

STATE OF CALIFORNIA

**CALIFORNIA LAW
REVISION COMMISSION**

RECOMMENDATION AND STUDY

relating to

Inheritance Rights of Nonresident Aliens

September 1973

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
Stanford, California 94305

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NOTE

This pamphlet begins on page 421. The Commission's annual reports and its recommendations and studies are published in separate pamphlets which are later bound in permanent volumes. The page numbers in each pamphlet are the same as in the volume in which the pamphlet is bound. The purpose of this numbering system is to facilitate consecutive pagination of the bound volumes. This pamphlet will appear in Volume 11 of the Commission's *Reports, Recommendations, and Studies*.

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

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Ex Officio

September 20, 1973

To: THE HONORABLE RONALD REAGAN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The California Law Revision Commission was directed by Resolution Chapter 42 of the Statutes of 1956 to make a study to determine whether Probate Code Sections 259, 259.1, and 259.2, pertaining to the right of nonresident aliens to inherit property in this state, should be revised. The Commission submitted a recommendation and study on this topic to the 1959 session of the Legislature. *Recommendation and Study Relating to the Right of Nonresident Aliens to Inherit*, 2 CAL. L. REVISION COMM'N REPORTS at B-1 (1959). No legislation was enacted as a result of the 1959 recommendation.

The Commission has given this topic further study in the light of recent judicial decisions concerning the constitutionality of statutes restricting the right of nonresident aliens to inherit and, as a result of this further study, submits this recommendation and a background study. The background study was prepared at the suggestion of the Commission by Mr. Richard H. Will and is reprinted with permission from the *Pacific Law Journal*. Only the recommendation (as distinguished from the study) is expressive of Commission intent.

Respectfully submitted,
JOHN D. MILLER
Chairman

RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

relating to

INHERITANCE RIGHTS OF NONRESIDENT ALIENS

Probate Code Sections 259, 259.1, and 259.2, originally enacted in 1941 as an eve-of-war emergency measure, provide in effect that a nonresident alien cannot inherit real or personal property in this state unless the country in which he resides affords United States citizens the same rights of inheritance as are given to its own citizens. Section 259.1 places on the nonresident alien the burden of proving the existence of such reciprocal inheritance rights.

In 1959, the Law Revision Commission recommended the repeal of Probate Code Sections 259, 259.1, and 259.2.¹ The Commission reported that its study of these sections indicated that they had operated to frustrate decedents' wishes, to deny inheritance rights to innocent persons, and to require both the State of California and others to expend considerable time and expense in

¹*Recommendation and Study Relating to the Right of Nonresident Aliens to Inherit*, 2 Cal. L. Revision Comm'n Reports at B-5 (1959).

litigating cases which arose under those sections.² The Commission concluded that these adverse results far outweighed any benefits that might result from the operation of the sections. No legislation was enacted as a result of the 1959 recommendation.

In a 1968 decision, *Zschernig v. Miller*,³ the United States Supreme Court struck down an Oregon statute which sought to limit the right of a nonresident alien to inherit. The Oregon statute, which required the nonresident alien to establish the reciprocal right of a United States citizen to take property in the country of the alien's residence on the same terms as a citizen of that country, was held to be an unconstitutional intrusion by the state into the field of foreign affairs. In 1969, a California court of appeal held in

²The case for repeal of Section 259 and the related sections was stated in the 1959 recommendation as follows:

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

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

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

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

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

6. Section 259 has led to much litigation. The Attorney General has often been involved since an inheritance not claimed by reason of the statute may eventually escheat. Most of this litigation has been concerned with whether the foreign country involved did or did not permit United States citizens to inherit on a parity with its own citizens on the critical date. . . . [2 Cal. L. Revision Comm'n Reports at B-5, B-6.]

³389 U.S. 429 (1968). See note 6 *infra*.

*Estate of Kraemer*⁴ that Section 259, being substantially the same as the Oregon statute, was likewise unconstitutional for the same reason. And in 1971, in *Estate of Horman*,⁵ the California Supreme Court said: “*Kraemer* involved a statute substantially identical to that in *Zschernig*, and the decision in *Kraemer* was completely controlled by *Zschernig*.”⁶

Accordingly, because recent decisions indicate that Sections 259, 259.1, and 259.2 are unconstitutional and because the experience under the sections has been unsatisfactory, the Commission again recommends their repeal.

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

An act to repeal Chapter 3 (commencing with Section 259) of Division 2 of the Probate Code relating to inheritance rights of aliens.

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

Section 1. Chapter 3 (commencing with Section 259) of Division 2 of the Probate Code is repealed.

Comment. Chapter 3 (commencing with Section 259) is repealed. The manner in which it was applied was held unconstitutional in *Estate of Kraemer*, 276 Cal. App.2d 715, 81 Cal. Rptr. 287 (1969), which relied on *Zschernig v. Miller*, 389 U.S. 429 (1968). *Zschernig* invalidated an Oregon statute similar in text and operation to the California statute. See also *Estate of Horman*, 5 Cal.3d 62, 79, 485 P.2d 785, 797, 95 Cal. Rptr. 433, 445 (1971) (“*Kraemer* involved a statute substantially identical to that in

⁴276 Cal. App.2d 715, 81 Cal. Rptr. 287 (1969). The California Supreme Court denied a hearing, Peters, J., being of the opinion that the petition should be granted.

⁵5 Cal.3d 62, 79, 485 P.2d 785, 797, 95 Cal. Rptr. 433, 445 (1971).

⁶In *Clark v. Allen*, 331 U.S. 503 (1947), the United States Supreme Court held Section 259 constitutional on its face. In *Zschernig*, however, the court struck down the comparable Oregon statute because, as applied, the statute required “minute inquiries concerning the actual administration of foreign law, into the credibility of foreign diplomatic statements,” and other matters. 389 U.S. at 432. The California statute has been administered in a manner similar to that of the Oregon statute invalidated in *Zschernig*. See *Estate of Chichernea*, 66 Cal.2d 83, 424 P.2d 687, 57 Cal. Rptr. 135 (1967); *Estate of Larkin*, 65 Cal.2d 60, 416 P.2d 473, 52 Cal. Rptr. 441 (1966); *Estate of Schluttig*, 36 Cal.2d 416, 224 P.2d 695 (1950); *Estate of Gogabashvele*, 195 Cal. App.2d 503, 16 Cal. Rptr. 77 (1961). Reppy, J., concurring in *Estate of Kraemer*, 276 Cal. App.2d 715, 726, 81 Cal. Rptr. 287, 295 (1969), made the point that Section 259 was not unconstitutional on its face but that it was necessary to hold it unconstitutional as applied because the California Supreme Court’s opinions in *Estate of Larkin*, *supra*, and *Estate of Chichernea*, *supra*, required lower courts to make the unconstitutional inquiries. See also Comment, *Inheritance Rights of Nonresident Aliens—A Look at California’s Reciprocity Statute*, 3 Pac. L.J. 551 (1972), reprinted *infra*.

