand, adopting the view that a quid pro quo in terms of benefit and protection to the decedent during his lifetime is necessary to justify escheat, hold that California cannot escheat real property here owned by a New York domiciliary? That the Court would do so seems equally unlikely. Nor would its adoption of the general theory that the power of escheat derives from benefits and protection conferred on the owner of the property during his lifetime require the Court to do so, for certainly California would have extended both to the decedent in respect of the property sought to be escheated. The real property would have been acquired pursuant to California law, the rights of the owner therein during his lifetime, including the power to sell and mortgage it, would have been conferred by California law, etc.

Thus, it seems reasonable to conclude that the situs of real property has constitutional power to escheat it in all cases and that no other state could constitutionally escheat it against the wishes of that state.

B. Constitutional Power to Escheat Tangible Personal Property (Chattels).

While there is no United States Supreme Court decision on the matter, it is possible that if the Court should hold that the situs has exclusive jurisdiction to escheat real property, it will take the same view with respect to chattels. It is believed, however, that either or both of two considerations would probably lead the Supreme Court to take a somewhat different view of chattels than of real property insofar as escheat is concerned:

1. Historically, tangible personal property has not been as closely identified with its situs as has real property in Anglo-American legal theory.

In an earlier day, in fact, chattels were generally identified for legal purposes with the owner's domicile rather than with their situs, under the rubric mobilia sequunter personam - personal property follows the owner. Thus, for example, the distribution of chattels upon the death of the owner was held to be governed by the law of his domicile - and this is still the almost universal rule in this country today. Inter vivos transactions respecting chattels were also held to be governed by the law of the owner's domicile. In more recent years, however, there has been a growing tendency on the part of Anglo-American courts to identify chattels with their situs rather than with the owner's domicile for many legal purposes, particularly with respect to transactions during the owner's lifetime. Nevertheless, there may still be enough vitality in the older view to justify doubt that the Supreme Court would hold it to be a violation of the Fourteenth Amendment for the state of the owner's domicile, having acquired either in rem jurisdiction over a chattel by virtue of its presence there after the owner's death or personal jurisdiction over one having power to transfer title to the chattel, to enter a judgment escheating it even though the chattel was located in another state during the owner's lifetime and at the time of his death.

2. Chattels differ from real property in that they are inherently mobile. Thus, they cannot have that fixity of connection with a state which has doubtless been a factor in the tendency of all courts to conceive of the situs of real property as having virtually exclusive governmental power over it. This inherent mobility of chattels can give rise to a number of difficult questions so far as escheat is concerned which could never arise as to real property. For example, if the Supreme Court should take the view that the situs of tangible personal property has exclusive jurisdiction to escheat it,

would this in all cases mean the place of its actual physical location at the moment of the owner's death? Suppose that the chattel were moved to another state after the owner's death. Would its physical presence there then give that state exclusive power to escheat it? Or suppose that an automobile usually located at the owner's domicile in New York happened to be in California at the moment of his death, the owner having driven it here temporarily on business or pleasure. Would the Supreme Court say that California, which has conferred only fleeting benefit and protection on either the owner or the automobile, could escheat the latter and that New York, where both the owner and the automobile enjoyed long years of benefit and protection, could not?

These questions may suggest that the Supreme Court will go to the other extreme, holding that the domicile of the owner has exclusive jurisdiction to escheat his chattels. But would such a rule be applied in the case of a man domiciled in one state who kept a chattel permanently in another, or would the court hold in such a case that the situs has either exclusive or concurrent jurisdiction to escheat the chattel?

Some clues to the Supreme Court's eventual resolution of these questions may be found in its decisions respecting jurisdiction to impose death taxes on tangible personal property. There, the basic rule appears to be that the situs ordinarily has exclusive jurisdiction to tax. But special rules have been developed with respect to chattels temporarily in a state at the time of the owner's death. Perhaps the Court will, when the problem arises, apply to cases involving jurisdiction to escheat chattels the rules which it has developed in the tax cases; perhaps it will develop somewhat different rules. For the present it would seem that only two generalizations may be safely hazarded: (a) it is not as clear as it appears to be in the case of real property that the Supreme Court will hold that only the situs of a chattel at the moment of the owner's

death may escheat it and (b) it seems improbable that the Court will adopt the "might makes right" theory insofar as escheat of chattels is concerned - i.e., that any state which happens to acquire judicial jurisdiction, either in rem over the chattel or in personam over the person having power to transfer title thereto, may escheat it, even though that state has not conferred any substantial benefit or protection on either the chattel or its owner during his lifetime.

