

STATE OF CALIFORNIA

REPORT OF THE
**CALIFORNIA LAW
REVISION COMMISSION**

To the Governor and the Legislature of the State of
California at the Legislative Session of 1956

March 1, 1956

LETTER OF TRANSMITTAL

To HIS EXCELLENCY GOODWIN J. KNIGHT
Governor of California
and to the Members of the Legislature

The California Law Revision Commission, created in 1953 to examine the common law and statutes of the State and to recommend such changes in the law as it deems necessary to modify or eliminate antiquated and inequitable rules of law and to bring the law of this State into harmony with modern conditions (Government Code, Sections 10300 to 10340), herewith submits this report of its transactions during the year 1955.

THOMAS E. STANTON, JR., *Chairman*
JOHN D. BABBAGE, *Vice Chairman*
JESS R. DORSEY, *Member of the Senate*
CLARK L. BRADLEY, *Member of the Assembly*
JOSEPH A. BALL
BERT W. LEVIT
STANFORD C. SHAW
JOHN HAROLD SWAN
SAMUEL D. THURMAN
RALPH N. KLEPS, *Legislative Counsel, ex officio*

JOHN R. McDONOUGH, JR.
Executive Secretary

March 1, 1956



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REPORT OF THE CALIFORNIA LAW REVISION COMMISSION FOR THE YEAR 1955

I. FUNCTION OF COMMISSION

The California Law Revision Commission was created by Chapter 1445 of the Statutes of 1953. The commission consists of one Member of the Senate, one Member of the Assembly, seven members appointed by the Governor with the advice and consent of the Senate, and the Legislative Counsel who is an ex officio, nonvoting member.

The principal duties of the Law Revision Commission are set forth in Section 10330 of the Government Code which provides that the commission shall, within the limitations imposed by Section 10335 of the Government Code:

- (a) Examine the common law and statutes of the State and judicial decisions for the purpose of discovering defects and anachronisms in the law and recommending needed reforms.
- (b) Receive and consider proposed changes in the law recommended by the American Law Institute, the National Conference of Commissioners on Uniform State Laws, any bar association or other learned bodies.
- (c) Receive and consider suggestions from judges, justices, public officials, lawyers, and the public generally as to defects and anachronisms in the law.
- (d) Recommend, from time to time, such changes in the law as it deems necessary to modify or eliminate antiquated and inequitable rules of law, and to bring the law of this State into harmony with modern conditions.¹

The commission's program is fixed in accordance with Section 10335 of the Government Code which provides:

The commission shall file a report at each regular session of the Legislature which shall contain a calendar of topics selected by it for study, including a list of the studies in progress and a list of topics intended for future consideration. After the filing of its first report the commission shall confine its studies to those topics set forth in the calendar contained in its last preceding report which are thereafter approved for its study by concurrent resolution of the Legislature. The commission shall also study any topic which the Legislature, by concurrent resolution, refers to it for such study.

¹The commission is also directed to recommend the express repeal of all statutes repealed by implication, or held unconstitutional by the Supreme Court of the State or the Supreme Court of the United States. CAL. GOVT. CODE Section 10331.

II. PERSONNEL OF COMMISSION

Hon. Jess R. Dorsey of Bakersfield, Member of the Senate for the Thirty-fourth Senatorial District, was reappointed as the Senate member of the commission.

The term of Hon. Stanford C. Shaw of Ontario, Member of the Assembly for the Seventy-second Assembly District, expired at the end of his term of office in the Assembly on December 31, 1954 and Hon. Clark L. Bradley of San Jose, Member of the Assembly for the Twenty-eighth Assembly District, was appointed to that position. Mr. Shaw was subsequently appointed to the commission by Governor Knight in January 1955 and was reappointed by the Governor in November 1955 upon the expiration of that term.

Hon. Richard C. Fildew resigned from the commission in April 1955 upon his appointment as Judge of the Municipal Court in Pasadena and the Governor appointed Mr. Joseph A. Ball of Long Beach in his place. Mr. Ball was reappointed to the commission in November 1955 at the end of his first term of office.

Mr. John D. Babbage of Riverside was reappointed to the commission by the Governor in November 1955 upon the expiration of his first term of office.

As of the date of this report the membership of the Law Revision Commission is:

		<i>Term expires</i>
Thomas E. Stanton, Jr. San Francisco	Chairman	October 1, 1957
John D. Babbage Riverside	Vice Chairman	October 1, 1959
Hon. Jess R. Dorsey Bakersfield	Senate Member	*
Hon. Clark L. Bradley San Jose	Assembly Member	*
Joseph A. Ball Long Beach	Member	October 1, 1959
Bert W. Levit San Francisco	Member	October 1, 1957
Stanford C. Shaw Ontario	Member	October 1, 1959
John Harold Swan Sacramento	Member	October 1, 1957
Samuel D. Thurman Stanford	Member	October 1, 1955
Ralph N. Kleps Sacramento	ex officio member	**

The Law Revision Commission held its second election of officers in November 1955. Mr. Thomas E. Stanton, Jr. was re-elected chairman and Mr. John D. Babbage was re-elected vice chairman.

Shortly after its organization in 1954 the commission selected Stanford Law School as its headquarters and Professor John R. McDonough, Jr. of the law school faculty to serve as its executive secretary on a half-time basis. This arrangement, which makes available to the commission without cost a suite of offices in the Stanford Law School, the law library and other research facilities of the school, and the counsel of its faculty has worked well and is being continued. On February 1, 1955, Mrs. Virginia B. Nordby was appointed assistant executive secretary of the commission.

* The legislative members of the commission serve at the pleasure of the appointing power.

** The Legislative Counsel is an ex officio nonvoting member of the Law Revision Commission.

III. SUMMARY OF WORK OF COMMISSION

During 1955 the Law Revision Commission was engaged in four tasks:

- (1) Presentation of its 1955 legislative program to the Legislature; ²
- (2) Work on the several assignments given to the commission by the 1955 Session of the Legislature to be completed for presentation to the 1956 and 1957 Sessions; ³
- (3) Preparation of a calendar of topics selected for study to be submitted to the Legislature for its approval at the 1956 Session, pursuant to Section 10335 of the Government Code; ⁴ and
- (4) A study, made pursuant to Section 10331 of the Government Code, to determine whether any statutes of the State have been held by the Supreme Court of the United States or by the Supreme Court of California to be unconstitutional or to have been impliedly repealed. ⁵

The commission has developed effective procedures for performing the various assignments given to it by the Legislature. Most of the research studies which the commission determines are necessary will be done by experts in the fields of law involved, retained as research consultants to the commission. This is the procedure followed by the New York Law Revision Commission. It should prove economical because expert research consultants do not have to acquire the considerable background necessary to understand the specific problems under study. The commission has retained several research consultants on studies which it is currently making and its experience to date with this procedure has been satisfactory.

The commission assigns each of its studies to a committee of its members. The committee meets with the research consultant at the outset to discuss the problem with him. The consultant then makes a study and prepares a report. The report is considered by the committee and then by the commission as a whole which determines what report and recommendation it will make to the Legislature. In the case of each study which it makes the commission's report to the Legislature will include (1) its own official report and recommendation and a draft of any legislation necessary to effectuate its recommendation and (2) the research consultant's report which the commission considered in reaching its conclusions.

The commission met four times in 1955: on March 18 and 19 in Sacramento; on June 25 in Los Angeles; on September 16 and 17 in San Francisco; and on November 11 and 12 in Los Angeles. In addition, various committees of the commission met on several occasions during the year.

² See Part IV of this report, p. 10 *infra*.

³ See Part V A and Part VI of this report, pp. 12, 15 *infra*.

⁴ See Part V B of this report, p. 14 *infra*.

⁵ See Part VII of this report, p. 17 *infra*.

IV. 1955 LEGISLATIVE PROGRAM OF COMMISSION

A. TOPICS SELECTED FOR STUDY

Pursuant to Section 10335 of the Government Code, the Law Revision Commission included in its 1955 report to the Legislature a list of 23 topics which it had selected for study. Hon. Jess R. Dorsey, the Senate member of the commission, and Hon. Clark L. Bradley, the Assembly member of the commission, introduced a concurrent resolution authorizing the commission to study these topics. The Legislature approved 16 of the topics for study by the commission.⁶ These topics are included in the list of studies in progress contained in this report.⁷

B. PARTIAL REVISION OF EDUCATION CODE

The commission was directed by Chapter 1682 of the Statutes of 1953 to undertake a revision of the Education Code. This work was begun immediately after the commission was organized in June 1954. By January 1955 the commission had prepared two Education Code revision bills which were introduced by Senator Dorsey and Assemblyman Bradley. One bill revised the parts of the code which concern the composition of school district governing boards and the election, appointment, and recall of governing board members. The other revised certain other sections of the code by repealing obsolete sections, clarifying ambiguous sections, and resolving conflicts between sections of the code. Both bills were passed by the Legislature after some amendments, primarily of a technical nature, and were signed by the Governor, becoming, respectively, Chapters 799 and 877 of the Statutes of 1955. The Legislature made a limited appropriation for the Education Code assignment for Fiscal Year 1954-55 and these revisions were accomplished pursuant to that appropriation. For the commission's conclusions concerning future work on revision of the Education Code see its 1955 report to the Legislature at pages 12 to 14.

C. REVISION OF PROBATE CODE SECTIONS 640 TO 646

The commission was directed by Resolution Chapter 22, adopted in 1954 at the First Extraordinary Session of the Legislature, to make a study of Sections 640 to 646 of the Probate Code, which provide for summary distribution of estates not exceeding \$2,500 in value, and to prepare a draft of a revision of these sections bringing them into accord with the Inheritance Tax Law exemptions and the homestead provisions of the Civil Code. The commission presented a report to the 1955 Session of the Legislature recommending: (1) that the maximum value of an estate to be set aside under Sections 640 to 646 of the Probate Code be increased from \$2,500 to \$5,000; (2) that the "other estate" disqualification of survivors be increased from \$5,000 to

⁶ Cal. Stat. 1955, res. c. 207.

⁷ See Part V A of this report, p. 12 *infra*.

\$12,500; and (3) that certain other amendments be made to Probate Code Sections 640 to 646 to make the law clearer and more equitable. Senator Dorsey and Assemblyman Bradley introduced a bill which embodied these recommendations. The bill was amended in the Assembly to eliminate the proposed increase in the maximum size of estates to be set aside and to make certain technical changes; as thus amended, it was passed by the Legislature and signed by the Governor, becoming Chapter 1183 of the Statutes of 1955.

V. CALENDAR OF TOPICS SELECTED FOR STUDY

A. STUDIES IN PROGRESS

1. Studies pursuant to Resolution Chapter 207, Statutes of 1955

The following topics, recommended by the Law Revision Commission and approved by the 1955 Session of the Legislature, are now being studied by the commission. (A description of each of these topics is contained in the 1955 report of the commission to the Legislature.)

1. Whether the sections of the Civil Code prohibiting the suspension of the absolute power of alienation should be repealed.⁸
2. Whether the courts of this State should be required or authorized to take judicial notice of the law of foreign countries.⁹
3. Whether the Dead Man Statute should be repealed or, if not, whether the rule with respect to waiver of the statute by the taking of a deposition should be clarified.¹⁰
4. Whether California should continue to follow the rule that survival of actions arising outside California is governed by California law.¹¹
5. Whether Section 201.5 of the Probate Code should be revised [treatment of separate property brought into California].¹²
6. Whether Section 660 of the Code of Civil Procedure should be amended to specify the effective date of an order granting a new trial.¹³
7. Whether, when the defendant moves for a change of place of trial of an action, the plaintiff should in all cases be permitted to oppose the motion on the ground of the convenience of witnesses.¹⁴
8. Whether the law with respect to the "for and against" testimonial privilege of husband and wife should be revised in certain respects.¹⁵
9. Revision of Sections 1377 and 1378 of the Penal Code to eliminate certain obsolete language therein [compromise of misdemeanor charge].¹⁶
10. Resolution of conflict between Penal Code Section 19a, limiting commitment to a county jail to one year in misdemeanor cases, and other provisions of the Penal Code and other codes providing for longer county jail sentences in misdemeanor cases.¹⁷
11. Whether Sections 2201 and 3901 of the Corporations Code should be made uniform with respect to notice to stockholders relating to sale of all or substantially all of the assets of a corporation.¹⁸

⁸ See REPORT OF CALIFORNIA LAW REVISION COMMISSION 18 (1955).

⁹ *Id.* at 19.

¹⁰ *Id.* at 20.

¹¹ *Id.* at 21.

¹² *Id.* at 22.

¹³ *Ibid.*

¹⁴ *Id.* at 23.

¹⁵ *Id.* at 24.

¹⁶ *Id.* at 26.

¹⁷ *Id.* at 27.

¹⁸ *Ibid.*

12. Whether the jury should be authorized to take a written copy of the jury instructions into the jury room in civil as well as criminal cases.¹⁹
13. Whether Sections 389 and 442 of the Code of Civil Procedure, relating to bringing additional parties into a civil action by cross-complaint, should be revised.²⁰
14. Whether a statute should be enacted to make it unnecessary to appoint an administrator in a quiet title action involving property to which some claim was made by a person since deceased.²¹
15. Whether, when the defendant in a divorce or annulment action has defaulted, the court should be authorized to include an award of attorney's fees and costs in a decree of annulment or an interlocutory or final decree of divorce without requiring that an order to show cause or notice of motion be served on the defendant.²²
16. Whether there is need for clarification of the law respecting the duties of city and county legislative bodies in connection with planning procedures and the enactment of zoning ordinances when there is no planning commission.²³

The commission will submit a report on each of these topics to the 1957 Session of the Legislature.

2. Revision of Fish and Game Code pursuant to Resolution Chapter 204, Statutes of 1955

Resolution Chapter 204 of the Statutes of 1955, which was sponsored by Honorable Pauline Davis, Member of the Assembly for the Second Assembly District, directs the Law Revision Commission to undertake a study of the Fish and Game Code and to prepare a proposed revision of such code which would eliminate obsolete, superseded, ambiguous, anachronistic, and defective provisions thereof.

A preliminary study of this assignment revealed that it will involve a substantial revision of the Fish and Game Code. Accordingly, the commission has arranged to have the Legislative Counsel prepare a draft of a revised code for the commission's consideration. The commission has also discussed revision of the code with representatives of the Fish and Game Commission and the Department of Fish and Game and has been assured of their cooperation. In addition, the commission has sent approximately 900 letters to interested persons and groups throughout the State calling attention to its assignment to revise the code and soliciting suggestions for such revision.

Copies of the draft code will be distributed to interested persons throughout the State with a request that they study it and send their comments to the commission. The commission will then decide, on the basis of consideration of the draft code and the comments of interested persons and groups, what revisions of the code should be recommended.

The commission will submit a report and a draft of a revised Fish and Game Code to the 1957 Session of the Legislature.

¹⁹ *Id.* at 28.

²⁰ *Id.* at 29.

²¹ *Id.* at 30.

²² *Id.* at 31.

²³ *Id.* at 32.

B. TOPICS INTENDED FOR FUTURE CONSIDERATION

Section 10335 of the Government Code provides:

The commission shall file a report at each regular session of the Legislature which shall contain a calendar of topics selected by it for study, including a list of the studies in progress and a list of topics intended for future consideration. After the filing of its first report the commission shall confine its studies to those topics set forth in the calendar contained in its last preceding report which are thereafter approved for its study by concurrent resolution of the Legislature. The commission shall also study any topic which the Legislature, by concurrent resolution, refers to it for such study.

Pursuant to this section the commission reported a list of topics which it had selected for study to the 1955 Session of the Legislature; 16 of these topics were approved and studies of them are in progress. In addition, the Legislature referred the Fish and Game Code study and a study of the Inheritance and Gift Tax Laws to the commission. The commission's report on its study of the Inheritance and Gift Tax Laws is submitted herein. The commission expects to complete the bulk of its work on the remaining studies by July 1, 1956, and to make reports and recommendations on them to the 1957 Session of the Legislature. It is, therefore, including in this report a list of 15 new topics selected by it for study during Fiscal Year 1956-57. These topics are set forth in Appendix A of this report.

The topics which the commission has selected are based in part on suggestions received from judges, district attorneys, county counsels, bar associations, practicing attorneys, law professors and others throughout the State. The commission has also studied recent California court decisions, law reviews published by California law schools, and other pertinent source materials. From these sources the commission has selected subjects meriting study at this time. The legislative members of the commission will introduce at the 1956 Session of the Legislature a concurrent resolution authorizing the commission to study these topics.

VI. REPORT ON STUDY OF INHERITANCE AND GIFT TAX LAWS

By Resolution Chapter 205 of the Statutes of 1955 the California Law Revision Commission was directed and authorized "to study and analyze the provisions of the inheritance and gift tax laws and the federal estate and gift tax laws, and on the basis thereof to determine what might be done in order to bring the California laws into closer accord with the federal." The commission was directed to submit a report on the subject of its study, analysis and determination, together with a draft of any proposed legislation in the matter, not later than the 10th legislative day of the 1956 Session.

As directed by Resolution Chapter 205, in making its study, analysis and determination the commission consulted with the Inheritance and Gift Tax Division of the State Controller's Office, with representatives of the State Bar of California and with several attorneys engaged in private practice who were interested in and informed on the subject of the study. It then engaged Mr. James B. Frankel of the San Francisco Bar to make a study and report covering: (1) the points wherein the California inheritance and gift tax laws differ from the federal estate and gift tax laws; and (2) the feasibility of achieving conformity between the two sets of laws. Mr. Frankel's study is printed as Appendix B to this report.