Zschernig, and the decision in *Kraemer* was completely controlled by *Zschernig*.”). In addition, the operation of the California statute frustrated decedents’ wishes, denied inheritance rights to innocent persons, and required the inefficient expenditure of time and money by the state. See *Recommendation and Study Relating to Inheritance Rights of Nonresident Aliens*, 11 Cal. L. Revision Comm’n Reports 421 (1973). See also Comment, *Inheritance Rights of Nonresident Aliens—A Look at California’s Reciprocity Statute*, 3 Pac. L.J. 551 (1972).

BACKGROUND STUDY

This study is reprinted with permission from 3 *Pacific Law Journal* 551 (1972).

Inheritance Rights Of Nonresident Aliens— A Look At California's Reciprocity Statute

This comment examines California Probate Code Section 259 which allows nonresident aliens to inherit property only if U.S. citizens can inherit on equal terms with residents of the alien's country. The author analyzes the statute in terms of its constitutional validity in light of recent case decisions, its legislative objectives, and its practical consequences in actual operation. This examination of the statute reveals that there are few alternatives to the present law. In conclusion the author suggests that total repeal of the statute will best achieve the legitimate state policy in regulating distribution of property to nonresident alien heirs.

For thirty years California has been vexed with problems of determining the eligibility of nonresident alien heirs to inherit property under California Probate Code Sections 259, 259.1 and 259.2. These sections require a nonresident alien heir to prove that United States citizens, residing in his country, have the same inheritance rights as citizens of his country.¹ Since its inception this section of the Probate

1. CAL. PROB. CODE §259 provides

The right of aliens not residing within the United States or its territories to take real property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of reciprocal right upon the part of citizens of the United States to take real property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents and the right of aliens not residing in the United States or its territories to take personal property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take personal property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents.

CAL. PROB. CODE §259.1 provides

The burden shall be upon each nonresident alien to establish the existence of the reciprocal rights set forth in Section 259.

CAL. PROB. CODE §259.2 provides

If such reciprocal rights are not found to exist and if no heirs other than such aliens are found eligible to take such property, the property shall be disposed of as escheated property.

Code has been a continuing source of problems for the courts and the heirs of California decedents. It has created complex problems involving the foreign relations power of the federal government and the state power to control the disposition of property within its borders. In addition, it has produced confusion and uncertainty in the California law of inheritance resulting in much litigation.² Furthermore this section of the Probate Code does not even fulfill its purported purposes as expressed in a Statement of Urgency accompanying its passage.³

Roots of Alien Land Law

To fully appreciate the conflict, confusion, and uncertainty created by these statutes as well as to understand what is needed in the way of corrective legislation, any re-examination of these statutes must begin with the origins of the early common law. The right of aliens to inherit has been an ancient problem and has generally been a highly restricted right when granted. Among the Romans, aliens could not hold property except by express legislation. This policy was adopted by the Romans from the Greeks who excluded foreigners from participation in civil rights and regarded them as enemies.⁴ The policy of the later European civil law followed that of the Romans and also prevented aliens from taking property by descent or operation of law.⁵ As the feudal system developed, following the collapse of Rome, land became a political benefice given as a reward for services, including the indispensable requisite of allegiance. Aliens would not be able to fulfill that requisite.⁶ As with the Greek, Roman and Medieval law of Europe the early common law of England did not allow aliens to take property by descent or operation of law.⁷ The origin of this policy can be traced to the thirteenth century when England was in a continuing state of war with France.⁸ Because of this state of war, a French claimant to land was denied the property not because he was an alien *per se*, but because he was subject to the power of the king of France and no subject of the king of France could be heard in

2. 1959 CAL. L. REVISION COMM'N REPORT, RECOMMENDATIONS AND STUDIES, Vol. 2, at B-6 [hereinafter cited as LAW REVISION REPORT].

3. CAL. STATS. 1941, c. 895, §1, p. 2473.

4. *People v. Folsom*, 5 Cal. 373, 376 (1855).

5. *Id.*; See also Note, *Conflict Between Local and National Interests in Alien Landholding Restrictions*, 16 U. CHI. L. REV. 315, 317 (1949).

6. *Id.*

7. See *People v. Folsom*, 5 Cal. 373, 375-376 (1855); *Farrell v. Enright*, 12 Cal. 450, 455 (1859); *Norris v. Hoyte*, 18 Cal. 217, 218 (1861); *Carrasco v. State*, 67 Cal. 385, 386 (1885); *Blythe v. Hinckley*, 127 Cal. 431, 435 (1900); *affirmed* 180 U.S. 333 (1900).

8. 1 F. POLLOCK AND F. MATTLAND, *HISTORY OF ENGLISH LAW* 461 (2d ed. 1898).

English courts until Englishmen could be heard in French courts.^{8a} The state of war, however, continued so long that as time passed this foreign policy that restricted the subjects of the king of France became simply the common law rule that any alien could not take property in England by descent or operation of law.^{8b} This rule found its way into American law when the United States adopted the English common law as it existed at the time of the American Revolution.⁹ It remains the law in the United States today unless modified by statute or treaty.¹⁰

Early California Developments

After annexation to the United States, but prior to statehood, California followed the very liberal policy of permitting anyone to inherit, absent some express statutory prohibition.¹¹ This policy was the result of Congressional control over the Territories.¹² Discrimination between foreigners and native citizens was prohibited in order to encourage immigration of foreigners to the Territories.¹³

Upon attaining statehood California policy in regard to alien inheritance rights was made more restrictive.¹⁴ Since aliens could not inherit property in England at the time the United States adopted the common law, the United States Supreme Court held that the common law disability was a part of the common law of the several states.¹⁵ When California became a state the common law disability automatically became the law of California except where modified by treaty or statute.¹⁶ However, in its 1849 Constitution, California mitigated this more restrictive common law view by removing the disability with re-

8a. *Id.* at 462.

8b. *Id.* at 463.

9. See Note, *Conflict Between Local and National Interests in Alien Landholding Restrictions*, 16 U. CHI. L. REV. 315, 320 (1949).

10. *Id.*

11. See *People v. Folsom*, 5 Cal. 373, 379 (1855).

12. *Id.*

13. *Id.*

14. See *Farrell v. Enright*, 12 Cal. 450 (1859); *Blythe v. Hinckley*, 127 Cal. 431 (1900).

15. *Fairfax's Devisee v. Hunter's Leasee*, 11 U.S. (7 Cranch) 602, 622 (1813).

16. See *Farrell v. Enright*, 12 Cal. 450, 456 (1859); *Blythe v. Hinckley*, 127 Cal. 431 (1900).

gard to *resident* aliens of white or African descent.¹⁷ While the intent of this section of the California Constitution was to induce foreigners to settle in California,¹⁸ the obvious effect was to discriminate against Californians of oriental descent. However, the law was narrowly construed by the courts to leave the rights of *nonresident* aliens as they existed at common law.¹⁹ This allowed a nonresident alien to acquire title to real property in California by purchase or other act of the party, though not by descent or other operation of law.²⁰

The constitutional provision did not prevent the Legislature from extending inheritance rights to nonresident aliens if it so desired.²¹ Consequently, not long after the adoption of the California Constitution, the California Legislature, in 1856, extended inheritance rights to *all* aliens. This legislation permitted both resident and nonresident to inherit real or personal property in California.²² Thus, early in its history as a state, California repudiated the common law disability and allowed the testator's intent and the laws of distribution to control in all cases. In 1872 this policy became embodied in Civil Code Section

17. CAL. CONST. art. I §17 (1849 rev. 1879). The complete text of this section of the California Constitution in 1849 read

Foreigners of the white race or African descent, eligible to become citizens of the United States under the naturalization laws thereof, while bona fide residents of this state shall have the same rights in respect to the acquisition, possession, enjoyment, transmission and inheritance of property as native-born citizens.