C. Constitutional Power to Escheat Intangible Personal Property (Choses in Action).

While the four Supreme Court cases dealing with power to escheat discussed at length above all deal with choses in action, it is not possible on the basis of the opinions in those cases to state with certainty what, if any, are the constitutional limitations on escheat of choses in action upon the death of the owner intestate and without heirs. Clearly enough, a state must have judicial jurisdiction before it can enter a valid judgment. But on analogy to jurisdiction for purposes of garnishment of choses in action, as established in Harris v. Balk, judicial jurisdiction would appear to exist whenever the state has in personam jurisdiction over the obligor [FN re quasi in rem]. Such jurisdiction would in the case of many choses in action exist in several states, notably when the obligor [FN re use of obligor & obligee] is a corporation doing business throughout the nation or a substantial part of it. Does this mean that a race to judgment can be precipitated among such states and that the first state to enter judgment can confiscate the chose in action, even though it had no connection, or a relatively insignificant connection, with the former owner or with the chose in action during his lifetime? The following arguments that it may do so can be made: (1) the Supreme Court has not yet struck down any state's assertion of the right to escheat a chose in action; (2) the Court's apparent

concern with the "situs" of the bank accounts in the Security Bank and Anderson Bank cases must really have been a concern only as to whether the states had judicial jurisdiction in those cases; (3) the opinion in the Standard Oil case indicates that the Court was concerned therein solely with whether New Jersey had in personam jurisdiction over the obligor and not with whether it had a relationship to the parties concerned sufficient to justify its assertion of the right to escheat the stock and dividends involved; and (4) the Court has held that each of several states may constitutionally tax devolution of intangible personal property upon the owner's death, a much more liberal view than it has taken respecting either real property or chattels.

But these arguments, though weighty, are not necessarily conclusive. Against them may be arrayed the following consideration: (1) In each of the four decided cases there were sufficient contacts to have justified the state's action had a territoriality test similar to that applied in cases involving judicial jurisdiction, legislative jurisdiction, or jurisdiction to tax been explicitly applied by the Court; (2) the language of the opinion and the Court's reservation of decision as to some applications of the New York statute in the Connecticut Mutual case seem to evidence a concern with the justification for a state's claim of right to escheat ownerless property and (3) the tax cases are distinguishable both because death tax claims are not necessarily or perhaps even often mutually exclusive whereas escheat claims are and because the Court has required that there be some connection between the taxing state and the former owner or the chose in action in all of them.

While at the moment the situation with respect to jurisdiction to escheat choses in action is unclear, the following suggestions may be hazarded:

1. A state might be able, insofar as the Constitution is concerned, to escheat every chose in action made ownerless by the death of the owner intestate and without heirs which it can reduce to possession by means of acquiring personal jurisdiction over the obligor and entering a judgment in effect substituting itself as obligee in place of the former owner. There is, however, at least some ground for doubt that this may be done if the state had no connection with either the owner or the chose in action prior to his death.

2. Even if a state cannot constitutionally escheat any asset in a decedent's estate which it can reduce to possession, it probably can exercise the power of escheat insofar as choses in action are concerned in a wide variety of cases. Thus:

(a) The Security Bank and Anderson Bank cases seem to make it clear that a state can escheat choses in action which are created in transactions there and are payable there if it can acquire in personam jurisdiction over the obligor.

(b) A state can probably escheat choses in action owned by persons domiciled there at death when jurisdiction can be acquired over the obligor. This conclusion would seem to follow from the Supreme Court's decision in the Connecticut Mutual case as well as by analogy to cases upholding the right of a decedent's domicile to impose a death transfer tax on choses in action in his estate.