On the basis of these consultations, consideration of the research consultant's study and its own deliberations, the commission has determined as follows:

1. There are major and irreconcilable differences between the California inheritance tax law and the federal estate tax law, both as to the substance of the taxes and the procedure for determining and collecting them. The federal estate tax is on the act of giving, falls on the estate as a unit in the first instance, is based on the total value of the estate, and is self assessed and reported in much the same manner as the federal income tax. The California inheritance tax, on the other hand, is on the receipt of property from the decedent, falls on the beneficiary, is based not only on what he receives but also upon his relationship to the decedent, and is assessed by the State Controller and collected in the course of probate of the decedent's estate. These basic differences are reflected in rates, in exemptions, and in other characteristics and incidents of the respective taxes.

The California gift tax and the federal gift tax are closely related to their respective death taxes. Thus, there are many of the same major and irreconcilable differences between them as exist between the California inheritance tax and the federal estate tax.

These major differences between the respective death and gift taxes make it impracticable to achieve any substantial degree of conformity between California and federal law, save through the adoption of an estate tax and related gift tax by California, both modeled closely on, if not identical to, their federal counterparts.

2. Any study to determine the desirability of the adoption by this State of an estate tax and related gift tax modeled on the federal

taxes, for the purpose of achieving conformity between the death and gift tax laws of the two jurisdictions, should only be made after the Legislature has determined, as a matter of policy, that it desires to consider the abandonment of the inheritance tax concept and the adoption of the estate tax concept.

3. Although substantial conformity between the existing California inheritance and gift tax laws and the federal estate and gift tax laws cannot be achieved, it would be possible to achieve conformity as to a number of matters of detail wherein the laws now differ and which are not related to their basic differences. As is shown in the research consultant's study, some of these relate to the taxability of certain types of transfers,²⁴ deductions, exemptions and credits,²⁵ valuation,²⁶ and taxing procedure.²⁷

4. While the commission could study each of these points of difference and draft proposed legislation which would bring the California laws into closer conformity with the federal laws, it questions whether such legislation would serve any real purpose, so long as the basic differences between the California laws and the federal laws continue to exist. It believes that so long as California continues to adhere to the inheritance tax as distinguished from the estate tax, the objective should be to eliminate inequities, inefficiencies and loopholes in the existing inheritance tax system, and that conformity with the federal law should be sought only when such conformity will achieve this basic objective.

5. There may be a question, however, as to whether the commission is the most appropriate agency to make the type of study suggested in paragraph 4. The Inheritance and Gift Tax Laws are administered by the Inheritance and Gift Tax Division of the State Controller's Office, which is in day-to-day contact with the problems arising under them. The commission's prototype, the New York Law Revision Commission, has consistently followed the policy that "Proposals relating solely or primarily to matters within the special fields of other existing departments and agencies of the government [are] referred to such bodies."²⁸

In view of the foregoing determinations, the commission in completing its assignment has concluded that it should not submit any proposed legislation pursuant to Resolution Chapter 205. If, after consideration of the matters set forth above, the Legislature determines either (a) that, as a matter of policy, it desires to consider the abandonment of the inheritance tax concept and the adoption of the estate tax concept, or (b) that it desires to retain the inheritance tax concept but to achieve conformity with the federal law as to matters of detail which are not related to the basic differences between the two tax concepts, or (c) that it desires to achieve conformity with the federal law only where necessary to eliminate any inequities, inefficiencies or loopholes in the existing inheritance and gift tax laws, the commission is prepared to undertake such further study in this field as the Legislature may direct by concurrent resolution.

²⁴ See pp. 41-47 (estate) and pp. 56-57 (gift) *infra*.

²⁵ See pp. 48-50 (estate) and pp. 57-58 (gift) *infra*.

²⁶ See p. 51 (estate) and p. 58 (gift) *infra*.

²⁷ See p. 52 (estate) and p. 59 (gift) *infra*.

²⁸ REPORT, RECOMMENDATIONS AND STUDIES OF NEW YORK LAW REVISION COMMISSION 8 (1952).

VII. REPORT ON STATUTES REPEALED BY IMPLICATION OR HELD UNCONSTITUTIONAL

Section 10331 of the Government Code provides:

The commission shall recommend the express repeal of all statutes repealed by implication, or held unconstitutional by the Supreme Court of the State or the Supreme Court of the United States.

In 1955 the commission reported that it had examined the cases decided by the Supreme Court of the State and the Supreme Court of the United States since January 1, 1953, the date of the most recent report of the Legislative Counsel which included a report of statutes held unconstitutional or repealed by implication, and that it had found two decisions of the Supreme Court of California holding statutes of the State unconstitutional:

(1) In *State Board of Dry Cleaners v. Thrift-D-Lux Cleaners, Inc.*, 40 Cal. 2d 436, 254 P.2d 29 (1953) the court in a four to three decision held unconstitutional, under the due process clauses of the Constitutions of the United States and of the State of California, the minimum price provisions of the Dry Cleaners' Act of 1945 (Business and Professions Code Sections 9560 to 9567 and 9591).

(2) In *People v. Building Maintenance Contractors' Assn.*, 41 Cal. 2d 719, 264 P.2d 31 (1953) the court unanimously held unconstitutional for vagueness Section 16723 of the Business and Professions Code. Section 16723 is a part of the Cartwright Act Antitrust Law which prohibits certain trusts defined therein. Section 16723 provides that the prohibition does not apply to a trust "the object and purpose of which are to conduct operations at a reasonable profit or to market at a reasonable profit those products which cannot otherwise be so marketed." The court held that this section is not sufficiently clear to be given effect.

The commission has examined the cases decided by the Supreme Court of the State and the Supreme Court of the United States since its 1955 report was prepared. No decision of either court holding any statute of the State either unconstitutional or repealed by implication has been found.

VIII. RECOMMENDATION

The Law Revision Commission respectfully recommends that the Legislature authorize it to study the topics listed in Appendix A to this report.

Respectfully submitted,

THOMAS E. STANTON, JR., *Chairman*
JOHN D. BABBAGE, *Vice Chairman*
JESS R. DORSEY, *Member of the Senate*
CLARK L. BRADLEY, *Member of the Assembly*
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RALPH N. KLEPS, *Legislative Counsel, ex officio*

JOHN R. McDONOUGH, JR.
Executive Secretary

APPENDIX A

TOPICS INTENDED FOR FUTURE CONSIDERATION

Topic No. 1:

A study to determine whether the Penal Code and the Vehicle Code should be revised to eliminate certain overlapping provisions relating to the unlawful taking of a motor vehicle and the driving of a motor vehicle while intoxicated.

There are provisions in both the Penal Code and the Vehicle Code which deal with the unlawful taking of a motor vehicle and the driving of a motor vehicle while intoxicated. This duplication appears to be unnecessary and, in addition, creates some confusion.¹

Unlawful Taking of a Motor Vehicle. Vehicle Code Section 503 provides that a person who drives or takes a vehicle without the consent of the owner and with intent to either permanently or temporarily deprive the owner of his title to or possession of the vehicle, whether with or without intent to steal the same, is guilty of a felony. Penal Code Section 499(b) provides that a person who takes a vehicle without the consent of the owner for the purpose of temporarily using or operating the same is guilty of a misdemeanor.

Insofar as taking an automobile without the owner's consent with the intent to *permanently* deprive him of his property is concerned, Vehicle Code Section 503 appears to duplicate Penal Code Section 487, which makes such a taking grand theft.² Vehicle Code Section 503 also appears to duplicate Penal Code Section 499(b) with regard to the offense of taking an automobile without the owner's consent with the intent to *temporarily* deprive him of his property. The courts have apparently drawn a theoretical distinction between the latter two sections based on whether the defendant intended to temporarily deprive the owner of title or possession of the vehicle or whether he merely intended to temporarily use or operate it.³ This theoretical dis-

¹The later-enacted provisions of the Vehicle Code did not repeal the Penal Code provisions by implication. Vehicle Code Section 803(c) provides that the code does not repeal any existing statute or part thereof except as expressly provided in Section 802. None of the Penal Code sections discussed herein are listed in Section 802.

²See, generally, *People v. Kehoe*, 33 Cal. 2d 711, 204 P. 2d 321 (1949); *In re Connell*, 68 Cal. App. 2d 360, 156 P. 2d 483 (1945); *People v. Jeffries*, 47 Cal. App. 2d 801, 119 P. 2d 190 (1941).

It has been held, however, that the unauthorized *driving* of an automobile with intent to *permanently* deprive the owner of possession is a separate offense under Vehicle Code Section 503 and is not duplicated by Penal Code Section 487. *People v. Cuevas*, 18 Cal. App. 2d 151, 63 P. 2d 311 (1936).

³See, generally, *People v. Haydon*, 106 Cal. App. 2d 105, 234 P. 2d 720 (1951); *People v. Ragone*, 84 Cal. App. 2d 476, 191 P. 2d 126 (1948); *People v. Gherna*, 80 Cal. App. 2d 519, 182 P. 2d 331 (1947); *People v. Orona*, 72 Cal. App. 2d 478, 164 P. 2d 769 (1946); *People v. Bailey*, 72 Cal. App. 2d Supp. 880 (1946); *People v. Gibson*, 63 Cal. App. 2d 632, 146 P. 2d 971 (1944); *People v. Zervas*, 61 Cal. App. 2d 381, 142 P. 2d 946 (1943); *People v. Neal*, 40 Cal. App. 2d 115, 104 P. 2d 555 (1940).

tion has led to certain problems of pleading⁴ and proof⁵ and seems to be a tenuous basis for distinguishing between a misdemeanor and a felony.

Driving a Motor Vehicle While Intoxicated. Penal Code Section 367d and Vehicle Code Section 502 both make it a misdemeanor to drive any motor vehicle while intoxicated. Penal Code Section 367e and Vehicle Code Section 501 both make it a felony to cause bodily injury while driving under the influence of intoxicating liquor. There appears to be unnecessary duplication among these statutory provisions. Moreover, some problems appear to be created by the fact that the overlapping sections are not identical. With regard to Penal Code Section 367d and Vehicle Code Section 502 two material differences appear. First, Vehicle Code Section 502 relates to driving on a "highway," while Penal Code Section 367d relates to driving in general, thereby presumably relating not only to driving on public highways but also to driving on private grounds.⁶ Second, violation of Section 367d is punishable by fine or imprisonment only,⁷ whereas violation of Section 502 is punishable by fine and imprisonment and, in addition, possible suspension of driver's license. Whether the differences between these two sections cause difficulty does not appear from the reported cases.⁸

There is also a difference between Penal Code Section 367e and Vehicle Code Section 501. Both sections relate to the offense of injuring a person while driving under the influence of alcohol. Section 367e requires that the injury be the consequence of an act or neglect of a legal duty done "by reason of such intoxication"; in other words, there must be some causal connection between intoxication and injury. Section 501, however, requires that the injury be the proximate consequence of an unlawful act or neglect of a legal duty, and does not demand a causal relation between the state of intoxication and the commission of the unlawful act or omission.

The District Court of Appeal said in a recent case:

So closely allied are the offenses defined in * * * [these] sections that it would have been logical for the legislature to make driving while intoxicated a single offense, punishable as a misdemeanor in the circumstances specified in Sections 367e and 502, and as a felony under the conditions stated in Section 501.⁹

⁴ Where there is an attempt to charge an offense under Section 499(b), it is insufficient that the complaint charge an intent to use temporarily in the language of that section. In addition, the pleader must expressly negate any offense under Section 503 by alleging the lack of intent to deprive the owner of possession. *People v. Bailey*, 72 Cal. App. 2d Supp. 880 (1946); Comment, 19 So. CALIF. L. REV. 446 (1946).

⁵ See cases cited in note 3 *supra*.

⁶ *People v. Lewis*, 4 Cal. App. 2d Supp. 775 (1934).

⁷ CAL. PEN. CODE 19.

⁸ Apparently the only reported case to involve a prosecution under Penal Code Section 367d was *People v. Lewis*, see note 6 *supra*. Only one case has been found in which the relationship of Section 367d and Section 502 of the present Vehicle Code is discussed. *People v. Gossman*, 95 Cal. App. 2d 293, 212 P. 2d 585 (1949). In that case defendant was charged with violation of Vehicle Code Section 501, but convicted of violation of Section 502. The court affirmed the conviction on the ground that Section 502 is a lesser offense included in Section 501, and in dicta mentioned the existing duplication between Penal Code Section 367d and Vehicle Code Section 502. Apparently ignoring the language of Vehicle Code Section 803(c), the court stated that Section 367d is limited by Section 502.

⁹ *People v. Gossman*, 95 Cal. App. 2d 293, 296, 212 P. 2d 585, 587 (1949).

Topic No. 2:

A study to determine whether the procedures for appointing guardians for nonresident incompetents and nonresident minors should be clarified.

The provisions of Division 4 of the Probate Code are unclear as to the procedures to be followed in appointing guardians for nonresident incompetents and nonresident minors.

With regard to nonresident incompetents there are two sets of provisions in Division 4 of the Probate Code which may be in conflict as to the procedure to be followed in appointing a guardian. Chapter IV covers the appointment of guardians for incompetents generally; its provisions are not specifically limited to resident incompetents and would appear, therefore, to apply also to nonresidents. In general, they require service at least five days before the date of hearing upon the alleged incompetent and his relatives within the second degree residing in the State.¹⁰ The other provisions are contained in Chapter X, Nonresident Wards, and are clearly applicable only to nonresident incompetents. These provisions require a court order directing notification of interested persons in such manner as the court deems reasonable.¹¹ There is, therefore, at least a surface conflict between these two sets of provisions as to the procedure to be followed by a person seeking to be appointed guardian for a nonresident incompetent.

With regard to nonresident minors, there are also two sets of provisions in Division 4 of the Probate Code.¹² There is no conflict between them as to service of process. There is, however, some ambiguity as to whether a nonresident minor who is 14 years or older can himself petition for a guardian. Under Probate Code Section 1440 it would seem that a nonresident, 14-year-old minor can petition for a guardian¹³; but Section 1570, which deals specifically with nonresident wards, contains no provision for such a petition.

Topic No. 3:

A study of the provisions of the Code of Civil Procedure relating to the confirmation of partition sales and the provisions of the Probate Code relating to the confirmation of sales of real property of estates of deceased persons to determine (1) whether they should be made uniform and (2) if not, whether there is need for clarification as to which of them governs confirmation of private judicial partition sales.

Sections 752 to 801.15 of the Code of Civil Procedure provide for actions for partition of property. Section 784 deals with the confirmation of partition sales. Probate Code Sections 784 and 785 deal with the confirmation of private sales of real property of estates. These sections differ from Code of Civil Procedure Section 784 in three important respects. One difference is in the percentage by which an offer made in court must exceed the amount of the original bid.¹⁴ Another difference is that under the Probate Code the original bid must equal 90 percent of the appraised value of the property,¹⁵ whereas under Code

¹⁰ CAL. PROB. CODE Section 1461.

¹¹ *Id.* Section 1570.

¹² *Id.* Sections 1440-41, 1570.

¹³ *Id.* Section 1440.

¹⁴ CAL. PROB. CODE Section 785.

¹⁵ *Id.* Section 784.

of Civil Procedure Section 784 there is no such requirement. A third difference is that the Probate Code contains detailed provisions regarding real estate brokers' commissions,¹⁶ whereas the Code of Civil Procedure is silent on this matter. It may be that there is little reason for these differences.

If it is found that some or all of these differences should be retained, the question of whether the Code of Civil Procedure or the Probate Code governs confirmation of private partition sales should be clarified. The Code of Civil Procedure provides that private partition sales shall be "conducted" in the manner required for private sales of real property of estates.¹⁷ It is not clear whether this provision makes applicable to such sales the provisions of the Probate Code regarding the confirmation of sales, or whether, on the other hand, a private partition sale should be confirmed in the manner provided by Section 784 of the Code of Civil Procedure. The latter section deals with confirmation of partition sales but is ambiguous as to whether it applies to both public and private partition sales or only to public partition sales. The question is important because, as is shown above, the provisions of the Probate Code and the Code of Civil Procedure relating to confirmation are different; it will remain important if the two sets of provisions are not made uniform.

Topic No. 4:

A study to determine whether the law relating to motions for new trial in cases where notice of entry of judgment has not been given should be revised.

Code of Civil Procedure Section 659 provides that a party intending to move for a new trial must do so within 10 days after receiving written notice of entry of judgment. If notice of entry of judgment is not served by the prevailing party or if the affidavit of service is not filed, the losing party may move for a new trial at any time, however long it may be after judgment.¹⁸ Thus, the judgment in a sense never becomes final. Moreover, if a motion for new trial is made and granted many years after the date of judgment, witnesses may have died, moved, or forgotten in the interim. Although these disadvantages to the prevailing party may result from the carelessness of his attorney in failing to serve or file the notice of entry of judgment, they also ensue in situations where notice has not been served due to the death or disability of counsel. It would appear, therefore, to be desirable to provide a cut-off date for a motion for a new trial where notice of entry of judgment has not been served.

Topic No. 5:

A study to determine whether the provisions of the Civil Code relating to rescission of contracts should be revised to provide a single procedure for rescinding contracts and achieving the return of the consideration given.

Two methods for rescinding contracts are now provided by the California Civil Code. One method, authorized by Sections 1688 to 1691, is unilateral rescission by a party to the contract on various grounds

¹⁶ *Id.* Section 785.