By subsequent amendment art. I §17 was made applicable to personal property only (1894) and reference to the white race or African descent was deleted (1954).

18. *Farrell v. Enright*, 12 Cal. 450, 451 (1859).

19. *Id.* at 456.

20. *Siemssen v. Bofer*, 6 Cal. 250, 254 (1855); *Norris v. Hoyte*, 18 Cal. 217 (1861).

21. *State v. Rogers*, 13 Cal. 159, 163 (1859); *Estate of Billings*, 65 Cal. 593, 595 (1884); *Lyons v. State*, 67 Cal. 380, 382 (1885); *State v. Smith*, 70 Cal. 153, 155 (1886); *Blythe v. Hinckley*, 127 Cal. 431, 437 (1900).

22. CAL. STATS. 1856, c. 116, §1, p. 137. The full text of this reads

Aliens shall hereafter inherit and hold by inheritance real and personal estate in as full a manner as though they were native born citizens of this or the United States; provided, that no non-resident foreigner or foreigners shall hold or enjoy any real estate situated within the limits of the State of California five years after the time such non-resident foreigner or foreigners shall inherit the same; but in case such non-resident foreigner or foreigners do not appear or claim such estate within the period in this section before-mentioned, then such estate shall be sold upon information of the Attorney-General according to law, and the proceeds deposited in the Treasury of said State for the benefit of such non-resident foreigner or foreigners or their legal representatives, to be paid to them by the Treasurer of said State at any time within five years thereafter when such non-resident foreigner or foreigners or their legal representatives, shall produce evidence to the satisfaction of the Treasurer and Controller of State that such foreigner or foreigners are the legal heirs to, and entitled to inherit such estate. . . .

671,²³ which provides that “any person, whether citizen or alien, may take, hold, and dispose of property, real or personal, within the state.”²⁴

Since the Civil Code is to be liberally construed with a view to effecting its objects and promoting justice,²⁵ and since the object of this section was to extend the rights of inheritance to nonresidents, it was held that Civil Code Section 671 should be liberally construed to effect that purpose; thus the word “take” was construed to be broad enough to include taking by descent as well as by purchase.²⁶ The only restriction placed on the right of nonresident aliens to inherit by the 1856 legislation was that the property had to be claimed within five years.²⁷ This restriction was codified in 1872 and is presently embodied in Probate Code Section 1026.²⁸

California in the Twentieth Century

In the twentieth century California turned from its traditional liberal policy to one of restriction. The Alien Land Law, enacted in 1920, was an attempt to limit the rights of aliens to hold and dispose of real property in California.²⁹ The history of events leading up to its passage indicates that it was the end product of many attempts to place discriminatory restrictions on Chinese and Japanese aliens.³⁰ This law made a distinction between aliens who were eligible for citizenship and those who were not. It was, however, held unconstitutional in 1952 as a denial of the equal protection of the laws guaranteed by the fourteenth amendment to the United States Constitution.³¹

23. CAL. CIV. CODE §671; (Enacted 1872 amended by Code Am. 1873-74, c. 612, §100, p. 218).

24. CAL. CIV. CODE §671; It has been held that provisions embodied in Civil Code Section 671 were not affected by the article I section 17 of the California Constitution discussed at note 9 *supra* because that constitutional provision was held not to be a limitation upon the power of the legislature to regulate the right of nonresident aliens to take property by descent or devise, and that Civil Code Section 671 was within the principle that the legislature cannot abridge, but may extend the property rights granted to aliens in the state constitution. See *State v. Rogers*, 13 Cal. 159, 165 (1859); *Estate of Billings*, 65 Cal. 593, 595 (1884); *Lyons v. State*, 67 Cal. 380, 382-383 (1885); *Carrasco v. State*, 67 Cal. 385, 386 (1885); *State v. Smith*, 70 Cal. 153, 155 (1886); *Blythe v. Hinckley*, 127 Cal. 431, 437 (1900).

25. CAL. CIV. CODE §4; see also *Carrasco v. State*, 67 Cal. 385, 386 (1885).

26. *Estate of Billings*, 65 Cal. 593, 594 (1884).

27. CAL. STATS. 1856, c. 116, §1, p. 137.

28. CAL. PROB. CODE §1026.

29. *The Alien Land Law*, an initiative measure approved at election Nov. 2, 1920, effective Dec. 9, 1920, CAL. STATS. 1921, p. lxxxvii.

30. See Note, *Conflict Between Local and National Interests in Alien Landholding Restrictions*, 16 U. CHI. L. REV. 315, 320 (1949) and *Oyama v. Calif.*, 332 U.S. 631 (1948) for brief history.

31. See *Sei Fujii v. State*, 38 Cal. 2d 718, 738 (1952); and *Haruye Masaoka v. People*, 39 Cal. 2d 883 (1952).

Events leading up to American involvement in World War II led to the present restrictions on the right of nonresident aliens to inherit.³² In 1941 the California Legislature enacted Probate Code Sections 259, 259.1, and 259.2.³³ The purpose of this legislation was to deal with three major problems:

- 1) Foreign countries had impounded money left to California citizens.
- 2) Confiscation by foreign governments prevented nonresident aliens from receiving property from California decedents.
- 3) There was concern that the money or property impounded or confiscated might eventually be used in a war against the United States.³⁴

Probate Code Section 259 provides that the right of nonresident aliens to take real or personal property in California by succession or testamentary disposition is dependent upon the existence of a reciprocal right of United States citizens to take real or personal property on the same terms and conditions as residents and citizens within the respective countries.³⁵

Probate Code Section 259.1 provides that the burden of establishing the existence of reciprocal rights shall be upon the nonresident alien. This section, originally enacted in 1941, was temporarily repealed in 1945 after World War II, apparently because it was believed the reason for its enactment had ended.³⁶ During the interval between repeal and re-enactment, there was a conclusive presumption of reciprocal rights *unless* the issue was raised prior to a hearing on any petition for distribution.³⁷ If the issue were raised prior to the hearing the burden of proof was on the local claimant.³⁸ The original section 259.1, however, was re-enacted in 1947.³⁹ The re-enactment of the original

32. See LAW REVISION REPORT at B-15; Heyman, *The Non-resident Alien's Right to Succession Under the "Iron Curtain Rule"*, 52 NW. U. L. REV. 221, 226-231 (1957); CAL. PROB. CODE §§259, 259.1, and 259.2.