(c) A state may be able to escheat a chose in action with which it had any substantial connection during the owner's lifetime if it can acquire judicial jurisdiction over the obligor. This proposition is not directly suggested by any of the four Supreme Court cases (except insofar as they may be taken to suggest that no prior-to-death contact at all is necessary to justify escheat).

It is suggested, however, by recent cases involving jurisdiction to tax intangibles upon the owner's death.

III. State Policy With Respect To Escheat.

Once the scope of a state's constitutional power to escheat assets in a decedent's estate is established, the question arises as to whether and in what cases the power should be exercised. This is, of course, a matter of policy for each state to determine for itself. The specific concern of the Law Revision Commission is with this question - i.e., what recommendation shall it make to the Legislature respecting an escheat policy for California? This section of the present study is concerned with this policy question.

The choices to be made by the Legislature necessarily depend on the range of choice which is open to it. This in turn depends on what the United States Supreme Court will eventually hold to be the scope of the state's power to escheat under the Constitution. Policy choices which California might make will, therefore, be discussed in terms of alternative hypotheses as to the view which the Supreme Court might take on the constitutional question.

A preliminary question, however, is whether California should simply adopt the policy of exercising its constitutional power to escheat to the fullest extent - in effect, push the "every state for itself" view as far as the United State Supreme Court will permit. If this view were taken, the executive department of the state government would simply be directed to assert the right to escheat in every situation in which a respectable claim might be made and to carry to the United States Supreme Court all cases in which the state's power to escheat a particular asset is denied. Thus, for example, the executive might be directed to claim all real and personal property, wherever situated, which is

owned by persons dying domiciled in this State, all real property and chattels found in this state regardless of the owner's domicile at death and regardless of whether the property was here at the date of death or was brought here later, and all choses in action where jurisdiction can be obtained over the obligor here, whether or not the owner or the chose in action ever had any connection with California during the decedent's lifetime.

Unless such an "all out" policy of escheat is adopted it becomes necessary to consider what choices California should make insofar as escheat is concerned among those which are open to it. In this connection real property, tangible personal property (chattels) and intangible personal property (choses in action) will be discussed separately.

A. What Should California's Policy Be in Respect of Escheat of Real Property?

The position is taken above that a state cannot constitutionally escheat real property located in another state against the latter's will. This would not, of course, preclude one state from recognizing a claim made by another state to escheat real property located there should it choose to do so. Thus arises the question of what policy California should adopt on this matter - specifically, whether it should assert the right to escheat real property located elsewhere or, conversely, should recognize the right of other states to escheat real property located here.

It is believed that a serious contention that California should forego escheat of real property located here could be made only in a case in which the owner dies domiciled in another state and the domiciliary state asserts the right to escheat it. In such a case, it may be argued, California ought to give the property to the domiciliary state for one or more of the following reasons: (1) that the state of domicile, having contributed the major share of benefits

and protection conferred by society on the owner during his lifetime has a moral or equitable claim to all of his property on his death which is superior to that of any other state; (2) that in many such cases the California real property will have been acquired in exchange for money or property originally earned or otherwise acquired in the domiciliary state; and (3) that such a policy, if followed by all states, would result in having all questions relating to escheat of a decedent's property decided under one law rather than the possibly divergent laws of several states.

It is arguable on the other hand, that California should escheat all real property located here owned by persons dying intestate and without heirs, whether they are domiciled here or elsewhere, either on the theory that California is entitled to escheat any asset which it can reduce to possession or on the theory that since California has conferred all or at least a major share of the benefits and protection provided by society with respect to the real property in question, this State rather than any other has the better right to escheat it.

While there is little primary authority on the question, it appears to be universally agreed that real property does and should escheat to the state of its situs; no case in which a contention was made that any other state had the right to escheat such property has been found, nor has any secondary authority seemingly taken that position. In Estate of Nolan, decided by the District Court of Appeal in 1954, it was apparently conceded by all parties that this was the rule; the Montana administrator made no claim to the real property left by the decedent in California and it was ordered distributed to this State.

If California were to take the position that no other state may escheat real property located here, logical consistency would seem to require that this State not assert the right to escheat real property elsewhere, whatever its connection with the owner thereof during his lifetime.