¹⁷ CAL. CODE CIV. PROC. SECTION 775.

¹⁸ *Smith v. Halstead*, 88 Cal. App. 2d 638, 199 P. 2d 379 (1948).

specified in Section 1689. The rescinding party must act promptly upon discovering the facts which entitle him to rescind and must restore or offer to restore everything of value which he has received under the contract.¹⁹ The other method, authorized by Sections 3406 to 3408, provides for a suit for a decree of rescission on any of the grounds upon which a unilateral rescission may be had and on certain other grounds as well. Either procedure may be used in the great majority of cases.

In theory, unilateral rescission does not involve a court proceeding. However, a law suit is often necessary in such a case because the party who has rescinded is unable to persuade the other party to return the consideration given and must resort to the courts to enforce the rescission he has declared. Thus, there are in California two kinds of actions involving rescission: (1) an action to enforce a prior unilateral rescission; and (2) an action for a decree of rescission. The courts have said that the former is an action at law and the latter a suit in equity. Whether the plaintiff is bringing one or the other has been held to determine the jurisdiction of the trial court,²⁰ whether a jury trial may be had,²¹ and whether defendant's property may be attached.²² Other important questions presumably arise from the fact that one is labeled "legal" and the other "equitable"—e.g., what Statute of Limitations applies, whether certain equitable defenses such as laches and clean hands are available, and whether the court can grant equitable relief.²³

While these differences between the actions make it important to distinguish between them, the courts have often failed to do so.²⁴ One factor which tends to blur the distinction between the actions is a line of early cases which held that a condition precedent to bringing an equitable action for a decree of rescission under Section 3406 is that the plaintiff first give notice of rescission and offer to restore the property he has received under the contract²⁵—precisely the procedure which must be followed in effecting a unilateral rescission. The result is

¹⁹ CAL. CIV. CODE Section 1691.

²⁰ *Philpott v. Superior Court*, 1 Cal. 2d 512, 36 P. 2d 635 (1934).

²¹ *Davis v. Security-First National Bank*, 1 Cal. 2d 541, 36 P. 2d 649 (1934).

²² *McCall v. Superior Court*, 1 Cal. 2d 527, 36 P. 2d 642 (1934).

²³ See Comment, *Failure to Distinguish between Actions at Law Based on Prior Rescission and Suits in Equity to Rescind*, 21 CALIF. L. REV. 130 (1933).

²⁴ See, e.g., *Stone v. Superior Court*, 214 Cal. 272, 4 P. 2d 777 (1931) (overruled in *McCall v. Superior Court*, 1 Cal. 2d 527, 36 P. 2d 642 (1934)); Comment, *Failure to Distinguish between Actions at Law Based on Prior Rescission and Suits in Equity to Rescind*, 21 CALIF. L. REV. 130 (1933).

²⁵ See, e.g., *Kelley v. Owens*, 120 Cal. 502, 52 Pac. 797 (1898); *Rosemead Co. v. Shipley Co.*, 207 Cal. 414, 278 Pac. 1033 (1929). Immediately after stating the rule, these cases go on to list certain important exceptions to it. No offer to restore is necessary where: (1) the consideration is of no value to either party; (2) the plaintiff merely received the individual note of the defendant; (3) the contract is absolutely void; (4) the defendant could not have been injured by a failure to offer restoration; (5) without fault of the plaintiff it is impossible to completely restore and a court of equity may adjust the rights of the parties; and (6) an accounting is needed to determine the rights of the parties.

Language in *Seeger v. Odell*, 18 Cal. 2d 409, 417-18, 115 P. 2d 977, 982 (1941), may indicate that an offer to restore is not necessary under Section 3406. However, the court does not discuss the prior rule and the decision may have been predicated on one of the exceptions to the rule. Language of the court in *King v. Mortimer*, 37 Cal. 2d 430, 435, 233 P. 2d 4, 7 (1951), can be construed to mean that an offer of restoration is necessary in actions under Section 3406. However, the opinion in that case does not clearly indicate whether the court conceived the action to be under Section 1691 or under Section 3406 and hence no definite conclusions can be drawn from it.

It has also been stated that an action under Section 3406 to have a rescission declared must be brought within the time that rescission could have been unilaterally accomplished under Section 1691, i.e., promptly upon the discovery of the right of rescission. *Toby v. Oregon Pac. R. R.*, 38 Cal. 490, 33 Pac. 550 (1893). However, this rule appears to be no more than an application of the equitable doctrine of laches.

that the law and the cases are in confusion. It would seem to be desirable to eliminate this confusion by providing a single procedure for rescission of contracts.

Topic No. 6:

A study to determine whether the law respecting mortgages to secure future advances should be revised.

There is considerable uncertainty as to the status in this State of mortgages to secure future advances. There is no statutory authority for real property mortgages covering future advances. Civil Code Sections 2974 and 2975 deal with mortgages of personal property to secure future advances but leave many questions unsettled. For example, while it is clear under Section 2974 that full repayment of a mortgage on livestock, other animate chattels, or crops given to finance production does not terminate the existence of the mortgage and that new advances may be made thereunder, it is not clear whether this is also true as to mortgages covered by Section 2975. Nor is it clear whether mortgages under either or both of these sections must, to be valid, state that they are given to cover future advances or state the maximum amount which they are intended to secure. Finally, the relationship between Sections 2974 and 2975 is ambiguous. Section 2975 appears to authorize future advance mortgages of any kind of personal property for any purpose. Section 2974 authorizes such mortgages on livestock, other animate chattels and crops to finance production and it is not clear whether this means that mortgages on such property given for other purposes are not valid because not mentioned in this section or are valid because they fall within the general language of Section 2975. This problem is especially acute as to mortgages on crops because such mortgages are explicitly mentioned in both sections.

Topic No. 7:

A study to determine whether Probate Code Sections 259, 259.1 and 259.2, pertaining to the rights of nonresident aliens to inherit property in this State, should be revised.

Probate Code Sections 259, 259.1 and 259.2 provide that a nonresident alien cannot inherit real or personal property located in California unless he can prove that the country where he resides gives the same right to citizens of the United States. If he cannot, the property passes to other heirs, if any, or escheats to the State.

These provisions have been a source of much litigation and have often been criticized.²⁶ One ground of criticism is that it is frequently difficult or impossible to prove the law of the foreign country concerned.²⁷ Another is that these sections fail to achieve their original purpose as recited in the statement of urgency accompanying their first enactment in 1941: ²⁸ that of keeping property left to nonresident aliens from being confiscated by totalitarian governments.²⁹ It was appar-

²⁶ See REPORT OF THE ATTORNEY GENERAL OF CALIFORNIA 63 (1950-52); Report of the State Bar Committee on Administration of Justice, 28 CAL. B.J. 256, 263 (1953); Chaitkin, *The Rights of Residents of Russia and Its Satellites to Share in Estates of American Decedents*, 25 SO. CALIF. L. REV. 297, 316 (1952).

²⁷ Chaitkin, *supra* note 26, at 310.

²⁸ *Id.* at 316.

²⁹ Cal. Stat. 1941, c. 895.

ently thought that this would be accomplished because such governments would deny inheritance rights to American citizens. This purpose has been frustrated because totalitarian governments have found it expedient to give inheritance rights to American heirs "since the number of estates with American heirs in these countries is utterly inconsequential in comparison with the number of American estates with heirs in the poverty-ridden countries under dictatorship."³⁰

If the purpose of these sections of the Probate Code is the limited one recited in the 1941 statement of urgency, it could be realized by providing simply, as a substitute for the present provisions, that if it appears that a nonresident alien will not have the benefit of property left to him the property shall be impounded. If, on the other hand, one substantial purpose of these sections is or should be to establish a principle of reciprocity in matters of inheritance without regard to whether the nonresident alien would receive the inheritance, the present provisions should be retained in substance with an additional provision for impounding property in any case in which the nonresident alien will not receive it, including those in which a reciprocal right to inherit is proved.

In a communication to the commission dated December 7, 1954, the Secretary of the State Bar advised that the Board of Governors had voted to request the commission to consider this topic for inclusion in its next calendar of topics intended for future consideration.

Topic No. 8:

A study to determine whether the law relating to escheat of personal property should be revised.

In the recent case of *Estate of Nolan*³¹ the California District Court of Appeal held that two savings bank accounts in California totaling \$16,000, owned by the estate of a decedent who had died without heirs while domiciled in Montana, escheated to Montana rather than California. The Supreme Court denied the Attorney General's petition for hearing.³²

There is little case authority as to which state, as between the domicile of the decedent and any other, is entitled to escheat personal property.³³ In some cases involving bank accounts it has been held that they escheat to the domiciliary state;³⁴ in others, that they escheat to the state in which the bank is located.³⁵ The Restatement of Conflict of Laws takes the position that personal property should escheat to the state in which the particular property is administered.³⁶

In two recent cases California's claim as the domicile of the decedent to escheat personal property has been rejected by sister states where the property was being administered, both states applying rules favor-

³⁰ Chaitkin, *supra* note 26, at 317.

³¹ 135 A.C.A. 49 (August 15, 1955).

³² 45 A.C. No. 13, p. 1 (Oct. 10, 1955).

³³ It seems to be well settled that real property escheats to the state of its situs. RESTATEMENT, CONFLICT OF LAWS Section 254 (1934); 2 EBALE, CONFLICT OF LAWS Section 254.1 (1935); 19 AM. JUR., *Escheat* Section 3 (1939).

³⁴ In re Lyons' Estate, 175 Wash. 115, 26 P. 2d 615 (1933); *cf.* In re Hull Copper Co., 46 Ariz. 270, 50 P. 2d 560 (1935) (this case involved escheat of unclaimed shares of a corporation).

³⁵ In re Rapoport's Estate, 317 Mich. 291, 26 N.W. 2d 777 (1947); In re Menschenfreund's Estate, 283 App. Div. 463, 128 N. Y. S. 2d 738 (1954).

³⁶ RESTATEMENT, CONFLICT OF LAWS Section 309 (1934).

able to themselves.³⁷ The combination of these decisions with that of the California court in *Estate of Nolan* suggests that California will lose out all around as the law now stands.

Topic No. 9:

A study to determine whether the law relating to the rights of a putative spouse should be revised.

The concept of "putative spouse" has been developed by the courts of this State to give certain property rights to a man or a woman who has lived with another as man and wife in the good faith belief that they were married when in fact they were not legally married or their marriage was voidable and has been annulled. The essential requirement of the status of putative spouse is a good faith belief that a valid marriage exists.³⁸ The typical situation in which putative status is recognized is one where a marriage was properly solemnized but one or both of the parties were not free to marry, as when a prior marriage had not been dissolved or a legal impediment making the marriage void or voidable existed.³⁹

The question of the property rights of the parties to an invalid marriage generally arises when one of the parties dies or when the parties separate. It is now well settled that upon death or separation a putative spouse has the same rights as a legal spouse in property which would have been community property had the couple been legally married.⁴⁰ This rule has been developed by the courts without the aid of legislation. The underlying reason for the rule apparently is the desire to secure for a person meeting the good faith requirement the benefits which he or she believed would flow from the attempted marriage.⁴¹

The courts have held that a putative spouse is not entitled to an award of alimony.⁴² They have also held, however, that a putative wife has a quasi-contractual right to recover from the putative husband (or his estate), the value of the services rendered to him during marriage less the value of support received from him. While in all of the cases in which this right has been recognized there was no quasi community

³⁷ See cases cited in note 35, *supra*.

³⁸ *Vallera v. Vallera*, 21 Cal. 2d 681, 134 P. 2d 761 (1943). The existence of a good faith belief is a question of fact in each case and the education and intelligence of the party claiming putative status can be considered. *Flanagan v. Capital Nat. Bank*, 213 Cal. 664, 3 P. 2d 307 (1931); *Santos v. Santos*, 32 Cal. App. 2d 62, 89 P. 2d 164 (1939).

³⁹ However, the decisive question in all situations is whether the party claiming putative status had a good faith belief that the couple was validly married, and it is therefore possible for a person to be a putative spouse even though there was no attempt to solemnize a marriage. See *Sancha v. Arnold*, 114 Cal. App. 2d 772, 251 P. 2d 67 (1952); *Santos v. Santos*, 32 Cal. App. 2d 62, 89 P. 2d 164 (1939); *Macchi v. La Rocca*, 54 Cal. App. 98, 201 Pac. 143 (1921).

⁴⁰ *Feig v. Bank of America*, 5 Cal. 2d 266, 54 P. 2d 3 (1936); *Schneider v. Schneider*, 183 Cal. 335, 191 Pac. 533 (1920); *Coats v. Coats*, 160 Cal. 671, 118 Pac. 441 (1911); *Patrick v. Patrick*, 112 Cal. App. 2d 107, 245 P. 2d 704 (1952); *Estate of Krone*, 83 Cal. App. 2d 766, 189 P. 2d 741 (1948).

⁴¹ See *Schneider v. Schneider*, 183 Cal. 335, 339, 191 Pac. 533, 535 (1920); Note, 37 CALIF. L. REV. 671 (1949). The application of this rule has operated to give a surviving putative husband, against the express directions of the deceased wife's will, the whole of the quasi community property acquired before 1923. *Feig v. Bank of America*, 5 Cal. 2d 266, 54 P. 2d 3 (1936). It has also operated to allow a putative wife to take all of the quasi community property under Probate Code Section 201 when the de facto husband died intestate, *Estate of Krone*, 83 Cal. App. 2d 766, 189 P. 2d 741 (1948); and to allow an innocent putative wife to take more than half the quasi community property under Civil Code Section 146 when she showed in an action for annulment that the husband was guilty of extreme cruelty. *Turknette v. Turknette*, 100 Cal. App. 2d 271, 223 P. 2d 495 (1950).

⁴² See *Sanguinetti v. Sanguinetti*, 9 Cal. 2d 95, 98, 69 P. 2d 845, 847 (1937).

property, it is not clear whether the existence of such property would preclude recovery in quasi contract. The earlier cases recognizing the quasi-contractual right all involved situations where one spouse had fraudulently misrepresented to the other that they were free to marry;⁴³ the theory on which recovery was allowed was that the defendant had been unjustly enriched by services rendered in reliance upon his misrepresentation.⁴⁴ But this rationale has apparently been abandoned in two recent cases. In one, the defendant's misrepresentation was innocent but recovery was nonetheless allowed.⁴⁵ In the other, there was no misrepresentation but the court permitted recovery on the ground that the defendant had been guilty of misconduct which would have constituted grounds for divorce had the parties been married.⁴⁶

The commission believes that several questions relating to the position of the putative spouse warrant study:

1. Is the theory of recovery in quasi contract either theoretically proper or practically adequate for the solution of the problem presented? The theory seems to have been abandoned recently by the courts, at least in part. Moreover, it will not justify recovery by one who has not been able, because of illness or other incapacity, to perform services which exceed in value the support received; yet, in most circumstances, such a claimant has the greater practical need for a recovery.

2. Should the existence of conduct which would be grounds for divorce justify recovery without regard to misrepresentations? If so, should it not be recognized that what is really involved is quasi alimony rather than recovery on the ground of unjust enrichment?

3. Should a putative spouse be able to recover both quasi community property and quasi alimony?

4. Where one of the spouses has died should the other spouse be given substantially the same rights which he or she would have had if the parties had been validly married?

Topic No. 10:

A study to determine whether the rule, applied in cases involving the value of real property, that evidence relating to sales of nearby properties is not admissible on the issue of value should be revised.*

In a condemnation proceeding the courts of this State will not admit evidence of sales of nearby properties to prove the value of the property condemned.⁴⁷ This rule may be applicable as well in other cases involving the value of real property.⁴⁸

It has long been the rule, on the other hand, that sales of adjacent property may be inquired into on cross-examination of expert witnesses for the purpose of testing their honesty and competence.⁴⁹ While the

* Same as Future Study Topic J, REPORT OF CALIFORNIA LAW REVISION COMMISSION 39 (1955).

⁴³ *Marsh v. Marsh*, 79 Cal. App. 560, 250 Pac. 411 (1926); *Mixer v. Mixer*, 2 Cal. App. 227, 83 Pac. 273 (1905).

⁴⁴ See *Sanguinetti v. Sanguinetti*, 9 Cal. 2d 95, 100, 69 P. 2d 845, 848 (1937).

⁴⁵ *Lazzarevich v. Lazzarevich*, 88 Cal. App. 2d 708, 200 P. 2d 49 (1948).

⁴⁶ *Sanguinetti v. Sanguinetti*, 9 Cal. 2d 95, 69 P. 2d 845 (1937).

⁴⁷ *Los Angeles v. Cole*, 28 Cal. 2d 509, 170 P. 2d 928 (1946).

⁴⁸ *Estate of Ross*, 171 Cal. 64, 151 Pac. 1138 (1915) (inheritance tax proceeding); see discussion in *Bagdasarian v. Gragnon*, 31 Cal. 2d 744, 756-57, 192 P. 2d 935, 942-43 (1948).