33. CAL. STATS. 1941, c. 895, §1, p. 2473.

34. See Heyman, *supra* note 32; Chaitkin, *The Rights of Residents of Russia and Its Satellites to Share in Estates of American Decedents*, 25 S. CAL. L. REV. 297-317 (1952); LAW REVISION REPORT at B-15.

35. CAL. PROB. CODE §259. Prior to 1945 amendment this section required reciprocal rights upon the part of the United States citizens to receive in this country payment of money originating from estates of persons dying in foreign countries, but this was subsequently deleted by amendment. CAL. STATS. 1945, c. 1160, §1, p. 2208; CAL. STATS. 1947, c. 1042, §1, p. 2443; See *Estate of Schluttig*, 36 Cal. 2d 416, 418 (1950); *Estate of Blak*, 65 Cal. App. 2d 232, 237 (1944); *Miller Estate*, 104 Cal. App. 2d 1 (1951).

36. See Chaitkin, *supra* note 34, at 308; Heyman, *supra* note 32, at 231; CAL. STATS. 1941, c. 895, §1, p. 2473; CAL. STATS. 1945, c. 1160, §2, p. 2209.

37. CAL. PROB. CODE §259, *as amended* by CAL. STATS. 1945, c. 1160, §1, p. 2208.

38. *Id.*

39. CAL. STATS. 1947, c. 1042, §2, p. 2444.

statute was probably the result of the fact that the United States Supreme Court in 1947 had upheld Probate Code Section 259 and 259.1 as originally enacted.⁴⁰ In addition, the fact that the "cold war" was in full force seems to have contributed to the California Legislature's desire to re-enact the harsher original statute.⁴¹ Probate Code Section 259.2 provides that if reciprocal rights are not found to exist and if no heirs other than nonresident aliens are found, the property is to be disposed of as escheated property.⁴²

Presently therefore, California law gives all aliens the right to inherit real or personal property under Civil Code Section 671 but under Probate Code Sections 259 and 259.1 a nonresident alien must prove that United States citizens residing in his country receive the same inheritance rights as citizens of that country before he will be allowed to inherit in California. If an alien can prove that American citizens can inherit under the same terms and conditions as citizens and residents of the alien's country, such alien may inherit in California subject only to Probate Code Section 1026 which requires claiming of the property within five years. If the alien cannot prove reciprocity in inheritance rights, local heirs may claim the property under Probate Code Section 259.2 and if there is no local heir, the property will be disposed of as if it were escheated property.

Constitutional Questions

The development of section 259 has created serious constitutional questions involving federal pre-emption and state interference with foreign relations. Prior to October 1969 this section and related provisions had been upheld against all attacks on constitutional grounds. It was held that a state in exercise of its sovereign power may provide conditions under which aliens may inherit and may wholly prohibit such inheritance.⁴³ In an early California case, *Blythe v. Hinckley*,⁴⁴ it was pointed out that the state has the primary power of regulation of the tenure of property within its limits and it could allow aliens to take, hold, and dispose of property. The only limit upon the state in its power to control the tenure of real property, recognized by *Blythe v. Hinckley*, was that it could not conflict with express provisions of a paramount treaty of the United States.⁴⁵ Under the supremacy clause

40. *Clark v. Allen*, 331 U.S. 503, 516 (1947).

41. Heyman, *supra* note 32, at 231.

42. CAL. PROB. CODE §259.2.

43. *Estate of Zimmerman*, 132 Cal. App. 2d 702, 704 (1955).

44. 127 Cal. 431 (1900), *affirmed* 180 U.S. 333 (1901).

45. *Id.* at 436.

of the United States Constitution a treaty regulating rights of aliens to possess and enjoy and inherit property must control if contrary to state legislation.⁴⁶ The *Blythe* case failed to define the limits of state power in the absence of a treaty or federal legislation. It did, however, hold that regulation of an alien's right to inherit is a subject legitimately within the scope of the treaty making power of the federal government.⁴⁷ But the absence of a treaty between the United States and a foreign nation upon the subject matter of the right of citizens of a foreign nation to inherit property within the United States is not equivalent to a denial of that right and cannot affect the power of a state to confer that right.⁴⁸ Where there is a conflict it was held that the state law was not an unwarranted interference with, or encroachment upon, the powers of the federal government, but merely that the state law, insofar as it conflicted, was merely suspended or controlled during the life of the treaty.⁴⁹ Prior to 1959 section 259 and related provisions were challenged and upheld as not being in conflict with article I section 10 or article II section 1 of the United States Constitution forbidding a state to enter into treaties, alliances, confederations or agreements or compacts with a foreign power.⁵⁰

In *Estate of Bevilaqua*, the California supreme court held that Probate Code Section 259 did not violate the due process clause of the Federal Constitution because the right of succession exists solely by statutory authority and can be changed, limited, or abolished at any time prior to the death of the ancestor.⁵¹ The *Bevilaqua* case, while recognizing the right of states to control the succession of property within its borders, did not delineate the scope of this state power in relation to the federal control over foreign affairs.⁵²

Probate Code Section 259 was challenged in 1947, in *Clark v. Allen*,⁵³ as a possible interference with the foreign affairs power of

46. *Blythe v. Hinckley*, 127 Cal. 431, 436 (1900); *Estate v. Romaris*, 191 Cal. 740, 744 (1923).

47. *Blythe v. Hinckley*, 127 Cal. 431, 436 (1900); see also *People v. Gerke*, 5 Cal. 381, 384 (1855) and *Estate of Romaris*, 191 Cal. 740, 744 (1923).

48. *Blythe v. Hinckley*, 127 Cal. 431, 435 (1900).

49. *Blythe v. Hinckley*, 127 Cal. 431, 436 (1900); see also *Romaris Estate*, 191 Cal. 740, 745 (1923); *Byrne v. Drain*, 127 Cal. 663, 667 (1900); *Estate of Turner*, 51 Cal. App. 317, 322 (1921); *Estate of Meyer*, 107 Cal. App. 2d 799, 809 (1951).

50. *Blythe v. Hinckley*, 127 Cal. 431, 437 (1900), holding article I sec. 17 of the California Constitution and Civil Code Section 671 allowing aliens to take, hold and dispose of property in California are not in conflict with art. I sec. 10 of the Constitution of the United States as a negotiation or making of a compact with a foreign country; *Estate of Reihls*, 102 Cal. App. 2d 260 (1951) upholding Probate Code §259; see also *Clark v. Allen*, 331 U.S. 503, 517 (1947), and *U.S. v. Curtiss-Wright Corp.*, 299 U.S. 304, 317 (1936).

51. 31 Cal. 2d 580, 582 (1948).