B. What Should California's Policy Be In Respect of Escheat of Tangible Personal Property (Chattels)?

If California has constitutional power to escheat any chattel which is physically located in the State at or after the owner's death, should it do so? An affirmative answer might be given to either part or both parts of this question on the ground that the State should escheat all property which it can reduce to possession. On the other hand, California might as a matter of policy take the position that chattels should escheat only to the state of the owner's domicile because of the closeness of its relationship to him and the protection and benefits conferred upon him during his lifetime, the fact that the chattel or the money or property in exchange for which it was acquired will often if not usually have been acquired in the domiciliary state, and that this approach would, if followed by all states, result in escheat of a decedent's chattels being governed by a single law. If this view were taken, California would escheat all chattels of its own domiciliaries which it could reduce to possession and would assert a claim to such chattels located in other states. It would, on the other hand, turn all chattels of nondomiciliaries found here over to their domiciliary states. A third position which California might take is that it will escheat only chattels permanently or usually located in this state during the owner's lifetime, turning other chattels found here over to the states wherein they were permanently or usually located. The rational basis for such a policy would be that the right to escheat ought to turn on benefit and protection which the owner has enjoyed in respect of the property escheated rather than in respect of his own person.

If California has constitutional power to escheat any chattel owned by a person who was domiciled here, should it do so? The answer to this question may turn upon whether the Supreme Court should hold that a state can escheat only the

chattels of its domiciliaries or whether it will hold that chattels can be escheated both on this basis and also when they are located in the state at or after death of the owner. If domicile were held to be the only constitutional basis for escheat, it would seem to be reasonably clear that California should, as a matter of policy, exercise that limited power fully. This would mean that California would (a) escheat all chattels of domiciliaries found in the State at or after the owner's death, proceeding on the basis of in rem jurisdiction over the chattel or personal jurisdiction over the person having power to transfer title to it or both; (b) escheat through proceedings here domiciliaries' chattels located outside the State whenever personal jurisdiction could be obtained over a person having power to transfer title to them; and (3) initiate proceedings for escheat of such chattels in sister states in all cases in which an effective judgment of escheat could not be entered here.

If, on the other hand, the Supreme Court were to hold that either situs of the property at or after death or domicile of the owner prior to death gives jurisdiction to escheat, a more difficult policy question would be presented. In this event, California could exercise its constitutional power fully, escheating all chattels found here at or after death regardless of the owner's domicile, escheating domiciliaries' chattels located elsewhere when personal jurisdiction could be obtained here over a person having power to transfer title to the chattel, and initiating proceedings in other states to escheat chattels of domiciliaries when an effective escheat judgment could not be entered here. Conversely, California might take the position that a state ought to make a basic choice in developing its policy between basing escheat on protection and benefit conferred on the owner personally and protection and benefit conferred on him with respect to the asset involved, escheating either on the basis of domicile

of the owner here or upon the basis of situs of the chattel but not on both bases.

No case has been found involving escheat of chattels left in one state by a decedent domiciled in another. The secondary authorities are divided on this question. The Restatement of Conflict of Laws states that a chattel escheats to the state in which it is administered as part of the decedent's estate. This simply restates the problem, however, for it moves the inquriy back another step to the question: Upon what basis should a state decide whether to administer upon a chattel the owner of which died intestate and without heirs? Professor Beale, on the other hand, says that a chattel escheats to the state of its situs. This difference of view between Professor Beale and the Restatement is not of great practical importance, however, since the situs and place of administration would usually be the same state. There does not appear to be any primary or secondary authority for the view that chattels should escheat to the state of the decedent's domicile.

[Here there will be a discussion of the present California law]

C. What Should California's Policy Be In Respect of Escheat of Intangible Personal Property (Choses in Action?

The Standard Oil decision suggests that constitutional jurisdiction to escheat a chose in action may exist whenever a state is able to acquire in personam jurisdiction over the obligor. If this suggestion is borne out in future Supreme Court decisions, should California fully exercise the power of escheat thus conferred upon it? Should California escheat assets owned during his lifetime by a person who died intestate and without heirs in such cases as the following:

(1) A is a resident of New York and decedent was a resident of that State. A owed decedent $500. A comes to California on a business trip after decedent's death, thus enabling California to acquire personal jurisdiction over him.