⁴⁹ See note 47 *supra*; *People v. La Macchia*, 41 Cal. 2d 738, 264 P. 2d 15 (1953).

jury is instructed in such cases to disregard the testimony except on the issue of the trustworthiness of the expert witness, jurors may often be confused and consider it also on the issue of the value of the property.⁵⁰

In recent dissenting opinions, some members of the Supreme Court have vigorously criticised the rule excluding evidence of the sale of adjacent properties and have urged that it be abandoned.⁵¹ Professor Wigmore reported that such evidence is admitted in most jurisdictions and concluded that the matter should be left to the discretion of the trial court.⁵²

Topic No. 11:

A study to determine whether the law respecting post-conviction sanity hearings should be revised.*

Section 1367 of the Penal Code provides that a person cannot be punished for a public offense while he is insane. The Penal Code contains two sets of provisions apparently designed to implement this general rule. One set pertains to persons sentenced to death⁵³ and the other set to persons sentenced to imprisonment.⁵⁴

Persons Sentenced to Death. Sections 3700 to 3704 of the Penal Code provide for a hearing to determine whether a person sentenced to death is insane and thus immune from execution. The hearing procedure is initiated by the warden's certification that there is good reason to believe that the prisoner has become insane.⁵⁵ The question of the prisoner's sanity is then tried to a jury.⁵⁶ If he is found to be insane he must be taken to a state hospital until his reason is restored.⁵⁷ If the superintendent of the hospital later certifies that the prisoner has recovered his sanity, this question is determined by a judge sitting without a jury.⁵⁸ If the prisoner is found to be sane he is returned to the prison and may subsequently be executed.

The commission believes that a number of important questions exist concerning the procedure provided for in Penal Code Sections 3700 to 3704. For example, why should the issue of the prisoner's sanity be determined by a jury in the initial hearing⁵⁹ but not in a later hearing to determine whether his reason has been restored?⁶⁰ Why should the statute explicitly state that the prisoner is entitled to counsel on a hearing to determine whether he has been restored to sanity⁶¹ and make no provision on this matter in the case of the initial hearing? Does this mean that the prisoner is not entitled to counsel at the initial hearing under the rule *expressio unius est exclusio alterius*? If so, is this desirable? Who has the burden of proof as to the issue of the prisoner's sanity and does this differ as between the initial and later

* See Future Study Topic A, REPORT OF CALIFORNIA LAW REVISION COMMISSION 33 (1955).

⁵⁰ Traynor, J., concurring and dissenting in *People v. La Macchia*, 41 Cal. 2d 738, 755, 264 P. 2d 15, 26 (1953).

⁵¹ *Ibid.*; *Los Angeles v. Cole*, 28 Cal. 2d 509, 519, 170 P. 2d 928, 934 (1946).

⁵² 2 WIGMORE, EVIDENCE Section 463 (3d ed. 1940).

⁵³ CAL. PEN. CODE Sections 3700-3704.

⁵⁴ *Id.* Sections 2684-85.

⁵⁵ *Id.* Section 3701.

⁵⁶ *Ibid.*

⁵⁷ *Id.* Section 3702.

⁵⁸ *Id.* Section 3704.

⁵⁹ *Id.* Section 3701.

⁶⁰ *Id.* Section 3704.

⁶¹ *Ibid.*

hearings? What standard of sanity is to be applied? Shall the court call expert witnesses? May the parties do so? Does the prisoner have the right to introduce evidence and cross-examine witnesses? In *People v. Riley*,⁶² the court held that (1) a prisoner found to be insane has no right of appeal and (2) a unanimous verdict is not necessary because the hearing is not a criminal proceeding. Are these rules desirable?

Persons Sentenced to Imprisonment. Penal Code Section 2684 provides that any person confined to a state prison who is mentally ill, mentally deficient, or insane may be transferred to a state hospital upon the certification of the Director of Corrections that in his opinion the rehabilitation of the prisoner would be expedited by treatment in the hospital and upon the authorization of the Director of Mental Hygiene.⁶³ The code contains no provision for a hearing of any kind and the decision of the Director of Corrections and the Director of Mental Hygiene is final. If the superintendent of the state hospital later notifies the Director of Corrections that the prisoner "will not benefit by further care and treatment in the state hospital," the Director of Corrections must send for the prisoner and return him to the state prison.⁶⁴ The prisoner has no right to a hearing before he is returned to prison. Section 2685 of the Penal Code provides that the time spent at the state hospital shall count as time served under the prisoner's sentence.

Sections 2684 and 2685 appear to present a number of important questions. Does the standard provided for removal of a prisoner to the state hospital or for returning him to the state prison—whether his rehabilitation would be expedited by treatment at the hospital and whether he would not benefit by further treatment there—conflict with the general mandate of Section 1367 that a person may not be punished while he is insane? If so, should a different standard and a different procedure be established to avoid the punishment of insane prisoners? Should the time spent in the state hospital by a prisoner adjudged insane for purposes of punishment be counted as part of time served under his sentence?

Topic No. 12:

A study to determine whether the law respecting jurisdiction of courts in proceedings affecting the custody of children should be revised.

There are in this State various kinds of statutory proceedings relating to the custody of children. Civil Code Section 138 provides that in actions for divorce or separate maintenance the court may make an order for the custody of minor children during the proceeding or at any time thereafter and may at any time modify or vacate the order. Civil Code Section 199 provides that, without application for divorce, a husband or wife may bring an action for the exclusive control of the children; and Civil Code Section 214 provides that when a husband and wife live in a state of separation, without being divorced, either of them may apply to any court of competent jurisdiction for

⁶² 37 Cal. 2d 510, 235 P. 2d 381 (1951).

⁶³ There is no equivalent provision for persons sentenced to the county jail as punishment for a public offense.

⁶⁴ CAL. PEN. CODE Section 2685.

custody of the children. Furthermore, anyone may bring an action under Probate Code Section 1440 to be appointed guardian of a child.⁶⁵

These various provisions relating to the custody of children present a number of problems relating to the jurisdiction of courts; for example: (1) Do they grant the courts jurisdiction to afford an adequate remedy in all possible situations? (2) When a proceeding has been brought under one of the several statutes does the court thereafter have exclusive jurisdiction of all litigation relating to the custody of the child? (3) Do the several statutes conflict or are they inconsistent as to whether the court awarding custody under them has continuing jurisdiction to modify its award?

(1) There appear to be at least two situations in which the only remedy of a parent seeking custody of a child is through a guardianship proceeding under Probate Code Section 1440. One is when a party to a marriage obtains an *ex parte* divorce in California against the other party who has custody over the children and resides with them in another state. If the second party later brings the children to California and becomes a resident of a county other than the county in which the divorce was obtained, the only procedure by which the first party can raise the question of custody would seem to be a guardianship proceeding under Probate Code Section 1440 in the county where the children reside. Although the divorce action remains pending as a custody proceeding under Civil Code Section 138, the court cannot enter a custody order because the children are residents of another county.⁶⁶ A custody proceeding cannot be brought under either Section 199 or Section 214 of the Civil Code because the parents are no longer husband and wife. Another situation in which a guardianship proceeding may be the only available remedy is when a foreign divorce decree is silent as to who shall have custody of the children. If the parties later come within the jurisdiction of the California courts, it is not clear whether the courts can modify the foreign decree to provide for custody and, if so, in what type of proceeding this can be done. It would appear desirable that some type of custody proceeding other than guardianship be authorized by statute for these and any other situations in which a guardianship proceeding is now the only available remedy to a parent seeking custody of his child.

(2) The various kinds of statutory proceedings relating to custody also create the problem whether, after one of these proceedings has been brought in one court, another proceeding under the same statute or under a different statute may be brought in a different court or whether the first court's jurisdiction is exclusive. This question can be presented in various ways, such as the following: (a) If a divorce court has entered a custody order pursuant to Civil Code Section 138, may a court in another county modify that order or entertain a guardianship proceeding under Probate Code Section 1440 or—assuming the divorce was denied but jurisdiction of the action retained—entertain a custody proceeding under Civil Code Sections 199 or 214? (b) If a court has awarded custody under Civil Code Sections 199 or 214 while the parties are still married, may another court later reconsider the question in a

⁶⁵ In addition, the Juvenile Court Law provides a procedure for declaring a minor a ward of the court. CAL. WEL. & INST. CODE Sections 550-911.

⁶⁶ *Titcomb v. Superior Court*, 220 Cal. 34, 29 P. 2d 206 (1934).

divorce proceeding under Civil Code Section 138 or a guardianship proceeding under Probate Code Section 1440? (c) If a guardian has been appointed under Probate Code Section 1440, may a divorce court or a court acting pursuant to Civil Code Sections 199 or 214 later award custody to the parent who is not the guardian?

A few of these matters were clarified by the decision of the California Supreme Court in *Greene v. Superior Court*,⁶⁷ holding that a divorce court which had awarded custody pursuant to Civil Code Section 138 has continuing jurisdiction and a court in another county has no jurisdiction to appoint a guardian of the children under Probate Code Section 1440. The Supreme Court stated that the general objective should be to avoid "unseemly conflict between courts"⁶⁸ and indicated that a proper procedure would be to apply to the divorce court for a change of venue to the county where the children reside.⁶⁹

It is not clear whether the exclusive jurisdiction principle of the *Greene* case either will or should be applied in all of the situations in which the question may arise. An exception should perhaps be provided at least in the case where a divorce action is brought after a custody or guardianship award has been made pursuant to Civil Code Sections 199 or 214 or Probate Code Section 1440, on the ground that it may be desirable to allow the divorce court to consider and decide all matters of domestic relations incidental to the divorce.⁷⁰

(3) There appear to be at least two additional problems of jurisdiction arising under the statutory provisions relating to custody of children. One is whether a court awarding custody under Civil Code Section 214 has continuing jurisdiction to modify its order. Although both Sections 138 and 199 provide that the court may later modify or amend a custody order made thereunder, Section 214 contains no such provisions. Another problem is the apparent conflict between Section 199 and Section 214 in cases where the parents are separated. Section 199 presumably can be used to obtain custody by any married person, whether separated or not, while Section 214 is limited to those persons living "in a state of separation." The two sections differ with respect to the power of the court to modify its order and also with respect to whether someone other than a parent may be awarded custody.

Topic No. 13:

A study to determine whether the doctrine of worthier title should be abolished in California.

The doctrine of worthier title applies to a situation in which a person conveys a freehold interest in property to a grantee and attempts to create a remainder in his own (the grantor's) heirs.⁷¹ At common

⁶⁷ 37 Cal. 2d 307, 231 P. 2d 821 (1951).

⁶⁸ *Id.* at 311, 231 P. 2d at 823.

⁶⁹ *Id.* at 312, 231 P. 2d at 823.

⁷⁰ Another exception might be desirable in a proceeding under the Juvenile Court Law to declare a minor a ward of the court. See *Smith v. Smith*, 31 Cal. App. 2d 272, 276, 87 P. 2d 863, 865 (1939).

⁷¹ The doctrine of worthier title should be distinguished from the Rule in Shelley's Case, which applies only to a situation in which the grantor conveys a freehold interest in property to a grantee and attempts to create a remainder in the heirs of the grantee. Under the Rule in Shelley's Case, the remainder in the heirs of the grantee is void and the grantee takes the remainder. SIMES, FUTURE INTERESTS 76 (Hornbook Series 1951). This rule has been abolished in California. CAL. CIV. CODE Section 779.

law, under the doctrine, it was held that in such a case the remainder was void and the grantor had a reversion.⁷² The reason for the doctrine apparently was to secure for feudal overlords certain benefits obtainable when property passed by succession but not when the property was vested by virtue of the remainder.⁷³

Originally the doctrine of worthier title was one of positive law. However, most American jurisdictions have followed the lead of Judge Cardozo in *Doctor v. Hughes*,⁷⁴ holding that the rule is one of construction rather than positive law. Thus, if an express intention to create a remainder in the heirs of the grantor can be shown, the remainder will not be construed as a reversion in the grantor. In the absence of such a showing of intention, the doctrine of worthier title creates a presumption that a remainder to the heirs of the grantor was intended to be a reversion in the grantor.⁷⁵ Most American jurisdictions today do not apply the rule to testamentary transfers.⁷⁶ However, it does apply to inter vivos transfers of both real and personal property.⁷⁷

The rule was first held to be applicable in California in *Bixby v. California Trust Co.*,⁷⁸ decided in 1949, which involved a suit by the settlor of a trust to revoke it. The settlor had conveyed "irrevocably" to the trustee with instructions to pay the income to the settlor for life and distribute the property to his heirs at law in accordance with the laws of succession of California as they should exist at the time of his death. The court held that in the absence of express language to the contrary, the settlor was presumed to have intended a reversion in himself rather than a remainder in his heirs.

The modern justification for the doctrine of worthier title usually stated by the courts and writers is that it effectuates the intention of the grantor—that when a grantor says that the remainder is to be in his heirs, he generally believes and intends that he will still have control over the descent of the property.⁷⁹ Such a premise seems questionable, particularly when the instrument was drawn by a lawyer as it was, for example, in the *Bixby* case. It would seem that the doctrine operates to defeat the intention of the grantor, rather than to effectuate it. Moreover, the *Bixby* case is unclear as to what is sufficient to repel the presumption and there have been no cases since to clarify the matter.

The doctrine of worthier title therefore creates a trap if the draftsman does not know of the *Bixby* case or if he unsuccessfully attempts to rebut the presumption. If an intended remainder is changed into a reversion by the doctrine, several unexpected and undesirable con-

⁷² See SIMES, *op. cit. supra* note 71, at 83. The common law cases rationalize this result by saying that (1) the heir is a part of the ancestor and the ancestor could not convey to himself, (2) a title taken by descent from the grantor is "worthier" than one taken by "purchase" (remainder over), and (3) the heir must, therefore, take by the "worthier" means of acquiring title. *Ibid.*

⁷³ *Ibid.*

⁷⁴ 225 N. Y. 305, 122 N.E. 221 (1919).

⁷⁵ The Restatement has adopted this view. 3 RESTATEMENT, PROPERTY Section 314(1) (1940).

⁷⁶ SIMES, *op. cit. supra* note 71, at 84; 3 RESTATEMENT, PROPERTY Section 314(2) (1940).

⁷⁷ *Ibid.*

⁷⁸ 33 Cal. 2d 495, 202 P. 2d 1018, Comment, 1 STAN. L. REV. 774 (1949).

⁷⁹ See *Doctor v. Hughes*, 225 N.Y. 305, 313, 122 N.E. 221, 222-23 (1919); 3 RESTATEMENT, PROPERTY Section 314, comment 1(a) (1940); SIMES, *op. cit. supra* note 71, at 88.

sequences may result.⁸⁰ During the life of the grantor the reversion is subject to claims of his creditors although he may have thought that he had divested himself of all interest in the property. If the transfer was in trust and the grantor also created a life estate in himself, the trust is revocable (regardless of language in the instrument to the contrary); thus, the trustee is reduced to little more than an agent of the grantor, and the expense and inconvenience of establishing a trust are completely wasted. Upon the death of the grantor who leaves a will the property may pass under the residuary clause of the will to takers who were not the persons intended by the grantor to have the property. The doctrine of worthier title will also, in many cases, have an important and unanticipated effect on the amount of the federal estate tax payable by the settlor's estate.

Topic No. 14:

A study to determine whether the Arbitration Statute should be revised.*

The present Arbitration Statute⁸¹ was enacted in 1927 and has not been amended in substance since. It was originally thought to apply only to commercial arbitrations⁸² but it has been held also to apply to those arising out of collective bargaining agreements.⁸³

A study of the statute with a view to recommending needed revisions would appear to be desirable. Such a study ought to encompass, among other matters, the following questions:

(1) Whether the statute should be made applicable to an agreement for an informal appraisal or evaluation as distinguished from the determination of a "controversy." The statute does not now apply to such agreements.⁸⁴

(2) Whether an arbitrator should be empowered to enter a default decision upon the failure of a party to an arbitration agreement to appear and participate after notice to do so.

(3) Whether the power of an arbitrator to issue a subpoena duces tecum and the scope thereof should be clarified.

(4) Whether statutory rules respecting enforcement and judicial review of arbitration awards should be revised.

Topic No. 15:

A study to determine whether the law in respect of survivability of tort actions should be revised.†

Insofar as the common law was concerned a cause of action arising out of a tort abated upon the death of either the person wronged or the wrongdoer.⁸⁵ This rule has been modified by statute, to varying degrees, in most American jurisdictions.⁸⁶

* See Future Study Topic K, REPORT OF CALIFORNIA LAW REVISION COMMISSION 40 (1955).

† Same as Future Study Topic B, REPORT OF CALIFORNIA LAW REVISION COMMISSION 33 (1955).

⁸⁰ See, generally, Turrentine, *Future Interests* in SURVEY OF CALIFORNIA LAW 199 (1949); Nossaman, *Gifts to Heirs—Remainder or Reversion*, 24 CAL. B. J. 59 (1949); Comment, 1 STAN. L. REV. 774 (1949); Comment, 46 MICH. L. REV. 991 (1948).

⁸¹ CAL. CODE CIV. PROC. Sections 1280-1293.

⁸² Kagel, *Labor and Commercial Arbitration under the California Arbitration Statute*, 38 CALIF. L. REV. 799 (1950).

⁸³ *Levy v. Superior Court*, 15 Cal. 2d 692, 104 P. 2d 770 (1940).

⁸⁴ *Bewick v. Mecham*, 26 Cal. 2d 92, 156 P. 2d 757 (1945).

⁸⁵ HARPER, LAW OF TORTS Section 301 (1933).

⁸⁶ PROSSER, TORTS Section 103 (1941); see also, HARPER, LAW OF TORTS Section 301 (1933).

Survival of tort actions in this State is governed in part by Probate Code Section 574 which provides (1) that a cause of action shall survive the death of the *person wronged* in any case where, during his lifetime, he has been injured by "any person who has wasted, destroyed, taken, or carried away, or converted to his own use, the property * * * or committed any trespass on the real property of the decedent * * * " and (2) that a cause of action shall survive the death of the *wrongdoer* in any case where he has, during his lifetime "wasted, destroyed, taken, or carried away, or converted to his own use * * * property * * * or committed any trespass on * * * real property * * * " .