52. *Id.*

53. 331 U.S. 503, 506 (1947).

the federal government. Since there was no treaty relating to real property involved in the *Clark* case, the United States Supreme Court had the opportunity to clarify the scope of the state power to control succession of property within its borders in the absence of a federal statute or treaty. It was held that, in the absence of a treaty covering succession, section 259 was not a wrongful extension of state power into the field of foreign affairs.⁵⁴ The argument was made that section 259 sought to promote the right of American citizens to inherit in foreign nations by offering to aliens reciprocal inheritance rights in California and that such an offer of reciprocal arrangements was more properly a matter for settlement by the federal government on an international basis. After citing *Blythe v. Hinckley* the Court rejected this argument as "farfetched."⁵⁵ The Court held that a general reciprocity statute did not intrude on the federal domain.⁵⁶ Furthermore it appeared to set forth a test for determining when a state had exceeded its powers by indicating that some incidental or indirect effect in foreign countries would be permissible.⁵⁷

While *Clark v. Allen* upheld the validity of the California statute, the United States Supreme Court later found statutes which were substantially the same, to be unconstitutional in their *application*. In *Zschernig v. Miller*⁵⁸ the Court struck down an Oregon law that required reciprocity as being a violation of the foreign affairs power of the President and Congress.⁵⁹ The basis of this decision was that even in the absence of a treaty or federal statute the exercise of a state's policy *may* disturb foreign relations and constitute an unconstitutional interference in the field of foreign affairs.⁶⁰ Although the Oregon law was substantially the same as California Probate Code Section 259 the Court in the *Zschernig* case refused to reexamine its earlier holding in *Clark v. Allen* which had upheld the California statute.⁶¹ The Court in *Zschernig* held that the particular history and operation of the Oregon statute made it an intrusion by the state into the field of foreign affairs.⁶² The suggestion that it had much more than

54. *Id.* at 517. See also *Estate of Thramm*, 80 Cal. App. 2d 756, 766 (1947); *Estate of Knutzen*, 31 Cal. 2d 573, 576 (1948); *Estate of Bevilacqua*, 31 Cal. 2d 580, 582 (1948); *Estate of Reihls*, 102 Cal. App. 2d 260, 269 (1951).

55. *Clark v. Allen*, 331 U.S. 503, 516 (1947).

56. *Id.* at 516-517.

57. *Id.*

58. *Zschernig v. Miller*, 389 U.S. 429 (1967).

59. *Zschernig v. Miller*, 389 U.S. 429, 441 (1967); see also *Gorun v. Fall*, 393 U.S. 398, 399 (1969).

60. *Id.* at 432, 441 citing *Hines v. Davidowitz*, 312 U.S. 52 (1940).

61. *Zschernig v. Miller*, 389 U.S. 429, 432 (1967).

62. *Id.* at 433.

“incidental or indirect” effect becomes obvious upon examining the Court’s discussion of the application of the Oregon statute. Its application had led into minute inquiries concerning the actual administration of foreign law, into the credibility of foreign diplomatic statements, and into speculation concerning how many nonresident aliens were actually denied the right to receive their inheritance due to confiscatory policies of their government.⁶³

With this sort of application in mind, the Court set its criteria for determining the constitutionality of reciprocity statutes. The Court pointed out that although the Oregon statute was not as gross an intrusion into the federal domain as others might be, it did have a *direct impact* upon foreign relations and it might “well adversely affect the power of the central government to deal with these problems.”⁶⁴ The *Zschernig v. Miller* decision suggests that if the minute inquiries concerning the actual administration of foreign law could be avoided in determining reciprocity in inheritance rights, reciprocity statutes would be constitutional.⁶⁵ The Court specifically distinguished the *Zschernig* case from *Clark v. Allen* by stating that at the time *Clark* was decided the case involved “no more than a routine reading of foreign laws.”⁶⁶ In other words, *Clark v. Allen* was concerned with the words of a statute on its face, *not in the manner of its application*.⁶⁷ In clear language, however, the United States Supreme Court stated that were it considering recent California cases, the result in California would be similar to the *Zschernig* decision.⁶⁸

The result indeed was similar when the California Court of Appeal for the Second District heard a similar case based on Probate Code Section 259. The court of appeal in *Estate of Kraemer*⁶⁹ held that the section was unconstitutional in its application because it interfered with the foreign affairs power of the federal government. The *Kraemer* decision was based explicitly and solely on *Zschernig v. Miller* and set out no new criteria for determining the constitutionality of the statute.⁷⁰ Since the *Zschernig* decision was concerned only with the

63. *Id.* at 432.

64. *Id.* at 441.

65. *Id.* at 432.

66. *Id.* at 433.

67. *Id.* at 432-433.

68. *Id.* The court in *Zschernig* noted that “we had no reason to suspect that the California statute in *Clark v. Allen* was to be applied as anything other than a general reciprocity provision requiring just matching of laws. Had we been reviewing the latter California decision of *Estate of Gogabashvele*, 195 Cal. App. 2d 503, 16 Cal. Rptr. 77 . . . the additional problems we now find with the Oregon provision would have been presented.”

69. 276 Cal. App. 2d 715, 725 (1969).

70. *Id.* at 725.

application of the Oregon statute the California court made it clear that Probate Code Section 259 as applied, in determining the actual administration of foreign law, was a wrongful interference with the foreign affairs power of the President and Congress.⁷¹

Confusion and Uncertainty

Even though it is constitutional on its face and may be constitutional in its application if alternate methods of application were used, Probate Code Section 259 has still led to extreme confusion in the law. In this regard, almost all of the litigation in the appellate courts concerning section 259 has involved the question of whether there was proof of the required reciprocity.⁷² Prior to 1957 the problem of proof under the statute was complicated by the principle that questions of foreign law were to be treated as questions of "fact."⁷³ Since the issue was one of fact it had to be proved in the same manner as any other issue of fact.⁷⁴ In this regard it was the operation of the foreign law and not merely the existence of the codes or statutes involved in the foreign law that had to be proved.⁷⁵ It was this treatment of foreign law as a question of fact which led to the issue as to the constitutionality of section 259 in its application. This problem of proof led to the "minute inquiries concerning the administration of foreign law" which were condemned in *Zschernig v. Miller*.⁷⁶ The effect of treating questions of foreign law as questions of fact was that any holding as to the existence or nonexistence of reciprocal rights between the United States and a foreign country was not binding in any other proceeding between different parties.⁷⁷ In effect there could be two judgments making opposite declarations with respect to the identical country and the identical period. In Germany for instance, it was held that reciprocal rights existed on April 22, 1942,⁷⁸ in March, 1945,⁷⁹ and on November 24, 1946.⁸⁰ Reciprocal rights however, did not exist in Germany on June 7, 1943,⁸¹ in January, 1944,⁸² on April 3, 1945,⁸³ or on March 12, 1948.⁸⁴ In German occupied

71. *Id.*

72. See LAW REVISION REPORT at B-17.

73. Estate of Schluttig, 36 Cal. 2d 416, 423 (1950).

74. Estate of Miller, 104 Cal. App. 2d 1, 14 (1951).

75. *Id.* at 15.

76. 389 U.S. 429, 432 (1967).

77. Estate of Miller, 104 Cal. App. 2d 1, 15 (1951).

78. *Id.* at 20.

