

STATE OF CALIFORNIA

# CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION AND STUDY

*relating to*

**The Right of Nonresident Aliens  
to Inherit**

January 1959

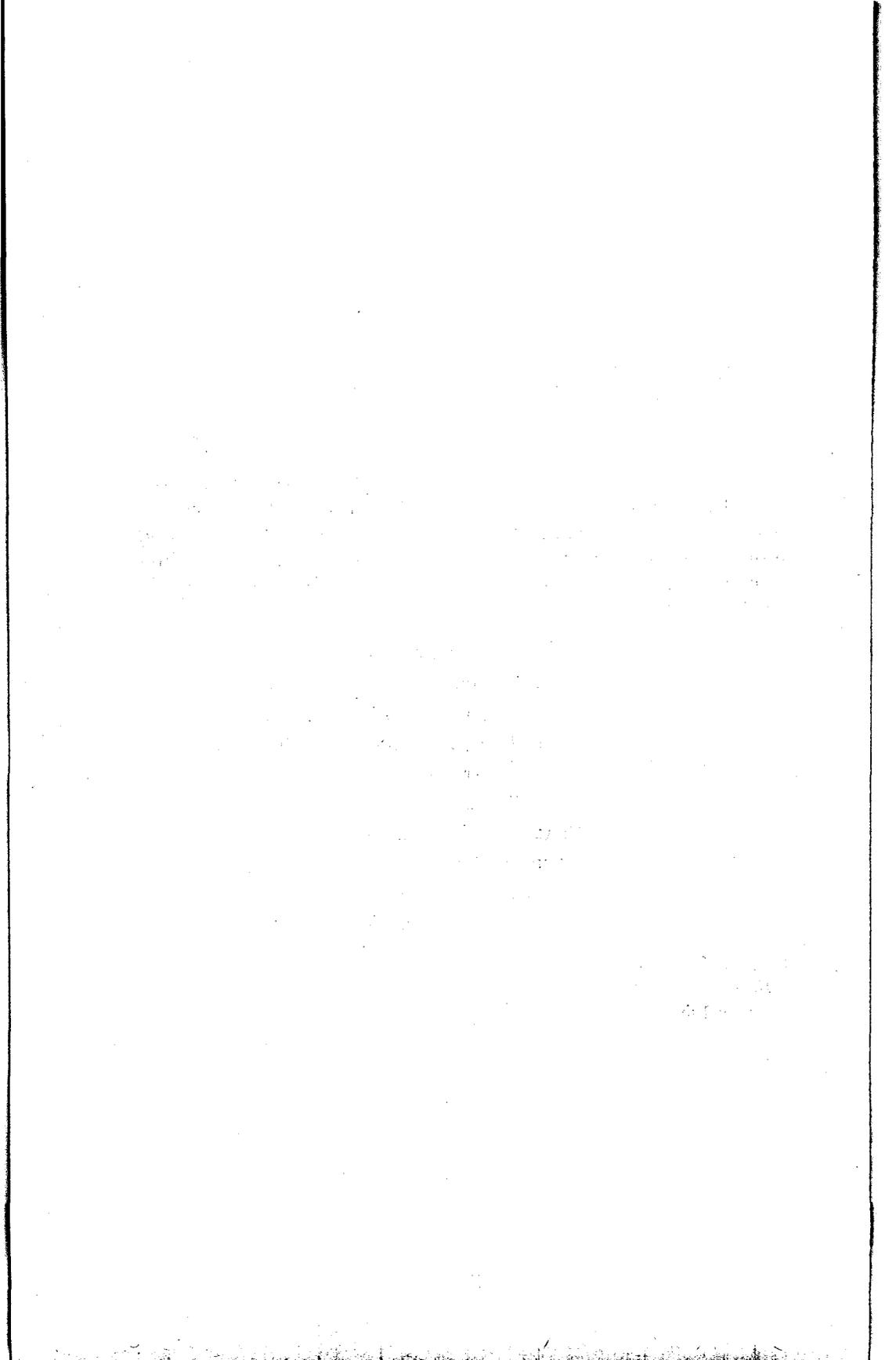
## LETTER OF TRANSMITTAL

To HIS EXCELLENCY EDMUND G. BROWN  
*Governor of California*  
and to the Members of the Legislature

The California Law Revision Commission was authorized 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 herewith submits its recommendation relating to this subject and the study prepared by its research consultant, Professor Harold W. Horowitz of the School of Law, University of Southern California.

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January 1959



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# RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

## RELATING TO THE RIGHT OF NONRESIDENT ALIENS TO INHERIT

Probate Code Sections 259, 259.1 and 259.2, originally enacted in 1941 as an eve-of-war emergency measure, provide in effect that a non-resident alien cannot inherit real or personal property in this State unless the country in which he resides affords United States citizens the same rights of inheritance as are given to its own citizens. Section 259.1 places on the nonresident alien the burden of proving the existence of such reciprocal inheritance rights. The Law Revision Commission recommends that these sections of the Probate Code (hereinafter collectively designated as "Section 259") be repealed<sup>1</sup> for the following reasons:

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

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

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

<sup>1</sup> The bill proposed by the Commission repeals these sections prospectively in effect but not in form, providing that they shall not apply to estates of decedents dying on or after October 1, 1959. The Commission's reasons for recommending this form of enactment are stated at a later point in this Recommendation.

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

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

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

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

1. When it appears that a nonresident alien will not have the substantial benefit or use or control of the money or other property due him under an estate or testamentary trust the property is converted into cash and deposited to his account at interest in a California bank.<sup>2</sup> At any time within five years thereafter the alien (or, if he is dead, his heir, legatee or devisee) may claim the deposit upon showing that no reason for further impoundment exists. If no such claim is made, more distant heirs of the decedent are authorized to claim the deposit within the second five-year period after the date of impoundment. If the money remains on deposit at the end of the second five-year period it escheats permanently to the State, saving the same rights to minors and persons of unsound mind as are provided for in Section 1430 of the Code of Civil Procedure in other cases of permanent escheat.

<sup>2</sup>Special provision is made in proposed new Sections 1045.2, 1045.3 and 1045.4 for cases in which the decedent leaves a will creating both present and future estates.

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

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

4. The court is authorized to provide for the payment of reasonable attorney's fees to any attorney who represented either the person on whose behalf the funds were impounded or the person to whom the payment is ordered to be made.

There is a serious question whether either the repeal of Probate Code Sections 259-259.2 or the enactment of the impounding statute can constitutionally be made retroactive. Under California law title to a decedent's property vests in his successors as of the date of death, at least in the case of intestacy. To give an interest in the estate of a decedent dying prior to the effective date of the proposed legislation to a person who on the date of the decedent's death took no such interest because he was disqualified by Section 259 would in the usual case involve taking that same interest away from some other heir who acquired it on the date of death under the present law. This might be held to be an unconstitutional deprivation of vested property rights. Moreover, it is arguable that to impound the interest of a nonresident alien heir not disqualified by Section 259, which he was entitled to take free of impoundment on the date of decedent's death, would impair his vested right in such property.<sup>3</sup>

The Commission has concluded that neither the repeal of Sections 259-259.2 nor the enactment of the impounding statute should be made retroactive. Thus, under the recommended legislation Sections 259-259.2 would not be repealed; instead, they would be made inapplicable to estates of decedents dying after the effective date of the legislation. Similarly, the new impoundment statute expressly provides that it is inapplicable to estates of decedents dying prior to its effective date, but with the provision that nothing in the proposed legislation shall be

<sup>3</sup> This seems more doubtful, however, since the very basis of impoundment is that the heir would not have the substantial benefit or use or control of the money or other property due him. Thus the statute works to protect rather than impair his rights.

construed to limit the power of a court to make protective orders in administering such estates. The latter provision is included because the research consultant's report discloses that some probate courts in other states have made impounding orders somewhat similar to those authorized by the new statute in the exercise of what they considered to be their inherent power to protect the interest of a nonresident alien heir.

Once it is made clear that the repeal of Sections 259-259.2 and the enactment of the impounding statute are not to be retroactive there would appear to be little ground for doubt about the constitutionality of the legislation which the Commission proposes, given the very substantial powers which a state has over the disposition of decedents' estates. The Commission has included a severability clause in the proposed legislation, however, out of an abundance of caution.

Finally, the Commission proposes an amendment to Section 1026 of the Probate Code. Section 1026 provides that a nonresident alien who becomes entitled to property by succession must appear and demand the property within five years from the time of succession. Under the impounding statute proposed by the Commission such an alien's inheritance could be impounded without his knowledge upon the petition of the personal representative, the Attorney General or an interested party. The Commission believes that when such an impoundment order is made the inheritance should thereafter be disposed of under the provisions of the impounding statute, even in cases in which this would result in its distribution to a nonresident alien more than five years after the original right of succession accrued. Accordingly, the Commission recommends that Section 1026 be amended so to provide:

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

*An act to add Section 259.3 and Article 4.5 of Chapter 16 of Division 3 to the Probate Code, to amend Section 1026 of said code and to declare the severability of the provisions of this act, all relating to the right of nonresident aliens to inherit property in this State.*

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

SECTION 1. Section 259.3 of the Probate Code is enacted, to read: 259.3. The provisions of this chapter do not apply to estates of decedents dying on or after October 1, 1959.

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

Article 4.5. Disqualified Nonresident Aliens

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

\* Matter in italics would be added to the present law.

- (a) Who is an alien not residing in the United States or any of its territories; and
- (b) Who a court finds would not, as an heir, legatee, devisee or distributee of an estate probated under the laws of this State or a beneficiary of a testamentary trust administered under such an estate, have the substantial benefit or use or control of the money or other property due him.

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

1044.1. The provisions of this article do not apply to estates of decedents dying prior to October 1, 1959. Nothing in this article shall be construed to limit the power of a court to make appropriate orders in estates of decedents dying prior to October 1, 1959, to protect and safeguard the interests of heirs, legatees, devisees or beneficiaries of testamentary trusts who are entitled to inherit or take under the laws of this State as they existed prior thereto.