Prior to 1949, Probate Code Section 574 alone governed survival of tort actions. It is, of course, limited to cases involving wrongs to property interests. The decisions under Section 574 gave it a rather broad construction. For example, in *Hunt v. Authier*,⁸⁷ the Supreme Court held that the wife and children of a murdered man had suffered a property loss by reason of the deprivation of the decedent's future earnings and that their cause of action therefore survived the death of the wrongdoer. In *Moffat v. Smith*,⁸⁸ the Supreme Court held that a cause of action on behalf of one who had been permanently injured in an automobile accident survived the death of the wrongdoer because the diminution of the plaintiff's earning capacity was an injury to property.

In 1949 the Legislature made two changes in the law respecting survival of tort actions. Section 574 of the Probate Code was amended to provide that it should not apply "to an action founded upon a wrong resulting in physical injury or death of any person." Concurrently, the Legislature enacted Section 956 of the Civil Code which provides that (1) a cause of action arising out of physical injury shall survive the death of both the person injured and the wrongdoer and (2) when the person injured dies before judgment the damages in such an action shall be limited to the loss of earnings and expenses to the decedent prior to his death and shall not include damages for pain, suffering, or disfigurement, nor punitive or exemplary damages, nor prospective profits or earnings after death.

This 1949 legislation might have been taken as a legislative expression of disapproval of the judicial definition of property and injury thereto in such cases as *Hunt v. Authier*⁸⁹ and *Moffat v. Smith*.⁹⁰ Nevertheless, in *Vallindras v. Massachusetts Bonding and Ins. Co.*,⁹¹ decided in 1953, the District Court of Appeal held that a cause of action for false imprisonment survived the death of the wrongdoer under Probate Code Section 574 because the plaintiff's counsel fees, wages lost while in jail, and reduced earning power after his release were injuries to property.⁹²

⁸⁷ 28 Cal. 2d 288, 169 P. 2d 913 (1946).

⁸⁸ 33 Cal. 2d 905, 206 P. 2d 353 (1949).

⁸⁹ See note 87 *supra*.

⁹⁰ See note 88 *supra*.

⁹¹ 255 P. 2d 457 (1953).

⁹² The decision was reversed on other grounds by the Supreme Court; the question of survivability of the cause of action was expressly left open. *Vallindras v. Massachusetts Bonding and Ins. Co.*, 42 Cal. 2d 149, 265 P. 2d 907 (1954). The case also involved a claim for damages for physical injuries which survived under Civil Code Section 956, but the "property injury" damages were attributable to the false imprisonment action rather than the action for physical injuries.

A number of questions may be raised concerning survival of tort actions in this State:

(1) Should all tort actions be made to survive the death of both the person wronged and the wrongdoer? If not, should specific additional actions be included among those which survive?

(2) Is the limitation of damages in Civil Code Section 956 in the case of the death of the person wronged before judgment justifiable? If so, should it be extended to all causes of action in which similar damages might arise—*e.g.*, false imprisonment, invasion of the right of privacy, etc.—assuming that such causes of action survive, either because of the enactment of legislation to that effect (see question No. 1) or under decisions similar to that of the district court of appeal in the *Vallindras* case?

(3) Should Probate Code Section 574 be amended to express a more limited concept of property and injuries thereto than it has been given in such decisions as *Hunt v. Authier*,⁹³ *Moffat v. Smith*⁹⁴ and *Vallindras v. Massachusetts Bonding and Ins. Co.*?⁹⁵

⁹³ See note 87 *supra*.

⁹⁴ See note 88 *supra*.

⁹⁵ See notes 91-92 *supra*.

APPENDIX B

**A COMPARATIVE SURVEY OF THE CALIFORNIA
INHERITANCE AND GIFT TAX LAWS AND THE
FEDERAL ESTATE AND GIFT TAX LAWS ***

* This study was made at the direction of the Law Revision Commission by Mr. James B. Frankel of the San Francisco Bar, research consultant.

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INTRODUCTION

Resolution Chapter 205, adopted by the 1955 Session of the California Legislature, directed and authorized the California Law Revision Commission "to study and analyze the provisions of the California inheritance and gift tax laws and the federal estate and gift tax laws, and on the basis thereof to determine what might be done in order to bring the California laws into closer accord with the federal." It is the purpose of this study to discuss some of the problems involved in moving toward such conformity and to highlight the major differences between the California and federal laws. Since the inheritance tax is of much greater fiscal significance than the gift tax and affects a much larger segment of the population, the bulk of this study will relate to that tax. However, much of what will be said about the inheritance tax, especially as to matters of policy, applies also to the gift tax.

At the outset it should be clearly understood that the California and federal statutes are based on entirely different principles. While the state inheritance and gift tax laws base the tax on what each beneficiary receives, comparable federal taxes are assessed on the basis of what each donor or decedent passes on. Thus the federal death tax is donor-oriented, while the California tax is beneficiary-oriented. The United States imposes a graduated "estate" tax on the total value of the estate left by a decedent. California imposes an "inheritance" tax on each transfer to a person who acquires some part of an estate. The federal tax is on the estate as a unit, based solely on its total value. The state tax is imposed on a series of separate transfers. It is based on both the value of the property transferred and the relationship of each recipient to the decedent.

THE POLICY OF A DEATH TAX

Death taxes may be approached from two different policy points of view. They may be regarded as revenue-raising devices and fashioned so as best to fill the public coffers. Or they may be looked at largely as instruments of social policy whose purpose is to effect some leveling of the wealth. In practice, of course, both elements are present in every tax.

Any evaluation of the relative revenue-producing capacity of estate and inheritance taxes is well beyond the scope of this study. It is difficult even to envision an accurate estimate without an elaborate statistical study. And since the money raised is so largely a function of the rates, not the kind of tax, such an analysis would have little meaning. Moreover death and gift taxes together produce only a very small proportion of federal and state revenue, somewhere in the neighborhood of 2 percent.¹ Therefore the relative fiscal effect of the taxes cannot be of very great importance.

On the other hand, the social policy of the two taxes is fairly susceptible of analysis and is probably a more real consideration in any choice

¹ BITTKER, ESTATE AND GIFT TAXATION 1-2 (P-H 1951).

between them. Both taxes embody the policy of cutting down the transmission of large agglomerations of wealth. Indeed, any realistic appraisal of death taxes must almost certainly result in the conclusion that this is their primary function. Whether an estate or inheritance tax better accomplishes this purpose is open to some dispute.

The problem of the relative advantages of estate and inheritance taxes is not a new one. Even in ancient Egypt death taxes were imposed. And as early as 1826 Pennsylvania passed a form of inheritance tax. With the adoption of the first real federal estate tax in 1916, the controversy about the relative merits of estate and inheritance taxes began to increase. In 1925 the National Inheritance Tax Conference advocated a general substitution of the estate tax for the inheritance tax; and since that time a number of states have switched. But the bulk of the states still impose an inheritance tax.

One feature of a graduated inheritance tax is that, at least theoretically, it encourages the dispersion of an estate among a number of beneficiaries. Transfers to several persons can each get the benefit of lower rates in lower brackets. An estate tax's graduated rates vary only with the size of the entire estate.

Moreover, since inheritance tax rates usually are graduated according to the relation of the beneficiary to the decedent, this type of tax could easily be employed to penalize close family control of wealth. The estate tax, which takes no account of the relationship of the beneficiary, could not perform this function. But as a matter of fact, the inheritance tax law, in California as elsewhere, imposes the comparatively *low* tax rates on transfers to close relatives. It seems to operate on the assumption that a direct descendant or spouse has a claim of right to a decedent's wealth, while collateral relatives and "strangers" receive a windfall when they get anything. This ethical notion evidently overbalances the policy of breaking up family accumulations.

Another feature of an inheritance tax is that it automatically imposes the tax on the beneficiaries of an estate in proportion to the share of the estate which each receives. An estate tax is theoretically payable out of the residue, and so may often be imposed on those persons the testator would least have wanted to bear it. However, any well-advised testator will take this into account in making his specific bequests. Most draftsmen of wills are aware of the usefulness of a provision prescribing proration of taxes. And many states, including California, have statutes requiring such proration in the absence of a specific will instruction to the contrary.

In contrast to an inheritance tax, which embodies the limited advantages just outlined, the overwhelming merit of an estate tax is its simplicity and ease of administration. This advantage is apparent in almost every difference between the two types of taxes.

Perhaps it is apposite here to point out that any death tax is only one of several possible ways of taxing the transmission of wealth. It is certainly the only method that has so far received widespread adoption. And, backed by a gift tax which catches any lifetime gifts made in lieu of transfers at death, a death tax is a fairly effective method. However, a number of other solutions have been proposed in recent years. Several writers have suggested that gift and death tax levies be

combined into an "integrated transfer tax."² This would impose a uniform system of taxes on any gratuitous transfers and would do away completely with any differences in treatment which depend on whether the transfer was made during life or at death. A similar proposal would impose a beneficiary-oriented "accessions tax," to be paid by each recipient of property.³ The tax would be cumulative throughout a beneficiary's life and would tax in graduated brackets any gratuitous receipts, whether by gift or inheritance, and regardless of the transferor. Such a tax would effect more efficiently the social policies of death and gift taxes. Thus it would impose a greater tax when wealth was transmitted intact than when it was split up. And the tax would be greater upon a transferee who already had received property from other transferors. A number of other types of tax have also been suggested.⁴ Most of these would seem to be too complex to be practicable.

Before deciding to conform the California transfer tax system to the federal in all details, a decision must be made as to just what basic type of tax California will have. It seems questionable to attempt to conform the California inheritance tax to the federal estate tax in a number of minor ways, when the underlying natures of the two taxes are so different. And if consideration is to be given to changing the basic principle of the California death tax, perhaps attention should also be given to some of the more recent transfer tax ideas that have been propounded by modern tax economists.

With these reservations in mind,⁵ we can proceed to outline many of the differences between the California inheritance tax and the federal estate tax and between the California and federal gift taxes. It should be noted at the outset that many of the differences between the California and federal laws are not statutory. They arise from the case law or regulations. And many issues which have been decided by federal regulations or cases are still open questions in California. If close conformity is to be accomplished, the California statutory scheme will have to be considerably more detailed than it now is, or else broadly revised and detailed regulations will be required in addition to the legislative changes.

DEATH TAX DETAILS

Taxable Transfers

There are a number of discrepancies between the two systems as to which transfers are taxable. Some of these are the following:

Revocable Inter Vivos Transfers. Transfers which the decedent could have revoked during his lifetime are taxable under both systems. But the precise scope of the federal and California provisions is some-

² *E.g.*, Dewind, *The Approaching Crisis in Federal Estate and Gift Taxation*, 38 CALIF. L. REV. 79 (1950). This course was even recommended by the United States Secretary of the Treasury in 1950. *Hearings Before the House Ways and Means Committee on Revenue Revision of 1950*, 81st Cong., 2d Sess., pt. 1, at 22 (1950).

³ See Rudick, *A Proposal for an Accessions Tax*, 1 TAX L. REV. 25 (1945).

⁴ *E.g.*, the "bequeathing power succession tax." VICKERY, AGENDA FOR PROGRESSIVE TAXATION 224-28 (1947).

⁵ Further details about the history and policy of death taxation and analyses of present and proposed systems may be found in: BITTKER, *op. cit. supra* note 1 at 1-19; SHULTZ, *THE TAXATION OF INHERITANCE* (1926); SURREY, *An Introduction to Revision of the Federal Estate and Gift Tax*, 38 CALIF. L. REV. 1 (1950); CCH *INH., EST. & GIFT TAX REP.* ¶ 1000 *et seq.* A simple survey of the California system is Barnett, *California Inheritance and Gift Taxes—A Summary*, 43 CALIF. L. REV. 49 (1955).

what different. California Revenue and Taxation Code Section 13646 specifically applies only to revocable *trusts*. But the regulation⁶ refers to transfers "in trust or otherwise." The scope of the regulation would seem justified by Section 13643 of the code, relating to transfers to take effect at death.

The federal statute⁷ reaches all transfers since June 22, 1936, where the decedent at the time of his death had the power to alter, amend, revoke or terminate, or where he relinquished such power in contemplation of death. The decedent is considered as having the power even though it is subject to a precedent giving of notice or is not effective until the expiration of a stated period after exercise. The power results in imposition of a tax whether it is exercisable by the decedent alone or in conjunction with *any* other person, and regardless of where the decedent got the power.⁸ However, under the applicable regulations⁹ a transfer is not taxable if the power may be exercised by the transferor only with the consent of all parties having an interest, vested or contingent, in the transferred property and if the power adds nothing to the rights of the parties as conferred by applicable local law.

The state regulation indicates that California treats revocable transfers in similar fashion. But there are at least two significant differences from the federal law. The regulation speaks of the transfer being subject to a power "reserved in the transferor." Thus a power reacquired, as in the case of a successor trustee, would not seem to be included. This is like the pre-1936 federal law. Moreover, "power" is defined to include a power exercisable by the transferor alone or by the transferor and "any other person not having a substantial adverse interest in the property transferred." This is much narrower than the federal law, which applies if *any* other person has the power together with the transferor, unless *all* vested and contingent beneficiaries must concur. The California definition of "power" is similar to that obtaining under federal law prior to June 2, 1924. Since then the federal provisions have been considerably tightened.

It is perhaps noteworthy that the California rule is fixed largely by regulation and could presumably be readily changed. But query whether the Controller is not now estopped to broaden the interpretation given to the California statute.

Inter Vivos Transfers Reserving Life Estate or Income for Life. The California provisions, while considerably less elaborate than the federal, are roughly equivalent. Revenue and Taxation Code Section 13644 taxes transfers where the grantor expressly or impliedly reserves a life income or interest in the property transferred. A 1953 amendment to that section provides that such reservation will be conclusively presumed where the transferor retains possession or enjoyment of the income or interest until his death.

The federal statute¹⁰ has greater scope. It covers also the situation where the transferor can designate, alone or with another, the persons who shall possess or enjoy the property or income. The California

⁶ CAL. AD. CODE tit. 18, Section 712.

⁷ INT. REV. CODE Section 2038.

⁸ Powers over transfers prior to June 22, 1936, are treated the same except where the power was not reserved but arose, for example, because the decedent was appointed a successor trustee.

⁹ U. S. Treas. Reg. 105, Section 81.20.

¹⁰ INT. REV. CODE Section 2036.

statute does not specifically reach such transfers. But Section 712 of the regulations seems broad enough to cover this general situation. However, the federal statute includes the property if the decedent has the power, alone or with *any* person, to designate the beneficiary; whereas Section 712 speaks in terms of a power exercisable by the transferor alone or in conjunction with any person *not having substantial* adverse interest. This difference is somewhat tempered by the fact that several federal cases have held that if the decedent has the power only as trustee and is circumscribed by enforceable standards of discretion, then the property is not includible.

The federal regulations¹¹ set forth three specific temporal standards for judging when property subject to a reservation of use, possession or right to income or other enjoyment will be included in the gross estate. Tax will result if such a power is reserved to a decedent: (1) for his life; (2) for any period not ascertainable without reference to his death; or (3) for such period as to evidence his intention that it should extend at least for the duration of his life and his death occurs before the expiration of such period. The California statutes and regulations are considerably less detailed; but they are probably broad enough to embrace these three criteria. And in case of doubt, it seems likely that California courts would try to follow the federal law.¹²

Inter Vivos Transfers Taking Effect at Death. Ever since the original Pennsylvania inheritance tax of 1826, most death taxes have applied to transfers "intended to take effect in possession or enjoyment" at or after death. The federal law relating to such transfers has undergone a series of complicated changes, the most recent of which was made by the 1954 Code.¹³ As it now stands, the estate tax law divides transfers taking effect at death into three categories:

- (1) Transfers made prior to October 8, 1949, are includible in the gross estate if possession or enjoyment through ownership can be obtained only by surviving the decedent, and the decedent retains an *express* reversionary interest, and if the actuarial value of the interest immediately before his death was more than 5 percent. ("Reversionary interest" includes the possibility that property transferred by a decedent may return to him or his estate or may be subject to a power of disposition by him.)
- (2) A transfer made after October 7, 1949, where the decedent dies *after* August 17, 1954, will be subject to similar rules, except that property will be included even though the reversionary interest was not expressly reserved.
- (3) A much more inclusive provision is applicable if the transfer was made after October 7, 1949, and the decedent died *before* August 17, 1954.

¹¹ U. S. Treas. Reg. 105, Section 81.18.

¹² *E.g.*, Estate of Thurston, 36 Cal. 2d 207, 223 P. 2d 12 (1950). This case held that although the California tax attaches when a transferor reserves a life estate, it can be avoided by subsequent relinquishment of the life estate before death, if such relinquishment is not made in contemplation of death. The court indicates that the federal law says nothing specific about this but seems to take it for granted. The opinion illustrates how California courts often place much reliance upon federal cases in interpreting the California death tax law.

¹³ INT. REV. CODE Section 2037.

Under both the present and prior federal statutes, the property is not included if possession and enjoyment could have been obtained by any beneficiary during the decedent's lifetime by the exercise of a power of appointment which in fact was exercisable immediately before the decedent's death.