79. Estate of Schneider, 140 Cal. App. 2d 710, 718 (1956).

80. Estate of Reihls, 102 Cal. App. 2d 260, 268 (1951).

81. Estate of Thramm, 80 Cal. App. 2d 756, 758 (1947).

82. Estate of Leefers, 127 Cal. App. 2d 550, 559 (1954).

83. Estate of Schluttig, 36 Cal. 2d 416, 425 (1950).

84. Kramer v. Sup. Ct., 36 Cal. 2d 159, 161 (1950).

France in 1941 or 1942⁸⁵ and Greece in 1942⁸⁶ reciprocal rights did not exist, but they did exist in German occupied Holland in 1941 and 1942⁸⁷ and in Russian controlled Rumania in 1949.⁸⁸

An attempt was made to rectify this confusing situation in 1957 when the California Legislature, acting upon the recommendations of the California Law Revision Commission,⁸⁹ enacted legislation to allow judicial notice of foreign law.⁹⁰ But in 1959 the California Law Revision Commission pointed out that the statute providing for judicial notice of the law of foreign countries did not completely solve all the difficulties under section 259 because the nonresident alien beneficiary still had the burden of establishing the existence of the reciprocal rights set forth in section 259 and incurring the expense incident thereto. The issue in each case was the inheritance law of the particular country at the time of death of the particular decedent. Thus, even though the issue was technically one of "law", a decision in one case still would not necessarily settle the question for litigation concerning the same country at a different time because the foreign law could change.⁹¹ Furthermore, litigation by different parties could question the "construction" made by a prior court of the inheritance law of a particular country at a particular time.⁹² Thus, inconsistent and confusing decisions have continued. The best example of this confusing situation can be seen in the inconsistent determinations of reciprocal rights of inheritance in the Soviet Union which were made in *Estate of Gogabashvele*⁹³ and *Estate of Larkin*.⁹⁴

In the *Estate of Gogabashvele* reciprocal rights of inheritance were found not to exist in the Soviet Union in 1956.⁹⁵ In *Estate of Larkin* however, the court held that the Soviet Union did extend reciprocal inheritance rights to citizens of the United States.⁹⁶ Relying heavily upon the writings of an expert on Soviet law, the court in the *Goga-*

85. *Estate of Michaud*, 53 Cal. App. 2d 835 (1942). Although the exact date of death is not cited in this case, it had to occur after the passage of Probate Code Section 259 in 1941 in order to subject the French heirs to the California reciprocity requirement.

86. *Estate of Corofingas*, 24 Cal. 2d 517, 518 (1944).

87. *Estate of Blak*, 65 Cal. App. 2d 232, 238 (1944).

88. *Estate of Kennedy*, 106 Cal. App. 2d 621, 629 (1951).

89. *Recommendations and Study Relating to Judicial Notice of the Law of Foreign Countries*, 1957 CAL. L. REVISION COMM'N REPORT, RECOMMENDATIONS AND STUDIES, Vol. I, at 1-17 (1957).

90. CAL. STATS. 1957, c. 249, p. 902.

91. LAW REVISION REPORT at B-25.

92. *Id.*

93. 195 Cal. App. 2d 503 (1961).

94. 65 Cal. 2d 60 (1966).

95. 195 Cal. App. 2d 503, 528 (1961).

96. 65 Cal. 2d 60, 86 (1966).

bashvele decision held that reciprocity could not be established in the Soviet Union because a communist country cannot countenance "such a thing as a right . . . as we understand it in this country."⁹⁷ The court held that no quantity of evidence regarding Soviet law and practice in the field of alien inheritance could establish reciprocity since the structure of the Soviet government and its commitment to the philosophy of communism make meaningless any talk of "inheritance rights" in the Soviet system. The main proposition in this argument was that Soviet legal theory simply did not recognize the concept of "natural rights."⁹⁸ The *Larkin* decision rejected this argument as being opposed to the legislative intent behind section 259 by pointing out that rights of inheritance, even in California, are at the sufferance of the legislature and are not based on inherent natural rights.⁹⁹ Furthermore, the court in the *Larkin* decision refuted the conclusion in the *Gogabashvele* case by use of the same Soviet expert used in the *Gogabashvele* decision.¹⁰⁰ The largest part of the *Gogabashvele* decision concerned itself with the political institutions of the Soviet Union which differ markedly from those of the United States.¹⁰¹ The court in *Larkin* noted, however, that such evidence did not relate to the issues before the court and that section 259 did not require foreign countries to have the same political and judicial system as that of the United States, but it merely required that the country not discriminate, in inheritance matters, between the nationals of that country and the resident citizens of the United States.¹⁰² The confusion and uncertainty in the law as the result of such diametrically opposed decisions is obvious.

Contradiction of Legislative Intent

It is ironic that these constitutional and interpretive problems arise out of an attempt to apply a statute which conflicts with its original purported purpose.¹⁰³ As evidenced by the Statement of Urgency accompanying Probate Code section 259 the California Legislature in 1941 was concerned with the confiscation of the gifts of California decedents by unfriendly foreign governments.¹⁰⁴ In operation, how-

97. 195 Cal. App. 2d 503, 528 (1961).

98. *Id.*

99. 65 Cal. 2d 60, 80 (1966).

100. *Id.* at 68.

101. 195 Cal. App. 2d 503, 509-522 (1961).

102. 65 Cal. App. 2d 60, 64 (1966).

103. See LAW REVISION REPORT at B-18, B-19, B-20, for a general overview of these conflicts.

104. See Statement of Urgency at CAL. STATS. 1941, c. 895, §1, p. 2473.

ever, section 259 fails to give effect to the California testator's intent or to the laws of intestacy if reciprocity is not established. If the designated beneficiary does not appear and prove reciprocity other more distant relatives, or the state, will take.¹⁰⁵ But even if reciprocity is proven section 259 does not insure that beneficiaries will actually receive the benefit of the inheritance. The inheritance might still be subject to "confiscation" through taxation or other means and as long as the "confiscation" is not a total taking the California courts will not intervene. Indeed, it has been held that, "short of a statute in a foreign country nationalizing every conceivable kind of property, it is not rational to ascribe to our legislature an intent to deny the right of inheritance, [and indirectly the intent of the testator,] to a nonresident alien merely because his government has embarked upon a program of socialization of industry."¹⁰⁶ In such a situation, if reciprocity could be established, the nonresident could inherit even though the foreign inheritance taxes were high.¹⁰⁷

It was recently held that California courts need require no more than a demonstration that the law of a foreign country, as written and applied, enables California citizens to inherit on terms of full equality with that country's residents.¹⁰⁸ Even with this reduced requirement of proof of reciprocity there is a very real problem in the expense involved in proving the existence of reciprocity. While the purpose of the California Legislature was to prevent heirs of California decedents from being denied their inheritance, the reciprocity requirement itself often frustrates that policy by making it uneconomical or burdensome for intended beneficiaries to claim the inheritance.¹⁰⁹

The Statement of Urgency also expressed fear that property left to friends and relatives in some foreign countries was being "seized" by these foreign governments and used for war purposes.¹¹⁰ Thus one of the major purposes of the law was to prevent assets in the United States from falling into the hands of unfriendly nations. This consideration has been poorly realized. It was not long after its passage

105. *See, e.g.*, Estate of Arbulich, 41 Cal. 2d 86 (1953); Estate of Schluttig, 36 Cal. 2d 416, 695 (1950); Estate of Bevilaqua, 31 Cal. 2d 580 (1948); Estate of Karban, 118 Cal. App. 2d 240 (1953).