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

1045.1. When a decedent leaves a valid will Section 1045 is applicable to any property passing thereunder as to which only a present estate is created.

1045.2. Except as provided in Section 1045.3, when a decedent leaves a valid will creating present and future legal estates in property passing under the will and the person entitled to any such estate is a disqualified nonresident alien at the time of the decedent's death, the court shall, upon petition filed as provided in Section 1045, order the property converted into cash. Using mortality tables as provided in Section 13953 of the Revenue and Taxation Code, the court shall divide the fund realized into sums representing the present value of the present and future estates. Any sum representing the value of an estate to which a disqualified nonresident alien is entitled under the will shall be deposited as provided in Section 1045 and the provisions of this article relating to the disposition of such deposited funds shall be

applicable thereto. All other sums shall be distributed in the course of administration to the persons who are entitled under the will to the estates which such sums represent.

1045.3. When a decedent leaves a valid will creating present and future legal estates in property passing under the will and the person entitled to the future estate is, at the time of the decedent's death, a disqualified nonresident alien but the person entitled to the present estate is not, the court, on petition filed as provided in Section 1045 shall, at the option of the owner of the present estate, either proceed as provided in Section 1045.2 or convey the property to a trustee to be appointed by the court upon security satisfactory to the court. The court shall retain jurisdiction for the settlement of the accounts of such trustee, in all matters necessary for the proper administration of such trust, and for final distribution of the trust property. The expense of administration of the trust shall be borne by the owner of the present estate and at the termination of such estate the owner or his estate shall have a lien on the trust property for the amount of such expense plus interest thereon to be fixed by the court at a rate not exceeding seven percent per annum.

1045.4. When the beneficiary under a testamentary trust or a trust established under Section 1045.3 is a disqualified nonresident alien at the time he is entitled to receive money or other property from the trust, the court shall, on petition of the trustee, any party in interest, or the Attorney General, order the property then due the beneficiary converted into cash by the trustee and deposited as provided in Section 1045. The court shall also order the trustee to make similar disposition of all other money or property which may become due the beneficiary in the future until such time as the court shall, on petition of the beneficiary, have determined that the beneficiary is no longer a disqualified nonresident alien. The provisions of this article relating to the disposition of deposited funds shall be applicable to funds deposited pursuant to this section, except that for the purpose of Sections 1046, 1046.1, 1047 and 1048 the date of entry of the court's order shall be deemed to be the date upon which the deposits were made by the trustee.

1046. At any time before the expiration of five years after the date of entry of an order for deposit made pursuant to Section 1045, 1045.1, 1045.2, 1045.3 or 1045.4, the person for whom the deposit was made may file in the court which made the order a petition to have the funds on deposit paid to him. If the court finds that the petitioner is no longer a disqualified nonresident alien the petition shall be granted.

1046.1. If the person authorized by Section 1046 to petition for payment of the funds is deceased, the petition therein authorized may be filed by his heir, legatee or devisee, provided that such petitioner is not a disqualified nonresident alien. If the court finds that the petitioner is not a disqualified nonresident alien and is entitled to the funds on deposit the petition shall be granted.

1047. At any time after the expiration of five years and before the expiration of ten years after the date of entry of an order for deposit made pursuant to Section 1045, 1045.1, 1045.2, 1045.3 or 1045.4, any person who is not a disqualified nonresident alien and who would have been entitled to the property distributable to the person on whose

behalf the order was made had the latter predeceased the decedent may petition the court to order the funds on deposit paid over to him. If a person who would otherwise have been authorized by this section to petition for payment of the deposited funds is unable to do so because he is a disqualified nonresident alien, the right of others to petition hereunder shall be determined as though such person had also predeceased the decedent. If the court finds that a petitioner hereunder is not a disqualified nonresident alien and is entitled to the funds on deposit the petition shall be granted.

1048. After the expiration of ten years from the date of entry of an order for deposit made pursuant to Section 1045, 1045.1, 1045.2, 1045.3 or 1045.4, the court shall, upon the petition of the Attorney General, order the funds on deposit escheated permanently to the State, saving however to infants and persons of unsound mind the rights provided in Section 1430 of the Code of Civil Procedure.

1048.1. A petition filed within the time provided in Section 1046, 1046.1 or 1047 need not be heard or decided within such time. If two or more petitions for the payment or escheat of the same impounded fund or part thereof are filed, they shall be decided in the order in which they are filed.

1049. When an order is made for the deposit of funds pursuant to Section 1045, 1045.1, 1045.2, 1045.3 or 1045.4 or for the payment or escheat of a deposit pursuant to Section 1046, 1046.1, 1047 or 1048, or at any intervening time, the court may order payment of reasonable attorney's fees out of such funds or such deposit to any attorney who represented the person on whose behalf such deposit is or was ordered. When an order is made for the payment of a deposit pursuant to Section 1046, 1046.1 or 1047, the court may order payment of reasonable attorney's fees out of such deposit to any attorney who represented the person to whom payment is ordered made.

1049.1. If a disqualified nonresident alien having an interest in all or any part of a decedent's estate probated under the laws of this State or of a testamentary trust administered thereunder or having an interest in funds deposited pursuant to the provisions of this article assigns such interest, his assignee has only the rights given to the assignor by this article. No payment of funds may be made to an assignee who is a disqualified nonresident alien.

1049.2. Whether a person is a disqualified nonresident alien within the meaning of this article shall be determined as of the date of the order for the purpose of which the determination is made.

1049.3. Any petition filed pursuant to Section 1045, 1045.1, 1045.2, or 1045.3 shall be verified and shall state the names, ages, and post office addresses of the heirs, devisees, and legatees of the decedent, so far as known to the petitioner.

When the petition is filed the clerk shall set the petition for hearing by the court and notice thereof shall be given for the period and in the manner required by Section 1200 of this code to the Attorney General, to the persons named in the petition, to all persons to whom notice is required to be mailed by Section 1200 of this code, and to such other persons, if any, as the court may direct. A copy of the petition shall be mailed to the Attorney General with the notice given to him.

1049.4. Any petition filed pursuant to Section 1045.4, 1046, 1046.1, 1047 or 1048 shall be verified and shall state the names and the post office addresses, so far as known to the petitioner, of all persons who are known by the petitioner to have, under the provisions of this article, an existing or contingent interest in the trust money or property or the deposited fund to which the petition relates.

When the petition is filed the clerk shall set the petition for hearing by the court and notice thereof shall be given for the period and in the manner required by Section 1200 of this code to the Attorney General, the persons named in the petition and such other persons, if any, as the court may direct. A copy of the petition shall be mailed to the Attorney General with the notice given to him.

1049.5. Whenever an order is made pursuant to the provisions of Section 1045, 1045.1, 1045.2 or 1045.3 for the conversion of an interest in a decedent's estate into cash the interest shall be sold in conformity with the provisions of Chapter 13 of Division 3 (commencing at Section 750) of this code.

1049.6. The court may make an order authorized in Section 1045, 1045.1, 1045.2 or 1045.3 on its own motion. In such case notice of the court's intention to make the order shall be given by the clerk of the court to the same persons and in the manner as though a petition had been filed.

1049.7. A petition authorized by Section 1045, 1045.1, 1045.2, or 1045.3 may be filed only after four months have elapsed after the first publication of notice to creditors and prior to distribution of the property involved. A petition authorized by Section 1045.4 may be filed at any time before the trustee has transferred the money or property to the beneficiary.

Sec. 3. Section 1026 of the Probate Code is amended to read:

1026. A nonresident alien who becomes entitled to property by succession must appear and demand the property within five years from the time of succession; otherwise, his rights are barred and the property shall be disposed of as escheated property, *provided, if an order impounding such alien's property is made pursuant to Section 1045, 1045.1, 1045.2, 1045.3 or 1045.4, the provisions of Article 4.5, Chapter 16, Division 3, (commencing at Section 1044) and not of this section, are applicable.*

SEC. 4. If any provision of this act or the application of such provision to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this act which can be given effect without the invalid provision or application and to this end the provisions of this act are declared to be severable.

## A STUDY RELATING TO THE RIGHT OF NONRESIDENT ALIENS TO INHERIT \*

### THE PRESENT LAW

Since 1856 California has had legislation permitting aliens to inherit real and personal property in California on an equal basis with citizens of the United States.<sup>1</sup> This principle appears in Section 671 of the Civil Code which provides:

671. Any person, whether citizen or alien, may take, hold, and dispose of property, real or personal, within this State:

This section of the Civil Code has been held to apply to resident and nonresident aliens<sup>2</sup> and to permit all aliens to take by descent as well as by purchase.<sup>3</sup> However, nonresident aliens must appear and claim their distributive shares in California estates within five years after the death of the decedent or their shares escheat to the State.<sup>4</sup> For some time a distinction was drawn by the Alien Land Law<sup>5</sup> between aliens who were and who were not eligible for citizenship concerning taking and holding interests in real property, but this statute was recently held unconstitutional as a denial by the State of the equal protection of the laws guaranteed by the Fourteenth Amendment.<sup>6</sup>

This was the pattern of California law concerning inheritance by nonresident aliens of real and personal property in California when, in 1941, Sections 259, 259.1 and 259.2 of the Probate Code were enacted.<sup>7</sup> These sections presently provide in effect that an alien who is not a resident of the United States cannot take real or personal property in California by succession or testamentary disposition on the same basis as United States residents and citizens unless the alien meets the burden

\* This study was made at the direction of the Law Revision Commission by Professor Harold W. Horowitz of the School of Law, University of Southern California.

<sup>1</sup> CAL. GEN. LAWS § 3606 (Hutch 1850-51), approved April 13, 1856, Article I, § 17, of the California Constitution provides that resident aliens shall have the same inheritance rights as citizens. In *People v. Brown*, 14 Cal. 459 (1859), it was held that this provision of the State Constitution did not prohibit the 1856 legislation extending inheritance rights to nonresident aliens.