While the federal statute has been going through many judicial interpretations and legislative changes, California has retained essentially the same few lines.¹⁴ These tax an inter vivos transfer "made with the intention that it take effect in possession or enjoyment at or after the death of the transferor." The statute has been involved in litigation only a few times. The most interesting case is *Estate of Madison*.¹⁵ While the federal estate tax will not tax a transfer where the transferor has entirely divested himself of all interest, even though there is a shift of possession or enjoyment upon his death, under the *Madison* case the California inheritance tax seems to reach a transfer where the transferor keeps nothing, while the beneficiaries receive the income for the life of the transferor and the corpus on his death. The opinion can be interpreted as taxing any trust where the corpus is distributable upon the death of the trustor. In this particular area, the California law is thus considerably broader in its incidence than the federal. The rationale of the *Madison* case seems to be that certain shackles on a beneficiary's enjoyment are removed on the death of the transferor.¹⁶

California deals specifically with the possibility of reverter problem only in Regulation Section 713. Under that section property transferred inter vivos is subject to taxation if it may revert or revest in the transferor upon the prior death of the transferee pursuant to an express provision in the instrument of transfer and not by reason of the statute of succession, and if the transferor predeceases the transferee. Any such reservation is of course also a limit on the transferee's possession or enjoyment. The California law is different from the federal statute in that (1) it is limited to express reservations, and (2) there is no 5 percent *de minimus* provision.

Note that under federal law even though the value of the possibility of reverter is not enough to throw the property into the transferor's estate, the actuarial value of the possibility of reverter itself is property of the decedent at the time of his death. It is therefore includible in his gross estate under Internal Revenue Code Section 2033 taxing property "to the extent of the interest therein of the decedent at the time of his death." This is perhaps also true under the California law¹⁷ as to possibilities of reverter which are not expressly reserved.

Inter Vivos Transfers in Contemplation of Death. The 1891 New York inheritance tax law first introduced a clause taxing any property transferred during life "in contemplation of death" without adequate consideration in money or money's worth. Both the present federal and California death taxes have a provision taxing such transfers. The language of the statutes is roughly comparable. It may be that the decided cases under the two systems are not entirely in accord. But whether a lifetime transfer was made in contemplation of death is

¹⁴ CAL. REV. & TAX. CODE Section 13643.

¹⁵ 26 Cal. 2d 453, 159 P. 2d 630 (1945).

¹⁶ See *Estate of Hyde*, 92 Cal. App. 2d 6, 14, 206 P. 2d 420, 425 (1949).

¹⁷ CAL. REV. & TAX. CODE Sections 13601-602.

largely a factual problem. Any differences in the cases may probably be ascribed to different fact situations.

In 1950 Congress modified the Internal Revenue Code to specify that no gift made more than three years before death will be treated as made in contemplation of death. This is a conclusive presumption. California adopted a similar provision in 1951. Congress also adopted in 1950 a rule that creates a prima facie presumption that gifts made less than three years before death *were* made in contemplation of death. But California has not followed on this point. However the federal prima facie presumption seems of no real significance. It does not accomplish anything that the taxing authorities could not do anyway by asserting a deficiency on grounds that a transfer was made in contemplation of death.

The California statute¹⁸ does make a more determined effort than does Internal Revenue Code Section 2035 to define just what "contemplation of death" means. And a recent California case, *Estate of Adams*,¹⁹ reviews the California law with respect to contemplation of death and points out that there is enough California authority so that it is not necessary to look to other state or federal decisions to decide a particular case. Nevertheless, it seems likely that the California and federal provisions will be interpreted quite similarly in this area.

Inter Vivos Advancements of Testamentary Gifts. The federal law follows the general rule that an advancement is not taxable unless it is shown to be in contemplation of death. The fact that it is designated an advancement is not in and of itself determinative of tax liability. On the other hand, California Revenue and Taxation Code Section 13647 specifically makes an advancement subject to tax. Advancements are taxed at their value as of the transferor's death.

The specific California provision may well result in different federal and state treatment of the same transfer. An advancement made more than three years prior to death would seem conclusively free of tax under the federal contemplation of death presumption. But it could be argued that the similar California presumption does not apply in the light of the specific statute taxing advancements.

Powers of Appointment. The federal and California provisions relating to powers of appointment are substantially different. Under Internal Revenue Code Section 2041 the exercise or ownership of a general power of appointment over property at the time of death will subject that property to estate tax in the donee's estate. California imposes no tax in such circumstances. But it taxes as a transfer of property from the donor to the donee at the date of the donor's death a gift of any power of appointment made by a donor at any time in conjunction with the disposition of property.²⁰

A power of appointment designates the person who takes property. A broad power of designation is thus essentially equivalent to ownership. One problem in taxing such a power under an inheritance tax system, however, is in determining whether the beneficiary under the exercise of the power should be regarded as receiving the property from the donor or the donee for purposes of applying inheritance tax rates

¹⁸ CAL. REV. & TAX. CODE Section 13642.

¹⁹ 39 Cal. 2d 309, 246 P. 2d 625 (1952).

²⁰ CAL. REV. & TAX. CODE Section 13691 *et seq.*

based on relationship. The common law property rule is that the beneficiary takes from the donor.

Most inheritance tax states have met the problem by imposing a tax on only the value of the life estate in the estate of the donor, whether he created the power of appointment during his life or at death. They tax the remainder value as if the property were transferred by the donee. On this second transfer, at least one state bases its tax rate on the relationship of the recipient to the original donor. But most states impose rates based on the relationship of the recipient to the donee. Some states have variations which depend on whether the power of appointment was or was not actually exercised by the donee.

California has a system different from any other. When a power of appointment is given, the value of the property subject to it is taxed as though it were transferred to the donee in fee at the time of death of the donor. If it is certain that all or a part of the property will go to charity on the death of the donee, then, to the extent that the charity will receive the property, the transfer is exempt from tax. The California provisions are the same whether the power of appointment is created during life or at death, except that a power of appointment created during life will not be taxed as a transfer to the donee if the donee in fact predeceases the donor or relinquishes the power prior to the donor's death, or if the donor has revoked the power.

It is worth noting that under California law the transfer of one-half of the separate property of a decedent to a surviving spouse is exempt. This includes a transfer in trust with a power of appointment in the surviving spouse. The theory of this marital exemption is that the untaxed one-half will be subject to tax in the estate of the surviving spouse. But under the applicable California power of appointment provisions, it seems possible that this half may escape tax altogether. The same result could follow in a transfer from a wife to her husband of her share of community property, in trust with a power of appointment. The transfer by the wife is exempt under statute. And the exercise of the power of appointment is not a taxable transfer.

It should also be noted that the federal taxing provisions relate only to "general" powers of appointment. These are, with certain exceptions, powers which enable the donee to appoint to himself or his estate or creditors. If the power is limited to exclude such appointees, no tax results. The California law, being based on a completely different principle, has no occasion to distinguish between general and special powers.

Community Property. There are significant differences between the California and federal treatments of community property interests. The Internal Revenue Code has no specific provisions dealing with community property. California has several.

The California statutes²¹ provide that on the death of a husband at least one-half of the community property is taxable. The one-half which belongs and goes to the wife is not subject to tax. If the wife dies first, the one-half which belongs to her surviving husband is not taxed. Moreover, to the extent the wife's one-half share of the community passes to her husband by will or intestacy, no tax is imposed. Also, the California statutes contain a specific provision with respect to widows'

²¹ CAL. REV. & TAX. CODE Sections 13551-56.

elections—where, for example, a husband requires a wife to elect whether to take under his will a life estate in the whole of the community in lieu of her fee interest in one-half. In such a case, if she takes under the will, the property thus taken, up to a value not exceeding one-half of the value of the community, is not subject to tax.

Under the federal estate tax, California community property acquired after July 29, 1927 (the date when it was first provided that the rights of husband and wife in community property are “present, existing and equal”) is regarded as one-half owned by each spouse. Therefore one-half is included in the estate of the first to die, regardless of who receives it. This differs from California mainly in that there is no special treatment for community property passing to a surviving husband.

There are several other differences between the two systems. For federal tax purposes, community property acquired before the 1927 date is regarded as separate property. California treats all community property the same. And the federal statutes make no provision for widows' elections. The estate tax treatment of such elections is not too clear. It is possible that part of the wife's share in the community may escape tax altogether. It seems likely that this would be partially offset by the imposition of a gift tax.²²

Joint Tenancy. The two systems have essentially the same treatment for joint tenancy property. Both treat the decedent as absolute owner of such property except to the extent that it is shown that the survivor contributed to the cost of the property. Under both systems it is now the rule that if joint tenancy property of husband and wife had its source in their community property it shall be treated as community property. California readopted this rule in 1955.²³ The Internal Revenue Code²⁴ specifies this treatment for any community property so converted after 1941.

Life Insurance. Under the Internal Revenue Code²⁵ there is included in the gross estate the value of all life insurance payable on account of the death of the decedent to his estate and all such insurance payable to other beneficiaries if the decedent possessed at his death any of the incidents of ownership (including a reversionary interest greater than 5 percent).

California²⁶ also taxes all insurance payable to or for the benefit of the estate. And insurance payable to named beneficiaries is also taxed if the insured retained the incidents of ownership, but only to the extent that the proceeds exceed \$50,000. (The exemption is prorated if the decedent left policies payable to several beneficiaries in an amount greater than \$50,000.) This California \$50,000 exemption is similar to a federal provision which was in effect prior to 1942. Another difference is that California exempts the proceeds of federal war risk insurance,²⁷ which the federal law does not.

²² See Brookes, *The Tax Consequences of Widows' Elections* in SO. CALIF. TAX. INST. 33 (1951).

²³ CAL. REV. & TAX. CODE Section 13671.5.

²⁴ INT. REV. CODE Section 2056.

²⁵ *Id.* Section 2042.

²⁶ CAL. REV. & TAX. CODE Sections 13721-24.

²⁷ *Id.* Section 13361.

Deductions, Exemptions and Credits

The state and federal laws both provide that certain types of property and certain types of transfers escape death taxes. In some cases this is a complete freedom from tax. In others, only a specified part of the transfer may be made free of tax. The special statutes may establish a deduction, an exemption, or a credit. Deductions and exemptions permit the exclusion of certain items in computing the value of the property upon which the tax is assessed. A credit is applied to reduce directly the amount of tax which is payable. It is generally allowed on account of some other tax which was paid upon the same property.

Under both systems, deductions go to reduce the net amount of the estate subject to tax. Exemptions, however, are treated differently. The federal law regards exempt property as beyond the scope of the tax and simply imposes its graduated rates upon the balance. Thus a federal exemption may be said to come "off the top." California in effect imposes its graduated rates upon the entire value of the property, including exempt property, and then reduces the tax by so much as is attributable to the exempt property. In making this calculation, exempt property is regarded as being in the lowest rate brackets. The result is that the nonexempt property is pushed up into a higher graduated bracket. Here, the exemption may be said to come "off the bottom." The purpose of the exemption thus seems in part defeated.

Specific Exemptions. Both the California and federal statutes set certain minimums below which the death taxes will not be operative. The Internal Revenue Code²⁸ allows one lump-sum exemption of \$60,000 for each estate. Unless the taxable estate before deducting the exemption exceeds this amount, no federal estate tax is imposed. California, consistent with its inheritance tax principles, grants varying exemptions depending upon the relationship of the recipient to the decedent.²⁹

The California exemptions range from \$24,000 for property left to a widow down to \$50 for property left to a "stranger." As indicated above, California exemptions come off the bottom of the taxable estate instead of the top. Thus the estate tax on a net estate of \$65,000 would be imposed on \$5,000 at only the minimum federal rates, while a California inheritance tax on a taxable transfer of \$65,000 to a widow would result in excluding the tax on \$24,000 at the minimum rate, while imposing a tax at graduated rates on the remaining \$41,000.

Separate Property Left to a Surviving Spouse. Both California and the United States give special consideration to separate property left to a surviving spouse. The Internal Revenue Code³⁰ contains a marital deduction which permits the deduction (up to one-half of the value of the adjusted gross estate) of the value of separate property of the decedent left to a surviving spouse. The federal provisions require that the property be left outright; the deduction is not available if the survivor's interest is "terminable." The federal provisions specifically do not apply to separate property which was converted from community after 1941.

²⁸ INT. REV. CODE Section 2052.

²⁹ CAL. REV. & TAX. CODE Sections 13801-804.

³⁰ INT. REV. CODE Section 2056.

California provides a marital exemption, not a deduction. This, like all exemptions in California, comes off the bottom instead of the top. The applicable provision³¹ permits the exemption of property equal in amount to the clear market value of one-half of the decedent's separate property if transferred to the surviving spouse. The California provision contains no terminable interest restriction. It specifically applies to a transfer in trust with a general or limited power of appointment. The California provision, unlike the federal, is applicable to separate property converted from community.

Charitable Bequests. In the case of bequests to "charitable" organizations, the federal law³² authorizes a deduction, while California³³ gives an exemption. The practical effect of the two methods of treatment in this instance seems to be the same.

The provisions are roughly similar in application. California, however, has nothing like the federal disallowance of deduction in the case of payments to charitable organizations which engage in "prohibited transactions" not consistent with their charitable purposes. Nor does California have any specific provision for tax treatment in the event of a disclaimer by a beneficiary with the result that property is transmitted to a charity. The federal statute specifically authorizes a deduction for a transfer as a result of an irrevocable disclaimer. Since California imposes its tax on the basis of the will, not the actual distribution of property,³⁴ it seems doubtful whether California would recognize as a charitable transfer property passing to a charity as the result of disclaimer by a beneficiary.

Expenses of Funeral, Last Illness and Administration. The California and federal provisions allowing deductions for debts of a decedent, expenses of funeral and last illness, and state and local taxes which are a lien at death are all roughly the same.³⁵ But in the case of deductions for attorneys' and executors' fees and other expenses of administration, the two systems are not very much alike.³⁶

California is much more strict as to what is allowable as an expense of administration. Deductible ordinary expenses are defined. Certain extraordinary expenses are singled out as deductible and others are made specifically not deductible. And California permits only the deduction of executors' and attorneys' commissions based on the value of the estate at death. Under the federal estate tax these fees may be deducted on the basis of the total estate accounted for.

The federal provisions deny the deduction of expenses of administration from the gross estate if these expenses are taken as deductions on the income tax return of the estate. The estate must elect whether to use the deductions on its estate or income tax return. California has no such limitation. Many expenses qualify as deductions for purposes of both the inheritance tax and the fiduciary income tax.

Amounts Paid as Estate or Inheritance Tax. California permits a deduction for the amount due or paid the United States as an estate tax.³⁷ The actual amount deductible is computed by the inheritance tax

³¹ CAL. REV. & TAX. CODE Section 13805.

³² INT. REV. CODE Section 2055.

³³ CAL. REV. & TAX. CODE Sections 13841-42.

³⁴ *Id.* Section 13409.

³⁵ CAL. REV. & TAX. CODE Sections 13983-87; INT. REV. CODE Section 2053.

³⁶ CAL. REV. & TAX. CODE Sections 13988-88.1; INT. REV. CODE Section 2053.

³⁷ CAL. REV. & TAX. CODE Section 13989.

appraiser by applying the federal exemptions, deductions and rates to that part of the estate subject to both California and federal taxes. The estate is valued as determined by the inheritance tax appraiser, without regard to the actual federal valuation. The amount deductible is the federal estate tax as so computed or the actual federal tax paid, whichever is less. While there is no strictly comparable federal deduction, there is a federal credit for state death taxes,³⁸ which is the occasion for the imposition of the California "pick-up" tax. This is discussed at greater length below.

Other Deductions and Exemptions. There are a number of differences between the two systems with respect to less important death tax deductions and exemptions. For example, both taxes make special provision for the estates of members of the United States armed forces who die as a result of disease or injury suffered while on active combat duty.³⁹ But the details of the provisions are quite different. California has no provision comparable to the federal statute which allows the deduction from the gross estate of casualty losses during administration.⁴⁰ The provisions dealing with intangible property within the jurisdiction belonging to nonresidents are necessarily not very similar.⁴¹

Gift Tax Credit. Both California and the United States allow a credit against the death tax for any gift tax paid on property included in the taxable estate.⁴² The California provision is similar to the federal one, although of course California allows a different credit as to each transferee instead of just one credit regardless of transferee.

Previously Taxed Property. Both California and the United States take account of the hardship that may be worked upon an estate by successive deaths within a short span of time. But they do this in completely different manners.

The federal law, which was drastically changed by the Internal Revenue Code of 1954,⁴³ now provides a credit against the estate tax where property was transferred to the decedent by a person who died within 10 years before or two years after the decedent's death. This credit is based on the estate tax paid by the estate of the transferor and the time differential between the two deaths.

Instead of a credit, California allows an exemption. This is similar to the pre-1954 federal deduction. It covers property subject to the California inheritance tax within a period of five years before the death of the decedent, provided that both (1) the relation of the beneficiary to the second decedent, and (2) the relation of the second decedent to the first decedent, were that relation defined as "Class A" by the statutes. Class A beneficiaries include spouse, lineal descendants, and lineal ancestors of the decedent. The exact amount of the exemption must be calculated in accordance with detailed and complicated rules, taking into consideration the deductions and other exemptions in both estates.

³⁸ INT. REV. CODE Section 2011.

³⁹ CAL. REV. & TAX. CODE Sections 13871-73; INT. REV. CODE Section 2201.

⁴⁰ INT. REV. CODE Section 2054.

⁴¹ CAL. REV. & TAX. CODE Section 13851; INT. REV. CODE Section 2101 *et seq.*

⁴² CAL. REV. & TAX. CODE Sections 14051-59; INT. REV. CODE Section 2012.

⁴³ Section 2013.