106. Estate of Kennedy, 106 Cal. App. 2d 621, 629 (1951) dealing with the country of Rumania; *see also* Estate of Larkin, 65 Cal. 2d 60, 86 (1966).

107. *Id.*

108. Estate of Larkin, 65 Cal. 2d 60, 65 (1966).

109. LAW REVISION REPORT at B-5.

110. CAL. STATS. 1941, c. 895, § 1, p. 2473.

that it became apparent that section 259 would operate against friendly nations as well as enemies.¹¹¹ In *Estate of Michaud*¹¹² a cousin of the California decedent inherited to the exclusion of a father and brother in France. In *Estate of Corcogingas*¹¹³ brothers and sisters were excluded in German occupied Greece and the inheritance went to a local heir. In *Estate of Blak*¹¹⁴ the government in exile of the Netherlands had to intervene to prove that Holland had always recognized inheritance rights of foreigners.

In addition to section 259 operating in some instances against friends of the United States it can also operate in favor of enemies of the United States as well. It is possible to find under this section that unfriendly nations have reciprocity in inheritance rights. For instance, it was held that there was reciprocity in Nazi Germany during World War II.¹¹⁵ It was argued in *Estate of Gogabashvele* that countries with which the United States is not officially at war but which are considered unfriendly could attempt to establish minimal reciprocity in inheritances "as a matter of expediency and shrewd business."¹¹⁶

Another problem created by section 259 is that since the time of death determines when reciprocity must exist¹¹⁷ it is possible to have reciprocity at the time of death when a country might be friendly, but not to have it at the time of distribution when the country might be unfriendly.¹¹⁸ Thus it is possible to have an alien, residing in an unfriendly nation at the time of distribution, inherit California property. And it is also possible for an alien residing in a friendly country at the time of distribution to be denied his inheritance because there was no reciprocity at the time of death.

Although this attempt at preventing United States assets from falling into the hands of unfriendly nations is poorly realized, it is of questionable validity anyway after the *Zschernig* decision, and it is probably best left to uniform national control. Traditionally this has been a matter of continued concern of the federal government.¹¹⁹ It has

111. *Estate of Michaud*, 53 Cal. App. 2d 835 (1942).

112. *Id.*

113. 24 Cal. 2d 517 (1944).

114. 65 Cal. App. 2d 232 (1944).

115. *Estate of Miller*, 104 Cal. App. 2d 1 (1951); *Estate of Schneider*, 140 Cal. App. 2d 710 (1956).

116. LAW REVISION REPORT at B-5; *Estate of Gogabashvele*, 195 Cal. App. 2d 503, 528 (1961); *See also Estate of Larkin*, 65 Cal. App. 2d 60, 64 (1966).

117. *See Estate of Giordano*, 85 Cal. App. 2d 588, 594 (1948); *Estate of Reihis*, 102 Cal. App. 2d 260, 269 (1951); *Estate of Arbulich*, 41 Cal. 2d 86, 91 (1953).

118. *See Estate of Nepogeodin*, 134 Cal. App. 2d 161 (1955).

119. Trading with the Enemy Act, 50 U.S.C.A. §1-40 (1917).

been the activity of the federal government and not decisions under section 259 that has kept assets out of the hands of unfriendly nations.¹²⁰ Under the *Trading with the Enemy Act*¹²¹ all inheritance rights of enemies of the United States are subject to a "vesting" order in the Attorney General of the United States (formerly in the Alien Property Custodian) who holds them in trust for the alien involved.¹²² Reciprocity notwithstanding, it has been this federal statute that has prevented the transfer of funds to unfriendly nations.

A third objective of section 259 was to bring about policies in foreign nations which would permit United States citizens to inherit property in those nations. This policy too has been poorly realized. It has been argued by the California Law Revision Commission that this is the *only policy* factor which Probate Code Section 259 *appears to be actually designed* to accomplish and yet it appears that even here California has been ineffectual.¹²³ As has been pointed out above, reciprocal inheritance rights do not necessarily mean that United States citizens will actually inherit any substantial amounts from estates in such countries.¹²⁴

Just as the policy of preventing assets in the United States from falling into the hands of unfriendly nations should be left to the federal government, the policy of attempting to bring about changes in foreign inheritance laws should also be left to the federal government. Even in the absence of federal controls, state action can conflict with federal prerogatives involved in the conduct of foreign affairs.¹²⁵ At least two California courts of appeal held that a conflict does exist with overriding federal policy.¹²⁶ It seems as if all Probate Code Section 259 really does is cause hardship to innocent relatives of California decedents.¹²⁷

Corrective Legislation Needed

Corrective legislation is needed if California is going to develop a consistent policy with regard to the inheritance rights of nonresident

120. See e.g., Estate of Zimmerman, 132 Cal. App. 2d 702 (1955); Estate of Schneider, 140 Cal. App. 2d 710 (1956); Estate of Nepogedin, 134 Cal. App. 2d 161 (1955).

121. Trading with the Enemy Act, 50 U.S.C.A. §1-40 (1917).

122. *Id.* at §6.

123. CAL. STATS. 1941, c. 895, §1, p. 2473; LAW REVISION REPORT at B-17, B-19, B-23 and B-24.

124. See text accompanying footnote 106 *supra*.

125. Hines v. Davidowitz, 312 U.S. 52 (1940).

126. Estate of Kraemer, 276 Cal. App. 2d 715 (1969); Estate of Horman, 11 Cal. App. 3d 1175, 1182 (1970).

127. LAW REVISION REPORT at B-5.

aliens. In developing any corrective legislation there are serious limitations imposed on the California Legislature. Any changes made must be controlled by the constitutional limitation that it not infringe or impinge upon the foreign affairs powers of the federal government. New legislation must meet the test implied in *Clark v. Allen* and have no more than an incidental or indirect effect on foreign countries.¹²⁸ It must also meet the test implied in *Zschernig v. Miller* that it be no more than a routine reading of foreign law.¹²⁹ Since the court in *Estate of Kraemer*¹³⁰ relied entirely upon the *Zschernig* decision, legislation must be developed that meets this test or avoids the problem altogether. It is difficult to see how any attempt to ascertain the law of foreign countries as actually applied could meet the test of a "routine reading." By the very nature of the problem an actual inquiry must be made and both sides to the dispute will present evidence of the foreign law favorable to their position.

In addition to meeting the requirements of constitutionality any changes in the law must also eliminate the confusion and unfairness in the present law. More importantly, however, it must be consistent with the purposes it was designed to serve. In this respect, in developing new legislation the Legislature must decide whether the policy reasons behind Probate Code Section 259 are important enough to retain the principle of reciprocity and make it viable under the constitutional guidelines discussed above, or return to California's earlier policy of allowing the intent of a deceased, whether expressed in a will or implied by the laws of succession, to control the disposition of all property in California, including property going to nonresident aliens.