(2) Decedent, a resident of Oregon, had a $500 bank account in the Portland branch of an Oregon bank. The bank also does business in California and is thus amenable to process here.

(3) Decedent, a resident of New Jersey, owned 100 shares of stock worth $5000 in a Delaware corporation whose principal place of business is in Ohio. The stock was purchased in New York. The corporation has qualified to do business in California and hence is amenable to process here.

If the view is taken that California should not as a matter of policy escheat intangible property in such cases even if it is constitutionally free to do so because of its lack of substantial connection with either the decedent or the chose in action during his lifetime, it becomes necessary to determine in what cases choses in action should be escheated. Domicile of the owner here at the time of his death would appear to be a proper basis for escheat of intangibles; such a policy would be justifiable with respect to choses in action even if it is not adopted in the case of real property or chattels because by their very nature choses in action cannot really be "localized" elsewhere.

An attempt to develop other bases for escheat of intangibles than the domicile of the owner gets into a difficult area. Any attempt to base escheat on the "situs" of such property must necessarily be abortive because, as is pointed out above, such property does not and cannot have a situs. A statute might attempt to designate a limited category of choses in action to be escheated

by providing that a chose in action shall escheat to this State "whenever there is a substantial connection between this State and the persons or events out of which the chose in action arose or with which it was closely connected during the decedent's lifetime". Such language would necessarily leave the matter for court decision on a case-by-case basis and would undoubtedly lead to considerable litigation. A more mechanical approach to the problem might be to designate the choses in action to be escheated in some such terms as "whenever the contract out of which the chose in action arose is made or is to be performed in this State".

Even if the suggestion made in the Connecticut Mutual case, that there may be a constitutional requirement of a substantial connection between a state asserting a right to escheat a chose in action and the intangible or the owner thereof, is borne out by future decisions, the Supreme Court's decisions will probably permit escheat on a variety of bases and questions similar to those just discussed will have to be decided.

If the Supreme Court should establish domicile of the decedent as a basis for escheat of intangibles should California exercise this power of escheat? If this were the only basis for escheat ultimately approved by the Court, the answer would clearly be in the affirmative. However, if domicile is only one of several bases of escheat jurisdiction approved by the Court, California will have to determine whether to escheat on this basis alone or in conjunction with other bases which are available; there, again, the policy questions discussed above will be presented for consideration and decision.

[Discussion of case law both of other states and Estate of Nolan. Also of secondary authorities]

IV. OTHER PROBLEMS

There are at least two other major problems for consideration by the Law Revision Commission in determining what recommendation to make to the Legislature concerning an escheat policy for California. The first question is related to the constitutional questions discussed above: When one state has entered a judgment escheating an asset in a decedent's estate, does the judgment protect the person against whom it was entered from escheat claims which could have been asserted by other states but for the judgment? The second question is related to the policy questions discussed above: What state's law should be applied to determine whether a person died intestate and without heirs?

A. Is An Escheat Judgment Res Judicata?

This question is simply whether one state is compelled by the full faith and credit clause of the United States Constitution to recognize the escheat judgment of a sister state. The question could not arise as to any type of property which the United States Supreme Court were to hold only one state can escheat. For example, if the position taken above, that the situs has exclusive jurisdiction to escheat real property, is correct the Supreme Court will never have to decide whether one valid judgment escheating real property precludes another. This question would not be reached in either of the two situations in which it potentially might arise. One situation would be a case in which the situs state had entered a judgment escheating real property and a nonsitus state later assumed to enter a conflicting judgment; in this case the second judgment would be void for lack of jurisdiction to escheat and there would be no occasion to decide whether it would also be a violation of the full faith and credit clause for the nonsitus state to refuse to recognize the judgment of

the situs state. The other situation in which the question might potentially arise would be one in which a nonsitus state entered a judgment purporting to escheat real property located elsewhere and the situs state later entered a conflicting judgment; in this case the refusal of the situs to give effect to the first judgment would be upheld because that judgment would be void for lack of jurisdiction to enter it. The same would be true with respect to chattels and choses in action should the Supreme Court hold that only one state has jurisdiction to escheat such property.