<sup>2</sup> *State v. Smith*, 75 Cal. 153, 19 Pac. 141 (1885); *Loyens v. California*, 67 Cal. 380, 7 Pac. 763 (1885); *Estate of Ehlman*, 65 Cal. 698, 4 Pac. 639 (1884).

<sup>3</sup> *Estate of Ehlman*, 65 Cal. 698, 4 Pac. 639 (1884).

<sup>4</sup> CAL. PROB. CODE § 1020; *Estate of Meyer*, 107 Cal. App.2d 789, 225 P.2d 597, 604 (1951). ("If a nonresident alien does not appear and claim his succession within five years after the death of his ancestor, the property does not go back to the estate nor is it inherited by the other heirs; it vests in the state.") *Loyens v. California*, 67 Cal. 380, 7 Pac. 763 (1885) (the statute is satisfied by an appearance by attorney).

<sup>5</sup> ALIEN PROPERTY INITIATIVE ACT OF 1920, Cal. Stat. 1921, p. lxxxvii, as amended, 1 CAL. GEN. LAWS Act. 361 (Deering Supp. 1957).

<sup>6</sup> See *Fujii v. California*, 38 Cal.2d 718, 243 P.2d 617 (1952).

<sup>7</sup> Cal. Stat. 1941, c. 395, § 1, p. 2473. See generally, on the background of §§ 259-259.2, Chaffkin, *The Rights of Residents of Russia and Its Satellites To Share in Estates of American Decedents*, 25 So. CALIF. L. REV. 297 (1952); Comment, 25 So. CALIF. L. REV. 329 (1952).

imposed on him by the statute of proving that the country of which he is a resident grants a reciprocal right to citizens of the United States to take real and personal property from estates of decedents in that country on the same basis as citizens and residents of that country.<sup>8</sup> If the nonresident alien claimant does not meet the requirements of the statute his share in the estate passes to other eligible heirs of the decedent. If there are no such heirs the estate is disposed of as escheated property.

The text of these sections in their present form is as follows:

259. 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 a 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.

259.1. The burden shall be upon such nonresident aliens to establish the existence of the reciprocal rights set forth in Section 259.

259.2. 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.

The present wording of the statute was adopted in 1947. As originally enacted in 1941 the statute was essentially the same as present Sections 259-259.2, with the exception of a provision which conditioned the inheritance rights of nonresident aliens on the additional requirement that the country in which the alien resided has extended to United States citizens the "rights . . . to receive by payment to them within the United States or its territories money originating from the estates of persons dying within such foreign countries."<sup>9</sup> The 1941 statute was amended in 1945.<sup>10</sup> The requirement that United States citizens be able to receive payment within the United States of shares in foreign estates was deleted and Sections 259.1 (placing the burden of proof on the issue of reciprocity on the nonresident alien claimant) and 259.2 (providing for distribution to other heirs or escheat) were repealed. In addition, additional sentences were added to Section 259 creating a presumption that the necessary reciprocal inheritance rights existed in

<sup>8</sup> The following states, in addition to California, have statutes embodying a reciprocity principle as a condition to inheritance by nonresident aliens: Iowa, IOWA CODE § 567.8 (1954); Montana, MONT. REV. CODES ANN. §§ 91-520, 91-521 (1947); Nevada, NEV. REV. STAT. §§ 184.230 to .250 (1957); Oregon, OR. REV. STAT. § 111.070 (1955).

<sup>9</sup> Cal. Stat. 1941, c. 895, § 1, p. 2473.

<sup>10</sup> Cal. Stat. 1945, c. 1160, pp. 2208-09.

the nonresident alien's country, and placing the burden of proof on the issue of reciprocity upon those persons who opposed the claim of the nonresident alien. The 1947 revision deleted the 1945 provisions concerning the presumption and burden of proof, and restored Sections 259.1 and 259.2.<sup>11</sup> Section 259.1 was amended in 1957, as part of an overall enactment of provisions concerning judicial notice of foreign law recommended by the California Law Revision Commission,<sup>12</sup> to make clear that the question whether a foreign country grants the reciprocal inheritance rights required by Section 259 should no longer be treated as a question of "fact."<sup>13</sup>

The original statute was enacted in 1941 as an emergency measure and the following statement of urgency accompanied its passage:

A great number of foreign nations are either at war, preparing for war or under the control and domination of conquering nations with the result that money and property left to citizens of California is impounded in such foreign countries or taken by confiscatory taxes for war uses. Likewise money and property left to friends and relatives in such foreign countries by persons dying in California is often never received by such nonresident aliens but is seized by these foreign governments and used for war purposes. Because the foreign governments guilty of these practices constitute a direct threat to the Government of the United States, it is immediately necessary that the property and money of citizens dying in this country should remain in this country and not be sent to such foreign countries to be used for the purposes of waging a war that eventually may be directed against the Government of the United States.<sup>14</sup>

This statement of urgency will be referred to again later in this study. It should be noted at this point, however, that the statement of urgency mentioned as the apparent moving considerations behind the enactment of the statute the following: (1) the fact that California citizens may not receive legacies from foreign countries because of impounding or confiscatory taxation, (2) the fact that beneficiaries of California estates who live in some foreign countries do not receive their legacies because funds transmitted to them are seized by those countries for war purposes and (3) the desire that funds from California estates not be sent to nations which are potential enemies of the United States. Section 259 was restricted, however, to requiring "reciprocity" in inheritance rights in order that a nonresident alien be permitted to inherit a California estate; as will be discussed, *infra*, the reciprocity requirement appears to bear little relationship to the achievement of the legislative goals set forth in the statement of urgency.

The validity of Section 259 was upheld by the United States Supreme Court in *Clark v. Allen*<sup>15</sup> against an attack on the ground that the statute, in seeking to bring about reciprocity in inheritance rights, con-

<sup>11</sup> Cal. Stat. 1947, c. 1042, pp. 2443-44.

<sup>12</sup> *Recommendation and Study relating to Judicial Notice of the Law of Foreign Countries*, 1 CAL. LAW REVISION COMM'N REP., REC. & STUDIES, p. I-7 (1957).

<sup>13</sup> Cal. Stat. 1957, c. 249, p. 902.

<sup>14</sup> Cal. Stat. 1941, c. 895, § 2, p. 2474.

<sup>15</sup> 331 U.S. 508 (1947).

stituted an encroachment by the State on the exclusive federal field of conduct of foreign relations. This decision also set forth a limitation on the scope of the statute: because of the supremacy clause of the Constitution, the statute applies only where there is no treaty between the United States and a particular foreign country concerning inheritance rights of citizens or residents of each of the countries in estates in the other. In *Estate of Bevilacqua*<sup>16</sup> the California Supreme Court sustained the statute against attacks under the due process clause of the Fourteenth Amendment and the provision of the State Constitution which prohibits "special laws."<sup>17</sup>

Leaving until later a discussion of the desirability of the reciprocity principle itself, there will be outlined here for background purposes several problems of construction and practical operation of Sections 259-259.2 in their present form. Some of these problems have been dealt with in California appellate court decisions.

1. It is perhaps not necessary that a United States citizen be able to inherit an estate in a particular foreign country in order that a resident thereof be permitted to inherit under Section 259. The statute in terms requires only that the foreign nation not discriminate against United States citizens, i.e., that the foreign nation permit United States citizens to inherit to the same extent as do residents and citizens of the foreign nation. If that condition is satisfied the statute appears to permit the nonresident alien to inherit a California estate on the same terms and conditions as do residents and citizens of the United States. The case has apparently not yet arisen, but it seems possible under the statute that a situation could arise of a foreign nation which did away with inheritance completely or impounded or levied confiscatory taxes on *all* inheritances. Under such circumstances there would be no discrimination against United States citizens and arguably reciprocity would be established, even though United States citizens could not inherit estates in the foreign country.

2. Although the statement of urgency which accompanied the enactment of Section 259 referred to withholding of transmission of funds to "unfriendly" nations, there is apparently nothing in the statute to prevent forwarding the proceeds of a California estate to a nonresident alien in an "unfriendly" nation so long as the reciprocity requirement has been satisfied. Nor is there anything in the statute which would permit a resident of a "friendly" nation to inherit here who was unable to prove that United States citizens are not discriminated against in his country.

3. The statute does not specify *when* the required reciprocity must exist. The California courts have decided that the critical time is the death of the decedent who leaves an estate in California.<sup>18</sup> A case could arise in which there was reciprocity at the time of death but not at the time of distribution of the estate, so that a nonresident alien beneficiary would be permitted to inherit a California estate even though at the time of distribution United States citizens could not inherit

<sup>16</sup> 81 Cal.2d 580, 191 P.2d 752 (1948).

<sup>17</sup> CAL. CONST. Art. IV, § 25.

<sup>18</sup> *Estate of Arbulich*, 41 Cal.2d 86, 257 P.2d 433, cert. denied, 346 U.S. 897 (1953); *Estate of Nepogodin*, 134 Cal. App.2d 161, 285 P.2d 672 (1955); *Estate of Giordano*, 85 Cal. App.2d 588, 193 P.2d 771 (1948).

estates in the foreign country on an equal basis with citizens thereof. This situation is illustrated by *Estate of Nepogodin*<sup>19</sup> which involved beneficiaries in Manchuria. At the time of the death of the decedent Manchuria was under the domination of Communist China but the "state" of Communist China had not yet been created. The court found that the only Chinese "state" at that time was Nationalist China and that there was reciprocity. Yet, at the time the question was raised, on distribution of the estate, the "state" of Communist China had come into existence and that "state" might not have extended reciprocal inheritance rights to United States citizens. Hence, as far as Section 259 was concerned the beneficiaries then in Manchuria were entitled to the California estate because there was reciprocity at the time of the death of the decedent. (The funds were not transmitted to the beneficiaries, however, because the Foreign Assets Control Regulations of the United States Department of the Treasury<sup>20</sup> prohibited the transfer, and the funds were deposited in a blocked account in the United States subject to transfer only upon license by the Secretary of the Treasury.)