Valuation

The main distinction between the California and federal valuation procedures is the federal provision for an optional valuation date.⁴⁴ California requires that the estate of a decedent be valued as of the date of his death.⁴⁵ But under the federal estate tax, valuation may be made as of the date of death or, if the executor so elects, as of a date one year after death as to property still held at that time and as of the date of sale or distribution as to property sold or distributed prior to that date.

Another important distinction is in the valuation of life estates and remainders. Since January 1, 1952, the federal taxing authorities have used tables based on a 3½ percent annual return. Since July 1, 1945, California has used 4 percent tables.⁴⁶ This naturally results in different valuations of the same interest. Other minor differences between valuation methods exist; for example, in the practices regarding valuation of inactive listed securities and life estates based on two or more lives.

One major problem in any inheritance tax is applying it to transfers made subject to a contingency or condition upon the occurrence of which the right, interest or estate of the transferee may be changed. Since an estate tax is imposed only on the value of the property of the decedent, it generally does not run into the problem of modifying the tax to take account of contingencies. Inheritance taxes, being based to some extent on who receives the property, must always take some account of the contingent nature of a transfer.

California has a statute prescribing that when the ultimate disposition of property is subject to a contingency, the tax is computed at the highest rate which, on the happening of any of the contingencies, would be possible under the provisions of the inheritance tax law.⁴⁷ Tax payment may be deferred pending the happening of a contingency if a bond is filed and interest paid.⁴⁸ Also, the Controller is authorized to make compromises which are then approved by the court.⁴⁹ And if a tax is paid on the basis of a high contingency, a refund may be had upon the happening of a contingency resulting in less tax.⁵⁰

The estate tax runs into the contingency problem only in the case of charitable bequests. The applicable federal regulations⁵¹ permit the deduction as a charitable bequest of only that amount which is certain to go to charity after any possible diversions. If there is a possibility that the charity will not take the property, the deduction is denied unless the possibility is so remote as to be negligible. No modification of the value is permitted because of the lesser or greater likelihood that a contingency will occur.

⁴⁴ INT. REV. CODE Section 2032.

⁴⁵ CAL. REV. & TAX. CODE Section 13951.

⁴⁶ *Id.* Sections 13953-54.

⁴⁷ *Id.* Sections 13411, 13956.

⁴⁸ *Id.* Sections 14171-78.

⁴⁹ *Id.* Sections 14191-92.

⁵⁰ *Id.* Sections 14401-403.

⁵¹ U. S. Treas. Reg. 105, Section 81.46.

Tax Rates

Insofar as tax rates are concerned, the basic distinction between the California and federal systems is in the relationship between the death and gift tax rates. In California the inheritance and gift tax rates are identical, so that whether a transfer is made during life or at death, the tax effect will be substantially the same. The federal gift tax rates are set at three-fourths of the comparable federal estate tax rates. The effective difference between the two rate tables is even greater than 25 percent. The reason for this is that the estate tax rates are applied to the "net benefit" (the amount reaching the beneficiary) *plus* the part of the estate which is used to pay the tax. Gift tax rates apply only to the net benefit. This setup naturally encourages lifetime transfers. It is perhaps worthy of consideration whether California policy should or should not similarly encourage inter vivos gifts.

Of course the California rates vary from person to person in accordance with the basic inheritance tax principle. And, as noted above, the California and federal rates are affected differently by exemptions from tax, since in California exempt property comes out of the bottom brackets whereas under the federal system it comes off the top.

Taxing Procedure

There is almost no real similarity between the California and federal systems of assessing and collecting death taxes. Probably the most significant difference is that the federal tax is self assessed (with valuations and tax due originally computed by the taxpayer and later audited by a revenue agent) while the California tax is assessed by state officials on the basis of information obtained from the taxpayer and other sources.

Assessing the Tax. California inheritance taxes are due and payable at death and become delinquent two years thereafter.⁵² Taxes are paid to the treasurer of the county whose superior court has jurisdiction to determine the tax.⁵³

The inheritance tax due in a particular case is determined by an appraiser appointed by the court from a panel of persons selected by the Controller. California has no actual tax return. But a number of documents must be submitted to the appraiser and these have the effect of furnishing relevant information so that he may determine the tax. The documents submitted include an inventory of the property in the estate, inheritance tax affidavit, community property affidavit, non-resident affidavit, joint tenancy affidavit, copies of the will, copies of trusts, data to aid valuation, etc. The appraiser determines the value of the property and the tax payable on the basis of the foregoing documents, a review of the property and other evidence, and such informal conversations as he deems necessary with the executor and his attorney.⁵⁴ He may conduct a formal hearing as part of this procedure. Ultimately he files with the court a written report setting forth the tax due. Notice of such filing is given and the person liable for the tax has 10 days in which to object.⁵⁵ If there is no objection the court

⁵² CAL. REV. & TAX. CODE Sections 14102-103.

⁵³ *Id.* Section 14104.

⁵⁴ *Id.* Section 14501-505.

⁵⁵ *Id.* Sections 14506-509.

confirms the report and makes its order fixing the tax. If there is an objection the court will hold a hearing at which the report is presumed to be correct, and the person liable for tax is given an opportunity to rebut it.⁵⁶

Under the federal procedure the burden of valuing property and calculating the tax is placed on the personal representative of the decedent. Shortly after the date of death this representative must file a preliminary notice giving the approximate value of the estate in rough detail.⁵⁷ Fifteen months after the date of death the estate tax return is due and the estate tax must be paid.⁵⁸ The estate tax return is examined by a revenue agent, who proposes a deficiency if he deems it necessary. If informal conferences fail to result in agreement, the Internal Revenue Service issues a formal notice of deficiency; and the estate may within the next 90 days file a petition for redetermination with the Tax Court.⁵⁹ The federal statutes (unlike California) contain a specific provision whereby payment of the tax may be extended up to 10 years if payment on the due date would result in undue hardship to the estate.⁶⁰

Penalties. Inasmuch as the federal and California assessment systems are so dissimilar, it naturally follows that the penalty provisions of the two taxes are quite different. California provides a penalty from \$1,000 to \$20,000 for refusing access to relevant books and records.⁶¹ There is also a penalty for failing to observe the requirements with respect to obtaining consents to transfer.⁶² California has no provisions such as the federal penalties for failure to file a return and for filing a fraudulent return. Here the Internal Revenue Code prescribes ad valorem penalties, fines and imprisonment.⁶³

Refunds. Both systems make provision for obtaining a refund in the event the tax was overpaid. The United States provides a specific form of claim.⁶⁴ The California refund procedure is somewhat more cumbersome. Instead of simply filing a form, application must be made to the court having jurisdiction of the estate, with notice given to the Controller. If the court authorizes the refund, it issues its order directing the county treasurer to pay it.⁶⁵

Statutes of Limitations. In the matter of limitations, the two tax systems are in no wise similar. California has no statute of limitations on the determination or collection of inheritance tax. The Revenue and Taxation Code specifically provides that the provisions of the Code of Civil Procedure relating to limitation of actions are not applicable.⁶⁶ The Internal Revenue Code, on the other hand, has a limitation of three years after the return is filed (six years if more than 25 percent of the gross estate has been omitted). Any action must be brought within six years after assessment.⁶⁷

⁵⁶ *Id.* Sections 14510-13.

⁵⁷ INT. REV. CODE Section 6036; U. S. Treas. Reg. 105, Section 81.58.

⁵⁸ *Id.* Sections 6075, 6151.

⁵⁹ *Id.* Sections 6211-13.

⁶⁰ *Id.* Section 6161.

⁶¹ CAL. REV. & TAX. CODE Section 14812.

⁶² *Id.* Section 14347.

⁶³ INT. REV. CODE Section 6651 *et seq.*; Section 7201 *et seq.*

⁶⁴ Form 843.

⁶⁵ CAL. REV. & TAX. CODE Sections 14361-428.

⁶⁶ *Id.* Sections 14355, 14674.

⁶⁷ INT. REV. CODE Sections 6501-503.

The California time limit on making refund claims varies with the ground for refund. Generally the period is six months or a year after the event takes place which justifies the refund.⁶⁸ The federal limit is three years from the date the return was required to be filed, or two years after the date the tax was paid, whichever is later.⁶⁹ A suit upon a refund claim must be brought within two years after the disallowance of the claim or at any time within six months after filing a claim, if it is not acted upon.⁷⁰

Interest. The United States charges 6 percent interest on deficiencies and allows interest at the same rate on refunds.⁷¹ California also imposes 6 percent interest on deficiencies from the date the tax becomes delinquent.⁷² But there is no interest allowed on refunds unless the refund is refused after final judgment; and then interest runs only from the date of such refusal.⁷³

Liens. Both California and the United States have elaborate provisions for liens to secure the tax. The federal lien attaches at death and remains until the tax is paid or 10 years after death. The lien is divested in the case of administration expenses and certain sales to bona fide purchasers.⁷⁴ The California lien continues until the tax and interest are paid in full; but there are provisions concerning mortgages and bona fide purchasers, and for the release of a lien if a bond is posted.⁷⁵ California makes specific provision for a suit to quiet title against a tax lien or to determine that property is not liable for tax.⁷⁶ Under both systems liens may be released by authorized officials, and the taxing authorities are specifically allowed to levy upon property to enforce the tax.⁷⁷

Special California Provisions. Two aspects of the California inheritance tax are completely unlike anything found in the federal system. The California law provides detailed requirements for obtaining releases on the transfer of bank accounts, stocks, etc. Before stock may be transferred or property delivered by a bank or custodian, and before the payment of any benefits under life insurance, the transferor must obtain from the Office of the Controller a "Consent to Transfer." These Consents are freely given; but they provide the inheritance tax authorities with a way of checking up on the property which should be included in the inventory of an estate. California also has statutory provisions concerning the opening of safe deposit boxes to which the decedent has access and the taking of an inventory of the contents.⁷⁸

California provides a special discount for prompt payment of tax, something the federal system does not allow. To the extent the inheritance tax is paid within six months from the date of death, there is allowed a discount equal to 5 percent of the amount of tax. However,

⁶⁸ CAL. REV. & TAX. CODE Sections 14361-428.

⁶⁹ INT. REV. CODE Section 6511.

⁷⁰ *Id.* Section 6532.

⁷¹ *Id.* Sections 6601, 6611.

⁷² CAL. REV. & TAX. CODE Section 14211.

⁷³ *Id.* Sections 14431-32.

⁷⁴ INT. REV. CODE Section 6324.

⁷⁵ CAL. REV. & TAX. CODE Sections 14301-306.

⁷⁶ *Id.* Section 14571-77.

⁷⁷ INT. REV. CODE Sections 6325, 6331; CAL. REV. & TAX. CODE Sections 14307-308, 14321-23.

⁷⁸ CAL. REV. & TAX. CODE Sections 14341-46.

this discount may be paid and subsequently completely lost if it later develops that a "pick-up tax" is payable by the estate.⁷⁹

The California "Pick-up Tax"

One aspect of the California inheritance tax system which merits special comment and consideration is the additional estate tax, commonly known as the "pick-up tax." Under the Internal Revenue Code the United States allows a credit against the estate tax (up to a specified maximum amount) for any death taxes paid to a state.⁸⁰ The credit applies only if the taxable estate (after deduction of the \$60,000 specific exemption) exceeds \$40,000. In order to take full advantage of this federal provision, that is, to make sure that the state tax is at least equivalent to the federal credit, most states have enacted special taxes which come into play when the regular state death tax would not result in a tax equal to the amount of the credit. California has such a provision.⁸¹

Because the tax imposed is simply "equal to the difference between the maximum credit and the inheritance tax payable," the pick-up tax is an estate tax, not an inheritance tax; like the federal estate tax itself, the maximum credit is simply a graduated percentage of the entire taxable estate. The nature of the pick-up tax is thus completely inconsistent with the basic principle of the California inheritance tax. The tax can only be rationalized as a makeshift device by which the State can collect the maximum federal credit instead of seeing it paid to the United States. It is somewhat anomalous that, after California has gone through all its elaborate procedures to relate the tax imposed to the relationships between a decedent and his beneficiaries, an arbitrary *estate* tax is imposed which very often results in the final tax paid bearing little connection to asserted inheritance tax objectives.

Another seeming anomaly now exists in connection with the pick-up tax, as a result of the recent federal change from a *deduction* for prior-taxed property to a *credit* for estate taxes paid on such property. A California statute specifically states that no California exemption for prior-taxed property is allowable with respect to the pick-up tax.⁸² This made sense under the old setup, since such property was deducted from the federal gross estate before the allowable state credit was computed. But this is no longer true. Therefore it seems that property recently taxed will be, in effect, taxed again by the California pick-up tax.

It may be noted that the pick-up tax generally comes into play only in fairly large estates. The reason for this is that the federal credit is based upon the entire taxable estate, without reduction on account of federal estate taxes assessed. The inheritance tax, on the other hand, is computed on the value of the property transferred, after a deduction for federal estate taxes paid. When the value of the gross estate is substantial, the graduated federal estate tax takes out a very large bite. As a result, the estate subject to inheritance tax is reduced to such an extent that the tax is less than the allowable federal credit.

⁷⁹ *Id.* Section 14161.

⁸⁰ INT. REV. CODE Section 2011.

⁸¹ CAL. REV. & TAX. CODE Sections 13441-42.

⁸² CAL. REV. & TAX. CODE Section 13824.

GIFT TAX DETAILS

Policy

The basic purpose of any gift tax is to act as a backstop to a death tax. It prevents the tax-free transfer of wealth during life where a similar transfer at death would be subject to tax. As noted previously, the California statutes assess lifetime transfers and transfers upon death at the same tax rates.⁸³ The federal provisions, encouraging lifetime transfers, impose gift tax rates equal to three-fourths of the comparable estate tax rates.⁸⁴

The federal and California gift taxes are, like the respective death taxes, based on entirely different principles. The federal provisions, donor-oriented like the estate tax, base the tax on the value of total lifetime gifts made by the donor, irrespective of who the donee may be. The California provisions, donee-oriented like the inheritance tax, base the tax on both the value of the property transferred by gift and the relationship of donee to donor.

There is comparatively little statutory authority under either system to govern the details of imposition of the gift tax. In California, moreover, there have been almost no decided cases under the gift tax. Therefore it is difficult in many instances to make accurate comparisons of the California and federal laws.

Taxable Transfers

Both the federal and California statutory provisions speak in the broadest terms. They impose a tax on the transfer of any property by gift.⁸⁵ Therefore, essentially, the two taxes reach the same transactions. To some extent differences in the application of the two systems have become apparent. Some of these are outlined below.

California has no gift tax provisions specifically dealing with powers of appointment. The exercise or release of such a power is presumably not a gift. As was noted in connection with the inheritance tax, some surprising interpretations are possible with respect to the California tax law dealing with powers of appointment. The federal gift tax, on the other hand, not only reaches a transfer which creates a power of appointment but also has an elaborate provision taxing the exercise of a "general" power of appointment and the release (including the lapse, under certain circumstances, but not the disclaimer or renunciation) of such a power.⁸⁶

In the case of certain transfers involving husband and wife there are several well-defined distinctions between the two gift taxes. If a gift of community property is made to a third person, both systems regard each spouse as the donor of one-half. California applies the same rule to community property regardless of when it was acquired.⁸⁷ But the federal law treats California community property acquired prior to July 29, 1927, as separate property. Under both systems the equal division of community property into separate property incurs no tax.

In their treatment of gifts of separate property, the federal and California statutes have little in common. If the separate property of either

⁸³ Compare CAL. REV. & TAX. CODE Sections 13404-407 with Sections 15205-208.

⁸⁴ Compare INT. REV. CODE Section 2001 with Section 2502.

⁸⁵ *Id.* Section 2501; CAL. REV. & TAX. CODE Section 15201.

⁸⁶ INT. REV. CODE Section 2514.

⁸⁷ CAL. REV. & TAX. CODE Section 15304.

spouse is transferred by agreement into the community property of both, it is regarded as a gift of one-half the value of the separate property under both systems. But in California if it is the separate property of the *wife* which is so converted, the other one-half will also be gift taxed if on her death it goes to her husband free of inheritance tax under the special inheritance tax exclusion. This one-half, in such event, is treated as a gift by the wife at the time of her death.⁸⁸ Moreover, a new provision of the 1954 Internal Revenue Code has eliminated the gift tax consequences of a transfer by a husband or wife of separate property into a joint tenancy in real property of both spouses unless the spouses elect to treat the transfer as a gift.⁸⁹

The federal law contains a marital deduction provision completely unlike anything in the California statutes. Internal Revenue Code Section 2523 provides, in effect, that only one-half of a gift of separate property from one spouse to another is subject to federal gift tax, provided the gift is not of a "terminable interest." And on a gift to a third person, if the other spouse consents, a gift is treated for federal gift tax purposes as made one-half by each spouse.⁹⁰ California has no such provisions.

The California regulations contain a specific provision dealing with a widow's election to take under the terms of her husband's will a distribution of property which results in her receiving less than one-half of the value of the community property.⁹¹ It provides that the acceptance of such distribution is not a gift by her of the difference between what she gets and her one-half of the community property. There is some question under federal law as to whether a wife would be making a taxable gift in these circumstances.

A new federal statute enacted in 1954 provides that where husband and wife enter into a written agreement relative to their marital and property rights and a divorce occurs within two years thereafter (whether or not the agreement is approved by the divorce decree), any transfer to a spouse in settlement of marital rights or to provide reasonable support for issue of the marriage during minority shall be deemed made for full and adequate consideration.⁹² California has no such provision. It seems doubtful that California could adopt the principle of the federal statute without specific legislative authority.