It has also been suggested above, however, in discussing both tangible and intangible personal property, that the Supreme Court will probably hold that more than one state has escheat jurisdiction as to such property. If the Court does so hold, will this mean that the two or more states having such jurisdiction may engage in a race to judgment and that the first judgment entered will protect the person against whom it is entered from claims to escheat made by other states? Suppose, for example, that one state having escheat jurisdiction should obtain personal jurisdiction over a bank and escheat a decedent's bank account or should obtain personal jurisdiction over a corporation and escheat a bond or share of stock or a right to a dividend issued by the corporation and owned by a decedent at his death. Could a second state, having concurrent jurisdiction to escheat the same intangible later acquire personal jurisdiction over the bank or the corporation and enter a second escheat judgment? This question was presented to the United States Supreme Court in Standard Oil Company v. New Jersey, Standard contending that other states had a better claim to escheat the stock and dividends there involved than did New Jersey and that affirmance of the New Jersey escheat judgment would expose it to double liability. Writing for the five-man majority of the Court Mr. Justice Reed said in response to this argument:

> We have indicated above that we consider the notice to the stockholders adequate to support a valid judgment against their rights as well as those of the Company. The res is the debt and the same rule applies with tangible property. The debts or demands represented by the stock and dividends having been taken from the appellant company by a valid judgment of New Jersey, the same debts or demands against appellant cannot be taken by another state. The Full Faith and Credit Clause bars any such double escheat.

While this language must probably be taken to be only a dictum in the Standard Oil case since the situation of an attempted second escheat of a chose in action was not before the Court, it would seem to indicate that the majority of the Court would protect an obligor from such an attempt, invoking the full faith and credit clause for this purpose. Yet, how the clause can have this effect is far from clear. Since the second state was not a party to the escheat proceeding in the first state, it is difficult to see how it could be bound by any determination made in that proceeding, whether thought to be "in rem" or "in personam". [FN to Riley case and particularly Stone reservation of this Q]. Could the second state not, therefore, raise the question of whether the first state in fact had jurisdiction to escheat the asset in question and to enter a second judgment of escheat against the obligor upon a determination that it did not? The answer to this question would seem to turn on whether judicial jurisdiction, without more, gives a state jurisdiction to escheat, as seems to be suggested in the Standard Oil case. If it does, the states are apparently free to engage in a race to judgment and when one has entered judgment no other state may do so. The only questions which would be open in a second escheat proceeding would be whether the first state had judicial jurisdiction over the obligor and whether the chose in action was in fact escheated [FN re only taking custody]. But if the Court should later qualify the view which it seemingly expressed in the Standard Oil case and hold what it appeared to suggest in the Connecticut Mutual case, that minimum contacts

with the owner or the chose in action are required to give a state jurisdiction to escheat, the question whether the first state had such minimum contacts would appear to be open in the second proceeding. To put the matter another way, if contacts are necessary to give a state constitutional power to escheat, it is difficult to see how an escheat judgment entered by a state lacking such contacts could foreclose a later escheat proceeding by a state having them even though the result were the imposition of double liability on the obligor.

The Supreme Court may be able to avoid this difficulty by giving a second state claiming a superior right to escheat property already escheated by another state, in lieu of a right to proceed against the obligor, a right to sue the escheating state to recover the asset, invoking the original jurisdiction of the Supreme Court. That Mr. Justice Reed envisaged this possibility may be suggested by the following statement made in his opinion for the majority of the Court in the Connecticut Mutual case in reply to the insurance companies' contention that their domiciles had a better claim to escheat the insurance moneys at stake in that case than did New York:

> The appellants claim that only the state of incorporation could take over these abandoned moneys. They say that only one state may take custody of a debt ***. The problem of what another state than New York may do is not before us. That question is not passed upon. ***

* * *

The problems presented by one state's escheating a chose in action by virtue of its jurisdiction over the obligor in a proceeding in which possibly superior equities of other states are not considered or determined troubled several members of the Supreme Court in both the Connecticut Mutual and Standard