4. If a nonresident alien is a beneficiary of an estate in California it is necessary that he appear and satisfy the burden of proof requirements of the statute on the issue of reciprocity. He may appear by attorney<sup>21</sup> or his nation's consul may appear for him.<sup>22</sup> Almost all the litigation in appellate courts concerning Section 259 has involved the question whether there has been proof of the required reciprocity. In practical operation the nonresident alien is put to the expense of counsel and witness fees in order to establish what the pertinent foreign inheritance law provides. Appellate court decisions have held that on the particular dates of death involved in each case there was no reciprocity with Yugoslavia,<sup>23</sup> Czechoslovakia,<sup>24</sup> Germany,<sup>25</sup> German-occupied France,<sup>26</sup> German-occupied Greece<sup>27</sup> and Italy.<sup>28</sup> Other decisions have found reciprocity with Communist China controlled Manchuria,<sup>29</sup> Germany,<sup>30</sup> Romania<sup>31</sup> and German-occupied Holland.<sup>32</sup> The problem

<sup>19</sup> 134 Cal. App.2d 161, 285 P.2d 672 (1955).

<sup>20</sup> 31 C.F.R. §§ 500.101 to .808 (1957).

<sup>21</sup> See note 4 *supra*.

<sup>22</sup> This is provided for by treaty in many cases. Office of the Legal Adviser, Department of State, *Treaties and Other International Agreements Between the United States of America and Other Countries Containing Provisions in Force Relating to the Status of Consular Officers*. A document from the State Department sent to the writer at his request, September 1, 1958.

<sup>23</sup> *Estate of Arundich*, 41 Cal.2d 36, 257 P.2d 482, cert. denied, 348 U.S. 937 (1955) (date of death, March 1947).

<sup>24</sup> *Estate of Karban*, 118 Cal. App.2d 240, 257 P.2d 649 (1953) (date of death, June 1948).

<sup>25</sup> *Estate of Schluttig*, 86 Cal.2d 416, 224 P.2d 676 (1950) (date of death, April 1945);

*Estate of Leeters*, 124 Cal. App.2d 550, 274 P.2d 232 (1954) (date of death, January 1944).

<sup>26</sup> *Estate of Michael*, 58 Cal. App.2d 535, 123 P.2d 595 (1942) (no date of death given).

<sup>27</sup> *Estate of Corcodinas*, 24 Cal.2d 517, 150 P.2d 194 (1944) (date of death, April 1942).

<sup>28</sup> *Estate of Giordano*, 85 Cal. App.2d 588, 193 P.2d 771 (1948) (date of death, January 1945).

<sup>29</sup> *Estate of Nepogodin*, 134 Cal. App.2d 161, 285 P.2d 672 (1955) (date of death, January 1949).

<sup>30</sup> *Estate of Schneider*, 140 Cal. App.2d 710, 296 P.2d 45 (1956) (date of death, March 1945); *Estate of Miller*, 104 Cal. App.2d 1, 230 P.2d 667 (1951) (date of death, April 1942); *Estate of Reihls*, 102 Cal. App.2d 260, 227 P.2d 564 (1951) (date of death, November 1946).

<sup>31</sup> *Estate of Kennedy*, 106 Cal. App.2d 621, 235 P.2d 827 (1951) (date of death, March 1949).

<sup>32</sup> *Estate of Blak*, 65 Cal. App.2d 232, 150 P.2d 567 (1944) (no date of death given).

of proof under the statute was complicated until the 1957 enactment of statutes providing for judicial notice of foreign laws<sup>33</sup> by the principle that questions of foreign law were to be treated as questions of "fact." Thus the finding of a court on the provisions of a particular foreign law at a particular time was a finding which an appellate court had to accept, whether or not it believed it was correct, if the finding was supported by substantial evidence.<sup>34</sup> And such a finding was limited only to that particular litigation.<sup>35</sup> Hence, seemingly inconsistent findings were made in different probate proceedings on the existence of reciprocity with a particular foreign country. For example, there were California decisions upholding trial court determinations that in 1942,<sup>36</sup> March 1945<sup>37</sup> and November 1946,<sup>38</sup> there *was* reciprocity with Germany, and that in January 1944<sup>39</sup> and April 1945<sup>40</sup> there *was no* reciprocity with Germany.

The above discussion has described the legislative history and operation of Sections 259-259.2 of the Probate Code. The remainder of this study discusses the question whether these sections of the Probate Code should be amended or repealed. The following discussion is divided into four parts:

1. Policy reasons for the enactment of legislation concerning inheritance by nonresident aliens.
2. Adequacy of Sections 259-259.2 in satisfying the need today for such legislation.
3. The approach of the New York statute to this problem.
4. Recommendation concerning amendment or repeal of Sections 259-259.2.

#### POLICY REASONS FOR THE ENACTMENT OF LEGISLATION CONCERNING INHERITANCE BY NONRESIDENT ALIENS

A number of states have enacted statutes dealing with inheritance by nonresident aliens. Some of these statutes reflect the same primary legislative purpose as that of Section 259; others reflect a different primary purpose. Policy reasons for the enactment of such statutes may be conveniently summarized under three general headings:

1. *To make certain that a testator's intent or the laws of intestacy will be given practical effect by legislation designed to insure that a nonresident alien devisee, legatee or heir will receive the benefit of his inheritance.* This is the theory of such statutes as Section 269 of the New York Surrogate's Court Act. This statute provides that where it appears that a legatee would not have the benefit or use or control of the property due him the property may be withheld from distribution to the legatee, and instead deposited to his account until he is able to have the benefit of the property. This statute is designed to protect nonresident beneficiaries in countries where internal conditions are such that if the property were transmitted to the beneficiary the beneficiary

<sup>33</sup> Cal. Stat. 1957, c. 249, p. 902.

<sup>34</sup> See, for discussion of cases, Chalkin, *supra* note 7; Comment, 25 So. CALIF. L. REV. 329 (1952).

<sup>35</sup> *Id.*

<sup>36</sup> Estate of Miller, 104 Cal. App.2d 1, 230 P.2d 667 (1951).

<sup>37</sup> Estate of Schneider, 140 Cal. App.2d 710, 296 P.2d 45 (1956).

<sup>38</sup> Estate of Rehs, 102 Cal. App.2d 260, 227 P.2d 554 (1951).

<sup>39</sup> Estate of Loefers, 127 Cal. App.2d 550, 274 P.2d 239 (1954).

<sup>40</sup> Estate of Schluttig, 36 Cal.2d 416, 224 P.2d 695 (1950).

would not receive the benefit of his inheritance because of confiscatory governmental actions. This policy factor was one of those specified in the statement of urgency which accompanied the enactment of Probate Code Section 259 in 1941. In its broadest implications this factor would lead to legislation designed to protect the nonresident alien beneficiary against *any* diminution of his inheritance by the country in which he resided, whether that country was "friendly" or "unfriendly" to the United States. It is not entirely clear whether the New York statute would be applied with respect to a beneficiary in a "friendly" nation; the reported cases which have thus far arisen in New York seem to have involved only nonresident beneficiaries who resided in "unfriendly" countries.<sup>41</sup> The reference to this policy factor in the Section 259 statement of urgency seemed to assume that "confiscatory" practices existed only in foreign countries the governments of which "constitute a direct threat to the Government of the United States."

2. *To prevent assets in the United States from falling into the hands of unfriendly nations.* This is a policy factor closely related to the first factor mentioned in that it is raised by the practice of certain nations in confiscating, in one way or another, inheritances received by residents of those nations of property in the United States. This factor was apparently the primary basis of most of the Section 259 statement of urgency.

3. *To bring about policies in foreign nations which would permit United States citizens to inherit property in those nations.* This is an interest which the federal government often seeks to advance by means of reciprocal treaty provisions establishing the inheritance rights of the citizens of one nation in estates in the other nation.<sup>42</sup> This policy factor was also included in the 1941 statement of urgency. It is the only policy factor which Probate Code Sections 259-259.2 appear to be designed to accomplish.

These are the three major policy factors which should be considered in determining what, if any, legislation should be enacted concerning inheritance of property in a state in the United States by nonresident aliens. Discussion will now be directed to the question whether Probate Code Sections 259-259.2 in their present form adequately meet the needs of the situation and, if not, what changes in the existing legislation would be desirable.<sup>43</sup>

<sup>41</sup> See cases and articles cited note 70 *infra*.

<sup>42</sup> See Boyd, *Treaties Governing the Succession to Real Property by Aliens*, 51 MICH. L. REV. 1001 (1953); Meekison, *Treaty Provisions for the Inheritance of Personal Property*, 44 AM. J. INT'L L. 313 (1950). As of August 13, 1956, there were treaties in force concerning rights of inheritance and acquisition and ownership of property between the United States and the following countries: Argentina, Australia, Austria, Bolivia, Canada, China, Colombia, El Salvador, Estonia, Ethiopia, Finland, France, Germany (Federal Republic), Great Britain (including various dominions, colonies, possessions, protectorates and mandated territories), Greece, Guatemala, Honduras, India, Ireland, Israel, Italy, Japan, Latvia, Liberia, New Zealand, Norway, Pakistan, Paraguay, Spain, Sweden, Switzerland, Thailand and Yugoslavia. Office of the Legal Adviser, Department of State, *Treaty Provisions Relating to the Rights of Inheritance, Acquisition, and Ownership of Property in Force Between the United States and Other Countries*, (Revised August 13, 1956) A document sent from the State Department to the writer at his request.

<sup>43</sup> See generally Chaitkin, *supra* note 7; Comment, 25 SO. CALIF. L. REV. 329 (1952); Kelly, *Effect of Probate Code Upon the Claims of Nonresidents To Share in California Estates*, 1 HASTINGS L.J. 128 (1950).