Deductions and Exemptions

The deductions and exemptions allowed under the two gift taxes are quite different. Both systems allow an annual amount which may be given without incurring tax. California exempts the gift of \$4,000 per year to any donee.⁹³ This is equal to the old federal exclusion. The Internal Revenue Code⁹⁴ contains an exclusion for \$3,000 per year per donee. Neither the California nor federal provisions apply to gifts of a "future interest." Considerable question formerly existed whether gifts to minors could be other than a future interest. However, by statutory provision (the California statute was adopted in 1955),

⁸⁸ *Id.* Section 15303.

⁸⁹ INT. REV. CODE Section 2515.

⁹⁰ *Id.* Section 2513.

⁹¹ CAL. AD. CODE tit. 18, Section 79.

⁹² INT. REV. CODE Section 2516.

⁹³ CAL. REV. & TAX. CODE Section 15401.

⁹⁴ INT. REV. CODE Section 2503.

both laws now specify that a gift to a minor is not a gift of a future interest provided both the property and income therefrom may be expended by or for the benefit of the minor during his minority and will to the extent not so expended pass to the minor at the age of 21 or, if he dies before reaching 21, be payable to his estate or as he may designate by general power of appointment.⁹⁵ The California annual exemption specifically does not apply to the one-half of community property converted from a wife's separate property which is subject to gift tax if it passes to the surviving husband on the death of the wife. The federal system has no need for such a provision.

Before imposing gift tax rates both California and the United States allow specific lifetime exemptions in addition to any applicable annual exemption or exclusion. The California specific exemptions vary depending on the relationship of the donee.⁹⁶ They are the same as the equivalent inheritance tax exemptions. The Internal Revenue Code⁹⁷ provides a specific exemption of \$30,000 for each donor. This applies whether the total amount is given to one donee or a dozen, and regardless of the relationship of the donees to the donor. There are other marked differences in the exemption procedures under the two gift taxes. California specific exemptions must be applied to net gifts as they are made.⁹⁸ The federal \$30,000 exemption, on the other hand, may or may not be applied, as the donor desires. Another basic difference is that, like all California exemptions, the California specific exemptions come off the bottom of a taxable transfer, not off the top as does the federal. The California gift tax rate brackets are thus applied before deducting the exemptions. The federal tax rate brackets are applied after the specific exemption is deducted.

Neither the federal nor California gift tax applies to a bona fide charitable gift.⁹⁹ But California has no provision comparable to the federal disallowance of a deduction for gifts made to a charitable organization which engages in certain "prohibited transactions." California does have such a disallowance provision in its income tax law with respect to deductions for charitable gifts. But neither the inheritance nor gift tax law has been modified to include this concept.

The federal gift tax exempts any gift of intangibles by a nonresident alien not engaged in business in the United States.¹⁰⁰ California imposes a tax on certain intangibles with a California situs belonging to a nonresident unless the nonresident's state of residence: (1) has a gift tax; and (2) does not impose it on California residents or has specific reciprocity provisions.¹⁰¹

Valuation

In assigning a value to the property transferred, the California and federal practices under the gift taxes differ in the same fashion that they do under the death taxes. For example, California uses 4 percent interest tables where the federal authorities use 3½ percent tables. Under the gift tax, as under the inheritance tax, California is faced

⁹⁵ *Ibid.*; CAL. REV. & TAX CODE Section 15402.

⁹⁶ CAL. REV. & TAX. CODE Sections 15421-24.

⁹⁷ INT. REV. CODE Section 2521.

⁹⁸ CAL. REV. & TAX. CODE Section 15426.

⁹⁹ INT. REV. CODE Section 2522; CAL. REV. & TAX. CODE Sections 15441-42.

¹⁰⁰ INT. REV. CODE Section 2501.

¹⁰¹ CAL. REV. & TAX. CODE Section 15451.

with the problem of contingent transfers. Here too, it taxes such transfers at the highest rate possible.¹⁰² There is provision for compromise and for postponing tax payment by posting a bond.¹⁰³ A refund may be obtained on the happening of a contingency which would have resulted in less tax.¹⁰⁴

Tax Rates

The basic tax computation procedure is similar under both gift taxes. The tax rates are applied to the total accumulated gifts. Then the tax previously paid is subtracted in order to arrive at the tax currently payable. Of course, the California graduated tax rates vary, depending on the relationship of the donee to the donor, whereas the federal rates are graduated solely on the basis of the total taxable gifts made by a donor, regardless of donee.

Taxing Procedure

Under both gift taxes a return must be filed by April 15 of each year for gifts made during the preceding calendar year.¹⁰⁵ A return is required if the value of gifts made exceeds the annual exemption or exclusion, or if there is a gift of a future interest regardless of amount.¹⁰⁶

The federal gift tax is payable at the time the return is filed.¹⁰⁷ The California tax is technically due when the gift is made, but does not become delinquent until the Controller finally determines the tax.¹⁰⁸ He is directed to do this within six months after the return is filed; but his determination is valid if made at any time within three years thereafter.¹⁰⁹

In California the donee may join in filing the donor's return¹¹⁰ or may file a separate donee's return.¹¹¹ In the case of a gift in trust *both* beneficiary and trustee must file a return.¹¹² Under the federal system *either* the beneficiary or trustee must file a return if the gift is in trust.¹¹³ And there is no federal provision for a donee's joining in a donor's return. A separate donee return must be filed.¹¹⁴

When the California Controller has determined the tax he notifies the donor by personal service or by mail of the amount due. His determination becomes final 60 days after notice unless the tax is paid under written protest and an action is brought in the superior court to recover it. In the latter event the determination becomes final whenever the judgment in the action becomes final.¹¹⁵ Under the federal system the gift tax return is examined by a revenue agent. If a deficiency is proposed the government will issue a formal notice, and the taxpayer may appeal to the tax court within 90 days thereafter.¹¹⁶

¹⁰² *Id.* Section 15210.

¹⁰³ *Id.* Sections 15931-52.

¹⁰⁴ *Id.* Section 16223.

¹⁰⁵ INT. REV. CODE Sections 6019, 6075; CAL. REV. & TAX. CODE Section 15651.

¹⁰⁶ U. S. Treas. Reg. 108, Section 86.20; CAL. AD. CODE tit. 18, Section 173.

¹⁰⁷ INT. REV. CODE Section 6151.

¹⁰⁸ CAL. REV. & TAX. CODE Sections 15904-905.

¹⁰⁹ *Id.* Section 15801.

¹¹⁰ Form GT-1 Rev., Sched. D.

¹¹¹ Form GT-2.

¹¹² CAL. REV. & TAX. CODE Sections 15671-72.

¹¹³ U. S. Treas. Reg. 108, Section 86.21.

¹¹⁴ Form 710.

¹¹⁵ CAL. REV. & TAX. CODE Sections 15803-805.

¹¹⁶ INT. REV. CODE Sections 6211-13.

The California gift tax is a lien upon the transferred property from the time of the gift until 10 years after the tax becomes delinquent. The lien may be released by the Controller in his discretion if he determines that the tax is otherwise sufficiently secured, or if a bond is posted. If the property is sold to a bona fide purchaser the lien is released; but then it attaches to all other personal property of the donee. The statutes provide for a writ of execution to enforce a judgment and for withholding credits or other personal property belonging to the person liable for tax and in the hands of a third person. Proceedings to collect tax may be brought at any time up to 10 years after the date of delinquency.¹¹⁷

The federal statute of limitations on assessment is three years after the return is filed, unless the amount omitted from the return is more than 25 percent of the total gifts stated in the return, in which case it is six years. Any action must be brought within six years after assessment.¹¹⁸ The federal lien attaches for 10 years from the time the gift is made. If property is transferred to a bona fide purchaser it is divested of the lien, but the lien then attaches to all other property of the donee. The lien may be released if the Secretary of the Treasury or his delegate determines that the tax liability has been satisfied, become legally unenforceable, or been adequately provided for, or if a bond is furnished.¹¹⁹ There are specific provisions for the liability of transferees for the tax.¹²⁰

The California gift tax may be refunded in the following circumstances: (1) if any tax was erroneously paid, by filing an application with the Controller within one year after payment or within one year after the tax determination becomes final, whichever is later; (2) if any tax paid was later declared by a competent court to be in excess of the amount due, by application to the Controller within one year after judgment becomes final; (3) if tax is paid on a "high contingency" and a lower contingency subsequently happens, by application filed with the Controller within six months after the happening of the contingency.¹²¹ Any application for refund must set forth in detail and under oath all the relevant grounds and facts.¹²²

The United States provides a regular form for claiming a refund.¹²³ A claim for refund must be made within three years after the return is required to be filed or two years after the tax was paid, whichever is later.¹²⁴ Suit may be brought within two years after disallowance of a claim or at any time within six months after filing a claim if it is not acted upon.¹²⁵

Under the California gift tax, if a return is not filed or if a return does not show all of the transfers made in the year for which the return is filed, a penalty equal to 5 percent of the tax on the transfers not

¹¹⁷ CAL. REV. & TAX. CODE Sections 16061-121.

¹¹⁸ INT. REV. CODE Sections 6501-502.

¹¹⁹ *Id.* Sections 6324-25.

¹²⁰ *Id.* Sections 6901-902.

¹²¹ CAL. REV. & TAX. CODE Sections 16221-24.

¹²² CAL. AD. CODE tit. 18, Section 272.

¹²³ Form 843.

¹²⁴ INT. REV. CODE Section 6511.

¹²⁵ *Id.* Section 6532.

reported is added to the tax. In the case of fraud, there is an additional penalty equal to 25 percent of the tax on the transfers not reported.¹²⁶ Wilful failure to file a return or pay a tax brings an additional penalty of \$1,000.¹²⁷ Refusal to give the Controller access to books and records relating to transfers, after his lawful demand, may result in a fine of from \$1,000 to \$20,000.¹²⁸

Under the federal gift tax, failure to file a return, unless there was reasonable cause, results in a penalty equal to 5 percent of the tax for each month of delay, up to a maximum of 25 percent.¹²⁹ In the case of an underpayment due to negligence or intentional disregard of the rules and regulations there is imposed a penalty equal to 5 percent of the underpayment. In the case of fraud, there is a penalty equal to 50 percent of the underpayment.¹³⁰ Moreover, any wilful failure to pay a tax or file a return, or any wilful attempt to evade tax is subject to both a substantial fine and imprisonment.¹³¹

California charges interest on delinquent taxes at the rate of 7 percent.¹³² Interest at 7 percent is also charged after June 15 of the year in which a gift was made if the return is filed after the due date.¹³³ California pays interest at 6 percent from the date of overpayment whenever an overpayment is determined by judgment of a court or was not due to an error or mistake of the taxpayer.¹³⁴ The United States both charges and allows 6 percent interest.¹³⁵

CONCLUSION

The foregoing survey in no way purports to be either an exhaustive catalogue of the differences between the California and federal transfer tax systems or a complete analysis of those differences which are discussed. But it should point up some of the decisions necessary in any move "to bring the California laws into closer accord with the federal."

As was noted at the outset, the basic choice is between the estate tax and the inheritance tax principles. Regardless of the outcome of this decision, there are, of course, a number of minor discrepancies which merit correction. And some consideration should be given to other, more important differences. However, there seems little point in worrying about conformity in a multitude of minor details if the present basic difference between the two tax systems is to continue. It would seem far better for California to maintain an integrated and consistent system of its own.

If California is to consider a basic change, strong arguments support the switch to an estate tax. Aside from the theoretical policy advantages outlined at the beginning of this survey, the main argument in favor of an inheritance tax is that California has one and so do most other

¹²⁶ CAL. REV. & TAX. CODE Sections 15681-82.

¹²⁷ *Id.* Sections 15685, 15965.

¹²⁸ *Id.* Section 16562.

¹²⁹ INT. REV. CODE Section 6651.

¹³⁰ *Id.* Section 6653.

¹³¹ *Id.* Sections 7201-203.

¹³² CAL. REV. & TAX. CODE Section 15961.

¹³³ *Id.* Section 15684.5.

¹³⁴ *Id.* Sections 16271-72.

¹³⁵ INT. REV. CODE Sections 6601, 6611.

states.¹³⁶ On the other hand, an estate tax has the important advantage of being relatively simple to administer.

This relative simplicity is apparent in many ways. Most obviously, the tax calculation involves only one computation, regardless of the number of beneficiaries. And all the inheritance tax difficulties with contingent transfers are eliminated. (New York, for example, switched to an estate tax in 1930; but even today it is making adjustments on contingent transfers under its old inheritance tax.) The estate tax requires no special rules to deal with renunciations and will compromises. And the complicated income tax deduction for the death tax attributable to income in respect of a decedent is not further complicated by not knowing which inheritance tax rate to use.

It should also be borne in mind that even now California does not impose a pure inheritance tax. As was observed above, the state pick-up tax is a function of the federal estate tax. It thus injects the principle of an estate tax into California death duties.

¹³⁶ **CLASSIFICATION OF STATE INHERITANCE, ESTATE AND GIFT TAX LAWS**

<i>State</i>	<i>Inheritance tax</i>	<i>Additional estate tax for federal credit</i>	<i>Estate tax</i>	<i>Estate tax for federal credit only</i>	<i>Gift tax</i>
Alabama	---	---	---	x	---
Arizona	---	---	x	---	---
Arkansas	---	---	---	x	---
California	x	x	---	---	x
Colorado	x	x	---	---	x
Connecticut	x	x	---	---	---
Delaware	x	x	---	---	---
District of Columbia	x	x	---	---	---
Florida	---	---	---	x	---
Georgia	---	---	---	x	---
Idaho	x	---	---	---	---
Illinois	x	x	---	---	---
Indiana	x	x	---	---	---
Iowa	x	x	---	---	---
Kansas	x	x	---	---	---
Kentucky	x	x	---	---	---
Louisiana	x	x	---	---	x
Maine	x	x	---	---	---
Maryland *	x	x	---	---	---
Massachusetts	x	x	---	---	---
Michigan	x	x	---	---	---
Minnesota	x	x	---	---	x
Mississippi	---	---	x	---	---
Missouri	x	x	---	---	---
Montana	x	x	---	---	---
Nebraska	x	x	---	---	---
Nevada	---	---	---	---	---
New Hampshire	x	x	---	---	---
New Jersey	x	x	---	---	---
New Mexico	x	x	---	---	---
New York	---	x	x	---	---
North Carolina	x	x	---	---	x
North Dakota	---	---	x	---	---
Ohio	x	x	---	---	---
Oklahoma	---	x	x	---	x
Oregon	x	---	---	---	x
Pennsylvania	x	x	---	---	---
Rhode Island	x	x	x	---	x
South Carolina	x	x	---	---	---
South Dakota	x	---	---	---	---
Tennessee	x	x	---	---	x
Texas	x	x	---	---	---
Utah	---	---	x	---	---
Vermont	x	x	---	---	---
Virginia	x	x	---	---	x
Washington	x	x	---	---	x
West Virginia	x	---	---	---	---
Wisconsin	x	x	---	---	x
Wyoming	x	x	---	---	---

* Maryland also levies a tax on commissions of executors and administrators. CCH INH., EST. & GIFT TAX REP. ¶1100.

Of course the federal estate tax is no purebred either. It does not escape completely the necessity for valuing the interests of each beneficiary. Both the deduction for charitable bequests and the marital deduction require the valuation of separate interests. And the proration of estate taxes, whether by will or by statute, requires a computation of the value of each beneficiary's share.

In the last analysis, there is much to be said both for and against trying to achieve absolute conformity. This survey has tried to bring out some of these considerations. If California is to revise its inheritance and gift tax laws, it can choose from among the following alternatives:

1. Switch to some sort of integrated transfer tax. This would be the most radical change. It is an alternative well beyond the scope of Resolution Chapter 205, but one well worth considering.

2. Conform fully to the federal estate tax. This is open to the objection that it involves an abdication of legislative responsibility to Congress. Moreover, this course necessitates constant revision by the California Legislature to keep abreast of federal changes. It has the advantages of making considerably easier the job of the persons who must compute the tax and of facilitating integrated estate planning. The switch to an estate tax would mean a radical change in computation and administration of the death tax. It would probably require a comprehensive study to decide where to set the rates.

3. Switch to an estate tax and set up an independent system, similar to the federal. This is, in essence, the procedure California follows with respect to the income tax; it conforms where it is convenient and not too expensive. This, too, necessitates constant revision in the light of federal changes. But it permits more independent judgment.

4. Retain an inheritance tax but try to conform to the federal system wherever possible. This would require a number of small changes. For example, treatment of certain types of trusts might be changed, only post-1927 community property might be regarded as true community, the life insurance exemption might be eliminated, etc. This would mean a multitude of minor decisions as to which aspects of the federal system should be followed. It would probably facilitate tax computation and administration and estate planning if even this modified conformity were achieved.

5. Retain an inheritance tax and ignore the federal system, but correct loopholes and inequities and simplify computation and administration under the present tax. This might include a different tax treatment for the exercise of powers of appointment, the imposition of some statute of limitations on the collection of an inheritance tax in the ordinary case, the elimination of the complicated calculations for the estate tax deduction and prior-tax property exemption, etc. Some step in this direction seems the minimum action that should be undertaken. The inheritance tax law for the most part dates from 1935, and the gift tax from 1939. Great changes in the law of transfer taxes and in the general economic picture have taken place since those dates.

The ultimate decision as to which alternative is best for California is quite properly in the hands of the Legislature.

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