Most of the policy considerations behind Probate Code Section 259 are questionable bases for *state* legislation. Preventing the confiscation of inheritance by foreign governments is a problem presently handled by the federal administrative agencies, federal statutes, and the Attorney General.¹³¹ Preventing assets in the United States from falling into the hands of unfriendly nations is clearly a federal problem. Bringing about policies in foreign nations which would permit United States citizens to inherit property in those nations has been a policy more properly reserved to the federal or central government since the development of early common law.¹³² It is doubtful whether the latter

128. *Clark v. Allen*, 331 U.S. 503, 517 (1947).

129. *Zschernig v. Miller*, 389 U.S. 429, 433 (1968).

130. *Estate of Kraemer*, 276 Cal. App. 2d 715 (1969).

131. *Trading with the Enemy Act*, 50 U.S.C.A. §1-40 (1917).

132. See discussion of restrictions on alien inheritances in the English common law discussed in the text *circa*. note 7 *supra*.

policy can be constitutionally implemented by a state.¹³³ But even if it could be done, it is a highly questionable policy for a state to follow. The only policy consideration behind Probate Code Section 259 that is properly a subject of state legislation is the policy of preserving the integrity of the wishes of the decedent in the disposition of property.

Looking beyond the specific policy considerations in section 259, an evaluation of other policies California has followed in dealing with alien inheritance rights is also helpful. California very early expressed an intent to base its land laws upon policies rooted in racial discrimination.¹³⁴ Such a policy is clearly an inappropriate basis for any legislation today.¹³⁵ Early California policy also removed the common law restrictions with regard to *resident* aliens as an attempt to encourage immigration into California.¹³⁶ This also is no longer an appropriate reason for legislation in this area. The California Legislature in 1856 extended the right of inheritance to all aliens.¹³⁷ Thus it can be said that California's traditional policy, with the exception of the *Alien Land Law* and Probate Code Section 259, has been to allow the intent of the deceased, either express or implied, to control.¹³⁸ This is the only remaining policy that appears to be a legitimate basis for state legislation in the field of foreign inheritance.

Alternatives to Reciprocity

Whatever policy the Legislature chooses to pursue, legislation implementing that policy must serve its intended purposes rather than frustrate them as is presently the case with Probate Code Section 259. In the light of these necessary policy limitations, alternatives to the present policy involved in section 259 are few. Some states have passed impounding statutes as a means of being sure that the intent of a deceased is carried out.¹³⁹ Such acts impound property of any beneficiary where it appears that he would not have the benefit, use or control of it due to taxation or confiscatory policies of his govern-

133. See text accompanying footnotes 68 and 69 *supra* for discussion on *Zschernig v. Miller and Estate of Kraemer*.

134. See text accompanying footnotes 17 and 29 *supra*.

135. *Sei Fujii v. State*, 38 Cal. 2d 718 (1952).

136. See text accompanying footnote 18 *supra*.

137. CAL. STATS. 1856, c. 116, §1, p. 137.

138. *Id.*

139. *E.g.*, NEW YORK SPCA §2218.

ment. Unless complete confiscation is involved however, it is questionable whether these impounding statutes are effective in carrying out the intent of the deceased since knowledge of inheritance and death taxes on his potential gifts should be assumed on the part of the deceased. It is easy to say that no man intends to leave a foreign government his entire estate by devising it to an ineligible devisee, but it is more difficult to presume that he was not aware of the taxes involved in leaving his entire estate to a close relative who happens to be an alien.

Impounding statutes however, must also meet the tests of constitutionality implied in *Clark v. Allen*¹⁴⁰ and *Zschernig v. Miller*.¹⁴¹ With this type of statute the determination of whether or not a beneficiary will get the benefit, use or control of his inheritance has often been tied to some federal agency which makes this determination for some particular federal purpose.^{141a} But even if a state were to relate its impounding statute to a federal administrative agency as an indicator of federal policy, new constitutional problems will arise. This situation has arisen, in New York, where the courts are required to rely upon a Treasury Department regulation to determine whether estates should be distributed to nonresident alien heirs.¹⁴² This has not been without criticism however, since there is a potential variance between federal and state policies. This variance was illustrated in *Estate of Beecher*,¹⁴³ when the petitioner temporarily came to the United States to claim his inheritance. Since his country was listed by the Treasury Department as one in which a payee would not "actually receive checks or warrants drawn against funds of the United States, or agencies or instrumentalities thereof, and be able to negotiate the same for value",¹⁴⁴ he should not have been entitled to receive payment in his own country. In other words, as far as the federal regulation was concerned the payee residing in a country on the Treasury list could not receive payment there even though he could come to the United States and receive payment here. The *Beecher* court held, however, that while New York statutory language explicitly applied to persons who were *residents* of countries on the Treasury list, regardless of whether they could come to the United States to receive payment, such payment would not be denied if the petitioner could show that his government

140. 331 U.S. 503, 517 (1947).

141. 389 U.S. 429, 433 (1967).

141a. *E.g.*, New York SPCA §2218 (as amended 1968).

142. 31 C.F.R. §211.3 (1957).

143. 61 Misc. 2d 46, 304 N.Y.S.2d 628 (1969). *See also* 31 C.F.R. §211.3 (1957).

144. *Id.*

would allow him the benefit, use and control of his inheritance.¹⁴⁵ Thus, it appears that nonresident aliens are put into exactly the same position by the New York impounding statute as they were by the Oregon and California reciprocity statutes, i.e., being required to prove the application of foreign inheritance law. It would seem that this would be more than an indirect effect on foreign affairs. Although the United States Supreme Court cited the Treasury list with approval as an indicator of federal policy,¹⁴⁶ it did so prior to the *Beecher* case. It has not yet considered whether the use of the Treasury list in conjunction with impounding statutes would constitute more than an indirect interference with the power of the federal government to regulate foreign affairs.

The only other available alternative that more nearly meets the tests of constitutionality, certainty and sound policy is to repeal Probate Code Section 259 entirely and allow California Civil Code Section 671 and Probate Code Section 1026 to control without restriction. Civil Code Section 671 allows any person to inherit California property.¹⁴⁷ Probate Code Section 1026 makes a simple time restriction that the beneficiary must claim the estate within five years.¹⁴⁸ Constitutionality would be satisfied because repeal would take the administration of nonresident alien inheritance out of the arena of foreign affairs. Certainty would be satisfied because absent total confiscation, which has seldom been a problem, deceased persons will be charged with knowledge that their intended nonresident alien beneficiaries may lose a part of their inheritance through foreign tax laws. Regardless of the time of death and political vicissitudes in foreign affairs, the right of nonresident aliens to inherit in California will always be the same. In addition to avoiding the constitutional problem and achieving certainty in the law, the repeal of section 259 would eliminate a source of problems which simply are not necessary since it is the federal law which prevents assets from falling into the hands of enemies of the United States. Most important, however, the repeal of Probate Code Section 259 will allow, as much as possible, California alien land law to rest on the sound and effective policy of allowing the intent of deceased persons, whether express or implied, to control the disposition of property in California.

Richard H. Will

145. *Id.*

146. *Gorun v. Fall*, 393 U.S. 398, 399 (1969).

147. CAL. CIV. CODE §671; see also text accompanying note 24 *supra*.

148. CAL. PROB. CODE §1026; see also text accompanying note 28 *supra*.