**ADEQUACY OF SECTIONS 259-259.2 IN SATISFYING THE NEED FOR  
LEGISLATION RELATING TO INHERITANCE BY  
NONRESIDENT ALIENS**

It seems apparent that Probate Code Section 259 in its present form does not adequately deal with the problems which are raised concerning inheritance by nonresident aliens. As pointed out in the preceding section there are three major policy factors to be considered in solving these problems. The statement of urgency which accompanied the passage of Section 259 indicated a legislative interest in all three of these factors. But the language of Section 259—embodying only the "reciprocity" requirement—is concerned chiefly with only one of these policy factors, that of promoting inheritance of foreign estates by United States citizens. And in its operation the statute may actually tend toward lessening the likelihood of achieving whatever ends may lie behind the other two policy factors. These points may be illustrated by an analysis of Section 259 in the light of the three basic policy factors.

**Giving Effect to the Intent of the Testator or the Laws of Intestacy**

An underlying reason for laws regarding inheritance is to permit a person to dispose of his property as he wishes after death or to distribute an intestate decedent's property in the manner it is likely the decedent would have intended if he had left a will. This Probate Code Section 259 may be said to do indirectly insofar as it may induce other countries to enact laws giving inheritance rights to United States citizens. The direct operation of the statute, however, is to *refuse* to give effect to the California testator's intent or to the laws of intestacy of this State if a beneficiary of a California estate is a nonresident alien and the reciprocity provisions are not satisfied. The basic question then arises whether the policy reasons behind the reciprocity provisions are so strong that they outweigh the policy reasons behind distributing the assets of a California estate according to the express or "implied" intent of the decedent. That question will be considered in detail later.<sup>44</sup>

But even if the required reciprocity is present and the nonresident alien is eligible to take the inheritance, a decedent's express or "implied" intent as to the disposition of his property may still be frustrated. A major consideration today in many states in determining whether to give effect to a decedent's intent when beneficiaries are nonresident aliens is the question whether such beneficiaries will actually receive the benefit of an estate to which they may be legally entitled to succeed. The question is raised because of the possibility that the country in which a nonresident alien beneficiary resides may confiscate in whole or in part property which the beneficiary may receive by inheritance from an estate in the United States. The confiscation could be in the form of outright seizure, taxation, currency exchange rates or the application of local policies concerning limited ownership of private property. The statement of urgency which accompanied the enactment of Section 259 indicated a legislative interest in dealing with this problem of possible confiscation by a government of a nonresident alien's interest in a California estate. But Section 259 does not solve

<sup>44</sup> See pp. B124-28 *infra*.

or even deal with this problem. For Section 259 is concerned only with the seemingly irrelevant (for this purpose) determination of whether there is reciprocity as to legal rights, and there seemingly need not be a perfect correlation between nations which do not extend reciprocity and nations which may confiscate funds which their citizens and residents may receive from estates in the United States.<sup>45</sup> Hence, where there is reciprocity and the nonresident alien is permitted to inherit under Section 259, there is nothing in the statute which attempts to deal with the problem of protecting the nonresident alien against confiscation of the funds he receives. Thus, even assuming that reciprocity is a desirable condition precedent to inheritance by a nonresident of property in California, it would appear to be necessary to enact *additional* legislation if the Legislature wishes to deal also with the problem of protecting distributees against confiscation of their California inheritances. Achievement of this purpose could take the form of impounding in California the nonresident alien's share in an estate instead of immediately transmitting it to him if it appears that the funds would be wholly or partially confiscated if he received them.

There is a further problem to be considered here: What should be considered to be "confiscation" of a nonresident alien beneficiary's share in a California estate so as to bring an impounding procedure into operation? The possible fact patterns appear to be numerous and difficult to specify. For example, currency exchange at the official rate of exchange in different countries may result in diminution in varying degrees of the amount the beneficiary may actually receive. Foreign countries could perhaps have some form of taxation of the beneficiary's inheritance. Foreign countries may have varying degrees of recognition of ownership of private property, so that the beneficiary would have, by our standards, only limited use of the property or limited powers of inter vivos or testamentary disposition over it. Or particular foreign countries may seize outright the property of certain persons in that country. This scope of potential fact situations suggests that it might be impracticable to draft a statute specifying in detail forms of confiscation which would lead to impounding a beneficiary's share in a California estate.

If California should decide, however, to attempt to assure that the alien beneficiary will receive substantially what is due him under California law, the New York statute, discussed at pages B-28-31 *infra*, provides a model which might be followed in California legislation. This statute permits impounding where it appears that the beneficiary would not have the benefit or use or control of the money or other property due him, or where other special circumstances make it appear desirable that such payment should be withheld. This statute has been applied in such cases as where currency exchange rates would substantially diminish the beneficiary's inheritance and where a particular country practiced outright seizure of a particular class of beneficiaries' property.<sup>46</sup>

Consideration might also be given to a statute which would bring an impounding procedure into operation if a nonresident alien beneficiary were a resident of a country which has been designated by the

<sup>45</sup> See cases cited notes 29-31 *supra*.

<sup>46</sup> See cases cited note 70 *infra*.

Secretary of the Treasury under 31 U.S.C. Section 123 as a country in which there is not "a reasonable assurance that the payee [of a check drawn against funds of the United States] will actually receive such check . . . and be able to negotiate the same for full value." If the Secretary of the Treasury so designates a country a United States check is not sent to a payee in that country; the funds are instead deposited in a special account for the benefit of the payee. In making this determination the Secretary of the Treasury is required by the statute to consider postal, transportation and banking facilities and local conditions in the country. Among the pertinent factors considered in the administration of the statute are possible physical confiscation of the check, the rate of exchange at which the check may be negotiated, and the taxes applicable to the negotiation.<sup>47</sup> These factors considered by the Secretary of the Treasury appear to be the same factors which would be relevant in determining whether a beneficiary's share in an estate would be confiscated by the country in which he resided if the funds were transmitted to him. It should be noted, however, that in practical operation, at least as judged by experience so far, use of the Secretary of the Treasury's list of countries would in effect protect the beneficiary from confiscation of his inheritance only in the context of the second policy factor, prevention of transmission of funds to "unfriendly" countries. For the countries designated by the Secretary of the Treasury under 31 U.S.C. Section 123 have been only "unfriendly" or potentially "unfriendly" nations. At the date of this study the following countries are on the list: Albania, Bulgaria, Communist-controlled China, Czechoslovakia, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, the Union of Soviet Socialist Republics, the Russian Zone of Occupation of Germany and the Russian Sector of Occupation of Berlin, Germany.<sup>48</sup>

#### **Preventing Transmission of Property in California Ultimately to an Unfriendly Foreign Country**

This, too, is a factor which apparently lay behind the enactment of Probate Code Section 259, but is a factor with which the statute does not effectively deal. The consideration here is that of assuring that funds transmitted to nonresident alien beneficiaries do not ultimately end up being confiscated by a foreign nation and used against the interests of the United States. And reciprocity is again an almost irrelevant factor in attaining this end, for if there is reciprocity a nonresident alien in an unfriendly nation would be entitled to his share of the estate. For example, there have been California decisions which have found reciprocity to exist with Romania, German-occupied Holland, Communist China-dominated Manchuria and Germany during World War II.<sup>49</sup> To the extent that Section 259 deals with the problem there would be nothing to prevent the estate from falling into the hands of the unfriendly nation.

Should a statute be enacted to deal specifically with the aiding-an-enemy problem? It may well be that on balance the State of California should not attempt by legislation to deal directly with the problem of

<sup>47</sup> Letter from John K. Carlock, Acting General Counsel of the Treasury Department, to the writer, May 16, 1957.

<sup>48</sup> 31 C.F.R. § 211.3(a), as amended (1957).

<sup>49</sup> See cases cited notes 29-32 *supra*.

flow of funds to the ultimate benefit of unfriendly nations, but should leave this matter to the federal government to handle. Historically, protection of the interests of the United States by preventing the transmission to foreign countries of funds which may fall into the hands of an unfriendly nation has been a matter of continued activity by the federal government. For example, the Trading with the Enemy Act<sup>50</sup> provides for the control by the Alien Property Custodian of all money or property in the United States due or belonging to persons in nations with which the United States is at war. Under the Foreign Assets Control Regulations of the Secretary of the Treasury transmission of funds to Communist China and North Korea are now regulated.<sup>51</sup> Before the United States entered World War II various "freezing orders" were promulgated for the purpose of "blocking" assets in the United States of persons in countries invaded by Germany.<sup>52</sup> And, in a different context, under 31 U.S.C. Section 123, discussed *supra*, the Secretary of the Treasury continually designates what are in practical effect "unfriendly" countries to which United States checks will not be sent. Because of the application of the Trading with the Enemy Act or other federal regulation, there has not necessarily been an actual transfer of funds to the beneficiary in a foreign country in all cases in which a California court has found reciprocity to exist. When a beneficiary in a nation with which the United States was at war was involved it was actually the Alien Property Custodian, who had "vested" in himself the beneficiary's interest in the California estate, who sought to prove reciprocity and thereby obtain the inheritance. If the court found reciprocity the share in the estate then went to the Alien Property Custodian to be administered in the best interests of the United States with possible return of the property to the beneficiary at the end of the war.<sup>53</sup> And where reciprocity was in effect found with Communist China-dominated Manchuria the proceeds of the estate were not transmitted to the beneficiaries because the Foreign Assets Control Regulations prohibited the transmission of the funds.<sup>54</sup>

Where there is no federal control on transmission of funds it may still be an undesirable, though perhaps not invalid, encroachment by California into federal conduct of foreign relations for California to determine which nations are sufficiently unfriendly to the United States so that funds should not be transmitted to citizens and residents of those nations who are beneficiaries of estates in California. This would be a determination of a delicate matter of foreign relations under circumstances in which the court or other body making the determination might not have access to all the data necessary in order to decide if the particular nation should be considered "unfriendly" or "friendly." Hence it would not be unlikely that state action in this

<sup>50</sup> 50 U.S.C. App. §§ 1-40 (1952).