Oil cases. Thus, Justices Frankfurter, Jackson, and Douglas dissented in the Connecticut Mutual case on the ground that New York's assertion of the right to escheat the moneys involved should not be adjudicated in a declaratory judgment proceeding involving largely hypothetical questions and moneys which other states not represented might also wish to escheat. In the course of his dissenting opinion taking the same view Mr. Justice Jackson suggested that another state or states might claim the right to escheat the same moneys on such bases as that:

> (1) It [the claimant state] is the state in which the insured has died or where some other contingency occurred which brought the claim to maturity. (2) It is the state in which the beneficiary always has resided and was last known to reside. (3) It is the state of a proved later and longer residence of the insured. (4) It is the state to which both the insured and the beneficiary removed and resided after the policy was taken out in New York. (5) It is the state of actual permanent domicile, as opposed to mere residence in New York, of the insured and the beneficiary. (6) It is the state of actual delivery of the policy, though it was "issued for delivery" in New York. (7) It is the state where the claim is payable and where funds for its discharge are and at all times have been located.

Four Justices dissented in the Standard Oil case largely on the same ground. Mr. Justice Frankfurter wrote a dissenting opinion, in which Mr. Justice Jackson joined, asserting (1) that other states would have at least as good a claim as New Jersey to escheat the stock and dividends in question; (2) that the rights of the several states involved ought not to depend upon and be terminated by a race of diligence and (3) that competing state claims to escheat should be resolved by a suit among the claimant states invoking the original jurisdiction of the Supreme Court. Mr. Justice Douglas wrote the following short dissenting

opinion in which Mr. Justice Black joined:

> There are several states with possible claims to the escheat of intangibles. The state of incorporation of the obligor; the state where the last known owner was domiciled * * * the state where later on the true residence of the owner was proved to be; the state of his last known domicile; the state where the obligor has its main place of business; in case of insurance or trust property, the state of residence (or domicile) of the beneficiary. There may be still other states with claims of an equal or greater dignity to these. In this case we have heard from only one -- the state of incorporation.
>
> I think any of several states, including the state of incorporation, might constitutionally enact a custodial statute under which it undertook to hold the escheated intangibles pending determination by this Court of the claims of competing states. New Jersey has not done that. New Jersey undertakes to appropriate to her exclusive use (after a short statute of limitations has run) this vast amount of wealth. Hence, I dissent.

It is not clear whether the dissenters in Connecticut Mutual and Standard Oil cases thought that the judgments affirmed in those cases precluded a subsequent original proceeding in the Supreme Court among the various states concerned or simply that a more orderly way to proceed would be to require any state wishing to escheat a chose in action which other states might also claim to initiate a proceeding in the Supreme Court in which all escheat claims should be made and decided.

From all of this it appears that it is not possible at the present time to state categorically whether one against whom a judgment of escheat is entered is protected in all cases against similar claims by other states. It may be supposed that the Supreme Court will strive to reach this result but it can hardly be said that it will surely be accomplished or by what legerdemain the result will be brought about if it is.

B. What State's Law Should Be Applied to Determine Whether A Person Died Intestate and Without Heirs?

Before a California court reaches any of the questions discussed above, it must determine that the owner of the property involved died intestate and without heirs. What law should the court apply in making this determination?

Superficially, this question has a simple answer. Ordinarily we look to the law of the situs of real property and to the law of the domicile of the decedent in the case of personal property to determine whether the decedent has effectively disposed of the property by will and whether he is survived by persons entitled to take the property on intestacy. The same rule could be applied in making this determination for purposes of escheat.

The view might be taken, however, that escheat should occur only as a last resort and when no rational basis for distributing the property to private individuals can be found in the circumstances of the particular case. If this view is taken an alternative choice of law rule might be enacted by the Legislature for the purpose of determining whether the decedent died intestate and without heirs. For example, it might be provided that in the case of real property a court should, in deciding this question, apply first the law of the situs of the property and then the law of the decedent's domicile at the time of his death. A similar rule might be applied to chattels. In the case of choses in action it might be provided that the court should, in determining whether the decedent died intestate and without heirs, apply first the law of the decedent's domicile, then the law of the forum if it had a substantial connection with the decedent or the chose in action, and then the law of other states having a similar connection.