<sup>51</sup> 31 C.F.R. §§ 500.101 to .808 (1957).

<sup>52</sup> See Chaikin, *supra* note 7, at 297-98.

<sup>53</sup> See, e.g., Estate of Schneider, 140 Cal. App.2d 710, 296 P.2d 45 (1956); Estate of Miller, 104 Cal. App.2d 1, 230 P.2d 667 (1951).

<sup>54</sup> Estate of Nepogodin, 134 Cal. App.2d 161, 285 P.2d 672 (1955). In Estate of Blak, 65 Cal. App.2d 232, 150 P.2d 567 (1944), the court found reciprocity with German-occupied Holland. Distribution was made to the Dutch Minister in Washington, D.C., for the account of the beneficiary because United States Treasury Regulations prohibited the transmission of funds to German-occupied Holland.

In Estate of Kennedy, 106 Cal. App.2d 621, 235 P.2d 837 (1951), distribution was made to the attorney-in-fact of a Romanian beneficiary after a finding that Romania in 1949 granted the required reciprocal inheritance rights.

area could result in impeding the transmission of funds to a beneficiary in a nation where the foreign policy of the United States was to consider that nation either as friendly or as a nation to which, in the interests of the United States, transmission of funds should not be impaired.

It is reasonable then to conclude that the several states should not legislate at all on the question of transmission of funds to persons in "unfriendly" foreign countries, and that it should be left to the federal government to determine when restrictions on transmission should be imposed.<sup>55</sup> However, if the Legislature should wish to enact legislation in this area there appears to be available a possibly satisfactory solution of the problem which would cover those cases where there is no applicable federal control such as the Trading with the Enemy Act or Foreign Assets Control Regulations, and yet would not require state agencies to make the decision whether particular nations were to be considered as "friendly" or "unfriendly" to the United States. This could be done by providing that an eligible non-resident alien beneficiary's share in a California estate be impounded in California, instead of being transmitted to him, if he is a resident of a country designated by the Secretary of the Treasury under 31 U.S.C. Section 123. As was pointed out above, in practical operation a distinction appears to have been drawn by the Secretary of the Treasury, in designating countries, between "friendly" or "unfriendly" nations. Incorporation by reference in a California statute of these determinations by the Secretary of the Treasury would seem to offer a convenient means of preventing transmission of California estates to unfriendly nations while at the same time correlating such determinations with established foreign policy of the federal government.

#### **Bringing About Policies in Foreign Nations Which Would Permit United States Citizens To Inherit Property Left by Decedents in Those Nations**

Section 259 of the Probate Code does not deal other than incidentally with the problems of protecting a nonresident alien against confiscation of his inheritance and keeping funds out of the hands of potential enemies. But Section 259 does deal directly with the question of bringing about policies in foreign nations which would permit United States citizens to inherit property from estates in those nations. Is it desirable legislative policy that nonresident alien beneficiaries be permitted to inherit California estates only if their nations grant reciprocal inheritance rights to United States citizens? If so, then Section 259 might be retained in its present form with possible amendments to deal with problems created by the present wording of the statute, and supplemented with additional legislation to protect beneficiaries against confiscation of their inheritances or prevent transmission of estates to unfriendly nations, or both.<sup>56</sup> Inquiry will now be directed to possible amendments if the reciprocity requirement is to be retained, and then to the more basic question whether the reciprocity requirement itself should be abandoned.

<sup>55</sup> See Heyman, *The Nonresident Alien's Right to Succession Under the "Iron Curtain Rule,"* 53 Nw. U.L. Rev. 221, 239 (1957).

<sup>56</sup> This is the pattern of the Oregon statute. A nonresident alien beneficiary can inherit only if there is a reciprocal inheritance right and it is established that the beneficiary would receive the benefit of the inheritance "without confiscation, in whole or in part" by the country in which the beneficiary resides. *Ore. Rev. Stat. § 111.070* (1955).

In the general description of Sections 259-259.2 *supra* at pages B-15-18, there was set forth a few problems of construction and operation of the statute in its present form. Assuming that the reciprocity principle is to be retained, could these enumerated problems be solved by amendment of the statute?

1. The statute presently requires only that a foreign country not discriminate against United States citizens as distinguished from requiring that United States citizens be permitted to inherit. In this form it may require the greatest degree of reciprocity that it is reasonable to expect to obtain in international relationships. But amendment of the statute might be considered if the principle of affirmatively guaranteeing the right of American citizens to inherit abroad is determined to be of great enough importance.<sup>57</sup>

2. Although the problem has not been an important one in litigated cases since its enactment, the statute might be amended to require reciprocity not only at the time of death of the decedent but also at the time of distribution of the estate.

3. The problem of expense and burden of proof in establishing the existence of reciprocal inheritance rights has been a continuing one. In particular, the treatment of questions of foreign law as questions of fact led to the undesirable result of different courts reaching different conclusions as to the existence of reciprocity with a particular foreign country at a particular time, depending upon the findings made by the trier of fact after hearing expert testimony concerning the foreign law. In 1957 the Legislature enacted a statute providing for judicial notice of the law of foreign countries.<sup>58</sup> This statute will not completely solve all of the difficulties under Section 259, however, for the principle yet remains that the nonresident alien beneficiary must sustain the burden of proof on the issue of reciprocity and incur the expense<sup>59</sup> incident thereto.<sup>60</sup>

The more basic question to be considered is whether the reciprocity principle itself should be retained. There is certainly some argument to be made for the principle. The United States has entered into treaties with a number of nations establishing reciprocal inheritance rights.<sup>61</sup> The fact that this is a common topic of treaty negotiation indicates the possible desirability of attempting to achieve similar goals through the California law of inheritance in those cases where treaties do not already cover the subject. The granting of inheritance rights to United States citizens by foreign countries is a desirable end and perhaps the denial of inheritance rights in California should be utilized to the fullest extent possible to bring about that end.

<sup>57</sup> The original Oregon statute, enacted in 1937, ORN. COMP. LAWS ANN. § 61-107 (1940), conditioned inheritance of Oregon estates on the right of United States citizens to inherit estates in the particular foreign country "in like manner" as nationals of that country were permitted to inherit in Oregon. See *In re Estate of Krachler*, 139 Ore. 448, 263 P.2d 769 (1953). The present Oregon statute, enacted in 1951, ORN. REV. STAT. § 111.070 (1955), requires reciprocity in the same terms as CAL. PROB. CODE § 259.

<sup>58</sup> Cal. Stat. 1957, c. 249, p. 902.

<sup>59</sup> See Chaitkin, *supra* note 7, at 317.

<sup>60</sup> The issue in each case is what was the inheritance law of the particular country at the date of death of the particular decedent. Hence, even though such an issue is considered to be one of "law," the decision in one case would not necessarily settle the question for litigation concerning the same country at a different time. In addition, a second litigation could certainly question the "construction" made by a prior court of the inheritance law of a particular country at a particular time.

<sup>61</sup> See note 42 *supra*.

But it should be noted that California policy for many years before the enactment of Probate Code Section 259 was to extend inheritance rights to all aliens (with the narrow exception for a period of time of aliens ineligible to citizenship under the Alien Land Law). The statement of urgency which accompanied the passage of Section 259 emphasized not only the attainment of reciprocity but also, and to a greater degree, the prevention of transmission of funds to unfriendly nations. As has been pointed out the problem of prevention of transmission of funds to unfriendly nations is not necessarily solved by Section 259, and could be solved by a provision in the statute requiring or permitting impounding of funds under certain circumstances.

Moreover, there are several arguments against retention of the reciprocity principle:

1. The reciprocity principle results in frustrating a decedent's intent and in disinheriting innocent persons for reasons beyond their control.<sup>62</sup> Designated beneficiaries of a testator or the closest heirs of an intestate decedent lose their inheritances in favor of more distant relatives or in favor of the State of California. This has been the result in the many litigated cases in California in which it has been held that reciprocity was not proved.<sup>63</sup>

2. If the alien beneficiary is a resident of a Communist country the existence of reciprocal inheritance rights for United States citizens in such a country will not necessarily mean that United States citizens will thereby actually inherit any substantial amounts from estates in such countries. Inheritance rights for United States citizens would be largely illusory in such cases because of the limited scope of ownership of private property in Communist nations. If a foreign nation permits only narrowly limited ownership of private property then the granting by such a nation of equal inheritance rights to United States citizens will not as a practical matter mean that United States citizens will actually inherit anything. Similarly, if a foreign nation recognizes only limited rights of inheritance of private property, the extension of such inheritance rights to United States citizens will not as a practical matter mean that United States citizens will inherit any substantial amounts from estates in such a country. Reciprocity in itself would seem to be a meaningful and desirable principle only where the nations

<sup>62</sup> See Chalkin, *supra* note 7, at §17.

<sup>63</sup> See, e.g., *Estate of Arbulich*, 41 Cal.2d 86, 257 P.2d 433, cert. denied, 346 U.S. 897 (1953) (decedent left entire estate by will to brother in Yugoslavia, application of statute resulted in brother in United States taking entire estate); *Estate of Schlutts*, 36 Cal.2d 416, 224 P.2d 695 (1950) (all residuary legatees but one were citizens and residents of Germany or Austria, application of statute resulted in the one legatee in the United States taking the entire residue); *Estate of Bevilacqua*, 31 Cal.2d 580, 191 P.2d 752 (1948) (if no reciprocity widow and children in Italy would be cut off and first cousin in United States would inherit); *Estate of Karban*, 118 Cal. App.2d 240, 357 P.2d 649 (1953) (if estate went by intestacy decedent's closest relatives in Czechoslovakia would be cut off and more distant relatives in United States would take); *Estate of Michaud*, 53 Cal. App.2d 835, 123 P.2d 595 (1943) (first cousin in California would take instead of father and two brothers in German-occupied France).

involved have closely identical institutions of ownership and inheritance of private property.<sup>64</sup>

3. Reciprocity may be an undesirable principle in carrying on the psychological aspects of the "cold war" with Russia and its satellite nations. Protecting the inheritance rights in California estates of citizens of those nations, by holding the property for them in California, may perhaps better advance the conduct of foreign relations of the United States than does the denial of inheritance rights under Section 259.<sup>65</sup>

4. The reciprocity principle can as well be designated a principle of "retaliation." If it is California policy that there be no distinction between citizens and aliens in the right to take and hold property in California, there is some argument to be made against changing that principle only because a foreign nation has what to California would appear to be an "unenlightened" view as to the treatment of non-resident alien beneficiaries. The achievement of inheritance rights for American citizens in foreign countries should perhaps be brought about through diplomatic channels rather than through adopting an otherwise undesirable California law of inheritance.

5. Even with treatment of provisions of foreign law as questions of law instead of questions of fact there yet remains for the nonresident alien claimant, in a dispute with more distant relatives of the decedent or with the State of California, the problem of the expense and difficulty of sustaining the burden of proof on the issue of reciprocal inheritance rights.<sup>66</sup> It is not always a simple matter to determine what the inheritance law of a foreign country is. For example, current and reliable evidentiary data may not be readily available concerning the law of inheritance of a particular country. Or a foreign country may have different policies and legal concepts than the states of the United States with respect to ownership and inheritance of private property. Or a foreign country may utilize administrative agencies in dealing with inheritance with the result that there may not be any effective and well-settled inheritance law which can be proved before a California court.<sup>67</sup> Or a nonresident alien beneficiary may be a resident of a country which is temporarily or more permanently militarily occupied by another nation.<sup>68</sup> In many cases the potential inheritance is not sufficiently large to warrant the expenditure necessary to establish that reciprocity does exist.

If these arguments against the reciprocity principle are accepted it would then seem to be desirable that reciprocity be abandoned as a

<sup>64</sup> See Note, *Estates and the "Iron Curtain,"* 35 MASS. L.Q. 34 (May 1950). The ineffectiveness of succeeding in attaining "reciprocity" with Communist nations when different legal or economic institutions are involved is illustrated in another field—commercial treaties. "... national treatment" clauses assuring to nationals of one contracting party equality with the nationals of the other in specified matters [of international trade] are unreal concessions in the case of the U.S.S.R., owing to the great difference in the rights which contracting capitalist and Communist states extend to their own nationals." Pisar, *Soviet Conflict of Laws in International Commercial Transactions*, 70 HARV. L. REV. 593, 624 (1957).

<sup>65</sup> See Chaitkin, *supra* note 7, at 317. See also Comment, *State Regulation of Non-resident Alien Inheritance—An Anomaly in Foreign Policy*, 18 U. CHI. L. REV. 329 (1951).

<sup>66</sup> See p. B-25 *supra*.

<sup>67</sup> See, e.g., *Estate of Arbulich*, 41 Cal.2d 86, 257 P.2d 433, *cert. denied*, 346 U.S. 897 (1953); *Estate of Schluttig*, 36 Cal.2d 416, 224 P.2d 695 (1950).

<sup>68</sup> See, e.g., cases cited notes 26 and 32 *supra*.

condition to the inheritance of California estates by nonresident aliens and that Probate Code Sections 259-259.2 be repealed.

### THE NEW YORK STATUTE

Attention may now be directed to another statutory solution of the problems raised concerning inheritance by nonresident aliens, illustrated by the New York Statute.<sup>69</sup> This statute, Surrogate's Court Act Section 269, provides in part:

Where it shall appear that a legatee, distributee or beneficiary of a trust would not have the benefit or use or control of the money or other property due him, or where other special circumstances make it appear desirable that such payment should be withheld, the decree may direct that such money or other property be paid into the surrogate's court for the benefit of such legatee, distributee, beneficiary of a trust or such person or persons who may thereafter appear to be entitled thereto. Such money or other property so paid into court shall be paid out only by the special order of the surrogate or pursuant to the judgment of a court of competent jurisdiction.

The contrast between this statute and Probate Code Section 259 may best be illustrated by considering the three major policy considerations which should seemingly underlie any legislation in this area. The language of the New York statute is directed solely toward the first of those factors, effectuating the intent of the decedent by withholding the property for the benefit of the beneficiary if it appears that the beneficiary will not, for some reason, receive the benefit of the property if it is presently distributed to him. The beneficiary's right to inherit is not conditioned on the inheritance law or other policies of the foreign country of which he is a citizen and resident. The New York statute has been applied in many cases to impound a nonresident alien beneficiary's share in a New York estate where it appeared that if the property was transmitted to the beneficiary it would be confiscated—by currency exchange rates or by outright seizure or by

<sup>69</sup>The following states have enacted statutes similar to that of New York: Connecticut, CONN. GEN. STAT. § 2946d (Supp. 1955); Maryland, MD. ANN. CODE Art. 93, § 161 (1957); Massachusetts, MASS. ANN. LAWS c. 206, §§ 27A, 27B (Gen. Supp. 1955); New Jersey, N.J. STAT. ANN. tit. 17, § 25-10 (1953); Ohio, OHIO REV. CODE ANN. tit. 21, § 2113.81 (Page Supp. 1957); Pennsylvania, PA. STAT. ANN. tit. 20, §§ 1155-59 (Purdon Cum. 1957); Rhode Island, R.I. GEN. LAWS § 33-13-13 (1956).

Some states have achieved a result similar to the New York statute by rule of court in absence of legislation. Chalkin, *supra* note 7, at 213-16, lists the following such states: Michigan, Missouri, Nebraska, Pennsylvania and Vermont.

other measures—by the nation of which the beneficiary was a resident or citizen.<sup>70</sup>

Surrogate's Court Act Section 269 does not deal specifically with the second factor, withholding of transmission of funds where it is likely that the funds would fall into the hands of an unfriendly nation. But as pointed out above, the New York cases have involved beneficiaries in enemy nations in World War II or Russia and Russian satellites since World War II. Until 1944 another New York statute dealt in a way with the problem of prevention of transmission of funds to an unfriendly nation. This was New York Real Property Law Section 10 which provided that only "alien friends" could take or hold real property in New York. This statute had a different effect than Surrogate's Court Act Section 269: it was not a provision for impounding of the alien beneficiary's share of the estate if he was not an alien "friend," but was a condition on the right to inherit. The statute was amended in 1944<sup>71</sup> to conform to the New York law concerning personal property, and the statute now provides that all aliens may take and hold real property in the state. The following statement in the Recommendation of the New York Law Revision Commission concerning this amendment is of interest concerning the question, discussed in the preceding section of this study, whether state legislation on the subject of inheritance by nonresident aliens should attempt to deal other than incidentally with the problem of possible aid to enemy nations:

Any argument that the present disability of alien enemies with respect to real property should be maintained because of possible danger to the nation is without merit. With some foreign countries the United States has treaties which have been interpreted to mean that alien enemies who are citizens of those countries are not subject to the disabilities of alien enemies created by state law in respect to real property. Such treaties show that the United States does not believe that its safety depends upon the state disabilities. As such treaties do not exist with all countries, the result is a lack of uniformity of law in the state.

The federal government has the power to protect itself from injury by any person, whether alien or citizen. This power is exercised through the Trading with the Enemy Act and various

<sup>70</sup> See generally, Hayman, *The Nonresident Alien's Right to Succession Under the "Iron Curtain Rule,"* 52 Nw. U.L. Rev. 321 (1957); Chalkin, *supra* note 7, at 299-300; Felda, *Legacies Behind the Iron Curtain,* 10 Ohio St. L.J. 495 (1956); Note, *Beneficiaries Behind the Iron Curtain,* 7 Wakeham Rev. L. Rev. 175 (1956); Note, *Estates and the "Iron Curtain,"* 35 Mass. L.Q. 34 (May 1950). See, *eg.*, *Matter of Gold's Estate,* 173 Mass. 545, 18 N.E.2d 391 (Surr. Ct. 1940) (legacy impounded because legatee in Russia would receive only \$25-\$300 from a \$1,500 legacy); *Matter of Weidberg's Estate,* 173 Mass. 524, 15 N.Y.S.2d 252 (1949) (share impounded of Jewish beneficiary in Germany because Germany was confiscating property of Jews); *Petition of Masurovski,* 321 Mass. 33, 116 N.E.2d 854 (1954) (legacy impounded since Polish legatee would receive only 20% of value of legacy because of rate of exchange in transmission); *In re Uri's Estate,* 71 A.2d 665 (N.J. Super. 1950), appeal dismissed, 5 N.J. 507, 76 A.2d 249 (1950) (statute applied where shown that Hungarian foreign exchange regulations were such that legatee in Hungary would receive 3-4 of the purchasing value of the legacy, 3-4 being diverted to the Hungarian government). See also *Matter of Braler's Estate,* 305 N.Y. 148, 111 N.E.2d 424 (1953) (Hungary); *In re Ryslakiewicz's Will,* 114 N.Y.S.2d 504 (Surr. Ct. 1953) (Poland); *Matter of Best's Estate,* 200 Misc. 332, 107 N.Y.S.2d 224 (Surr. Ct. 1951) (Russia); *Matter of Tomae's Estate,* 199 Misc. 940, 105 N.Y.S.2d 844 (Surr. Ct. 1951) (Russian Zone of Germany); *Matter of Geffen's Estate,* 199 Misc. 756, 104 N.Y.S.2d 490 (Surr. Ct. 1951) (Lithuania); *Matter of Ramberg's Estate,* 174 Misc. 306, 20 N.Y.S.2d 619 (Surr. Ct. 1940) (German-occupied Norway).

<sup>71</sup> N.Y. Laws 1944, c. 272, p. 627.

proclamations and executive orders by which the government protects itself without causing unnecessary hardship to alien enemies and persons claiming through them. The present state law is not adapted to this purpose and works total forfeiture without regard to fault or danger.<sup>72</sup>

New York has no statutory provisions concerning the third factor, bringing about inheritance of foreign estates by United States citizens.

There are several aspects of the New York statute which should here be highlighted to point up problems which may arise if legislative attention is given to impounding a beneficiary's share in an estate so as to prevent confiscation of the property by a foreign country:

1. The statute is not limited in its terms either to nonresidents or to aliens but covers any beneficiary who would not receive the benefit of his inheritance. However, the reported cases all involved nonresident alien beneficiaries.

2. By its terms the statute would appear to permit impounding of a beneficiary's share in a New York estate where the beneficiary was a resident citizen of a friendly nation. But the reported cases under the statute all appear to have involved World War II enemy nations or Russia and Russian satellites since World War II.<sup>73</sup> In many of the cases under the statute the beneficiary's share of an estate was impounded on a showing that the country in which he resided was on the list of countries prepared by the Secretary of the Treasury under 31 U.S.C. Section 123.<sup>74</sup>

3. For how long a period should a distributive share be impounded for the benefit of a beneficiary? Neither the New York statute nor those modeled on it appear to place any limit on the period during which the court will hold the property for the beneficiary. Stated differently, the rights of the nonresident alien beneficiary are not at any time cut off in favor of other heirs or in favor of escheat to the state.<sup>75</sup>

4. How is the issue raised and who raises the issue as to whether the distributee would or would not have the benefit of the property due him? The New York statute provides only that the impounding provisions come into effect "where it shall appear" that the distributee would not have the benefit of the property, or "where other special circumstances make it appear desirable that such payment should be withheld." If a probate court is to withhold distribution to a beneficiary it may well be desirable that care be taken that there is adequate consideration of the question of how the issue is to be raised. The reported New York decisions do not make clear exactly how the issue is raised in the

<sup>72</sup> *Act, Recommendation and Study relating to the Disability of Alien Enemies with Respect to Real Property*, NEW YORK LAW REVISION COMMISSION REPORT, RECOMMENDATIONS AND STUDIES 451, 456 (1944).

<sup>73</sup> See note 70 *supra*.

<sup>74</sup> "[A] check drawn on government funds would be no less likely to reach a Hungarian payee than would a draft on any private account." *Matter of Braier's Estate*, 305 N.Y. 148, 157, 111 N.E.2d 424, 428 (1953). See also *Matter of Siegler's Will*, 284 App. Div. 436, 132 N.Y.S.2d 392 (App. Div. 1954); *In re Ryslakiewicz's Will*, 114 N.Y.S.2d 504 (Surr. Ct. 1952); *Matter of Best's Estate*, 200 Misc. 332, 107 N.Y.S.2d 224 (Surr. Ct. 1951); *Matter of Getrean's Estate*, 200 Misc. 543, 107 N.Y.S.2d 225 (Surr. Ct. 1951); *Matter of Thomae's Estate*, 199 Misc. 940, 105 N.Y.S.2d 844 (Surr. Ct. 1951); *Matter of Geffen's Estate*, 199 Misc. 756, 104 N.Y.S.2d 490 (Surr. Ct. 1951).

<sup>75</sup> Letter from Arthur Levitt, State Comptroller of the State of New York, to the writer, June 3, 1957.

New York courts. The issue is not ordinarily raised by the beneficiary himself. In most cases the alien beneficiary is represented by his nation's consul or by an attorney allegedly appointed by the beneficiary, and in the reported cases the "representative" of the alien beneficiary has sought immediate distribution. In most cases the court seems to have raised the issue on its own motion.<sup>76</sup> Other states with statutes similar to that of New York do have provisions concerning the raising of the issue. The New Jersey statute provides for withholding of distribution under specific circumstances "on motion of any person in interest, or, failing such, on motion of the attorney general or on the court's own motion."<sup>77</sup> The Massachusetts statute provides that the court may order deposit of a distributive share in a savings bank "on petition of an interested party or in its discretion."<sup>78</sup>

### AUTHOR'S RECOMMENDATION

It is difficult to estimate the extent to which nonresident aliens may in the future become entitled by testate or intestate succession to property in California. In 1950 there were over 200,000 residents of California who were born in nations presently potentially "unfriendly" or under the domination of "unfriendly" nations.<sup>79</sup> The likelihood that these California residents will have beneficiaries of their estates who are residents of these countries, together with the quantity of litigated cases under Section 259, suggests that California should continue to have some form of legislation concerning inheritance of California estates by nonresident aliens.

It seems to me that the following principles should be the guide in drafting legislation to deal with the problems created by inheritance of California estates by nonresident aliens:

1. No distinction should be drawn concerning the right to inherit real or personal property in California between resident and nonresident aliens, or between nonresident aliens who reside in different countries, because of those countries' rules concerning inheritance by United States citizens. Thus, for the reasons given *supra* at pages B-26-28, the reciprocity principle should be abandoned and Probate Code Sections 259-259.2 should be repealed.

2. Some provision should be made for impounding the distributive share of a nonresident alien in a California estate if it is likely that if the funds were transmitted to the beneficiary he would not receive the benefit of his inheritance.<sup>80</sup> This could be done effectively by pro-

<sup>76</sup> See, e.g., *In re Ryslakiewicz' Will*, 114 N.Y.S.2d 504 (Surr. Ct. 1953); *Matter of Best's Estate*, 200 Misc. 333, 107 N.Y.S.2d 224 (Surr. Ct. 1951).

<sup>77</sup> N.J. STAT. ANN. tit. 3A, § 25-10 (1953).

<sup>78</sup> MASS. ANN. LAWS c. 206, §§ 27A, 27B (Supp. 1956).

<sup>79</sup> This is the approximate number of "foreign born white" persons who were residents of California in 1950 and who were born in the following countries: Germany, Poland, Czechoslovakia, Hungary, Yugoslavia, Latvia, Estonia, Lithuania, Rumania, Bulgaria, Albania, Russia and China, 1950 UNITED STATES CENSUS OF POPULATION, *Nativity and Parentage*, Special Reports IV, 3A-71 (1954).

<sup>80</sup> Statutory authorization for withholding a beneficiary's distributive share may not be necessary. See *Howaldt v. Superior Court*, 18 Cal.2d 114, 114 P.2d 333 (1941), where the probate court ordered the Public Administrator to withhold distributive shares of nonresident heirs because the distributees were residents of Germany and because of the war conditions in Germany. The German heirs filed a proceeding to review the probate court's order. It was argued on appeal in support of the court's order that the probate court must insure that a decedent's property is distributed according to the decedent's intent or the laws of intestacy and make appropriate regulations to that end, including withholding of distribution if existing conditions so require. The Supreme Court did not decide this point in the *Howaldt* case.

viding for impounding (a) under the circumstances set forth in the New York statute or (b) if the beneficiary resides in a country designated by the Secretary of the Treasury under 31 U.S.C. Section 123. There might be some question whether incorporation by reference of the amendable list of countries prepared by the Secretary of the Treasury would be an unconstitutional delegation of power by the California Legislature, but California cases would seem to sustain such a statute.<sup>81</sup>

3. No effort should be made to deal directly in a California statute with preventing the transmission of funds to unfriendly nations. This is an area in which federal government policy should prevail and in which the federal government is constantly active. However, in giving effect to a policy of protecting the inheritance rights of the nonresident alien beneficiary use of the list of countries prepared by the Secretary of the Treasury would in all likelihood have the collateral effect of drawing what is in practical operation a distinction made by an agency of the federal government between friendly and unfriendly nations.

4. The question of how the issue of impounding is to be raised should be covered in some adequate manner.

5. There should be no time limit on the period during which funds will be impounded for the benefit of the beneficiary or his heirs. Funds might be deposited or invested in some appropriate manner for the benefit of the beneficiary, or might be deposited with the State Treasurer for use by the State, but with recognition of the right of the beneficiary or his heirs to obtain distribution whenever it is shown that the considerations which led to impounding no longer obtain and that the proper claimant is entitled to receive the property. As long as there is a known and existing beneficiary of a California estate, it seems to me undesirable to disinherit such a beneficiary in favor of other heirs or permanently to escheat to the State the distributive share of such a beneficiary. If the funds are deposited in a bank or otherwise invested or used by the State the property would be put to beneficial use in the community while impounded.

<sup>81</sup> "the attempt to make future regulations of another jurisdiction part of the state law is generally held to be an unconstitutional delegation of state power." Brock L. Superior Court, 9 Cal.2d 391, 397, 71 P.2d 209, 213 (1937). But in *People v. Oyama*, 29 Cal.2d 164, 178, 173 P.2d 794, 803 (1946), *rev'd on other grounds*, 332 U.S. 633 (1948), involving the Alien Land Law which conditioned inheritance of land in California on eligibility to United States citizenship the California Supreme Court said:

The Legislature of this state has set up eligibility to citizenship as a primary standard, and because the determination of some fact or condition incorporated in this primary standard rests elsewhere than in the Legislature, or this requirement is to be measured by another standard not under the control of the state and which may be subject to change, does not amount to an unconstitutional delegation of legislative authority.

See also *Ex parte Gerino*, 113 Cal. 413, 77 Pac. 166 (1904); *Mantione v. State Bd. of Equalization*, 37 Cal. App.2d 149, 106 P.2d 657 (1941); *In re Lasswell*, 1 Cal. App.2d 183, 36 P.2d 672 (1934).

It seems reasonable to conclude that the principle stated in the *Oyama* case would be applied to the use of the Secretary of the Treasury's list, particularly in light of the reasons for using that list of countries instead of leaving the decision to a State agency. See pp. B-21-22 *supra*.