Escheat and a Constitutional Dilemma: Mannheim v. Superior Court

Lawrence C. George

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal

Part of the Law Commons

Recommended Citation
Available at: https://repository.uchastings.edu/hastings_law_journal/vol22/iss2/9

This Note is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository.
Escheat and a Constitutional Dilemma:
Mannheim v. Superior Court

By LAWRENCE C. GEORGE*

ALTHOUGH the brotherhood of man may be a biological fact, a fair number of Californians die intestate each year leaving no known heirs of any of the degrees specified in the Probate Code. The estates of such decedents are distributed to the State of California, except for such portions as may be claimed by the heirs of a predeceased spouse under section 228. According to the statutory scheme, the state holds the funds distributed to it for a period of 5 years subject to claims by the heirs of the decedent, and thereafter all claimants to the funds are forever barred.

The estate has escheated, or rather, the escheat that began with distribution to the state for want of known heirs has become complete. Or, to be yet more precise, the escheat perfected at the decedent's last heartbeat has survived defeat. The nicety of the dis-
tentions just stated is a matter of constitutional dimensions according to the recent decision of the court of appeal in Mannheim v. Superior Court.\^8

The Mannheim case presents a challenge for the California Supreme Court to review and to harmonize the diffuse statutory and common law sources of California doctrine on the subject of escheat. Having granted a hearing,\(^9\) it is hoped the court will now provide definitive resolution to the issues of logic and of policy raised in the following analysis of the appellate decision under review.

The court of appeal in Mannheim held, for constitutional reasons, that attempts by the legislature in 1968 and 1969 to enlarge the class of heirs entitled to take escheated estates before final vesting of the escheat in the State of California could be applied only to estates of decedents dying after the effective dates of the respective amendments to sections 296.4 and 228. The court thus rejected the contention that expanding the class of claimants would defeat vested rights in the original class of heirs at law; it found that even a provisional escheat is such an accretion to the public funds that its alienation by a legislative act constitutes a gift forbidden by California Constitution, article 13, section 25. Implicit in the decision is a distinction between the preexisting "unknown heirs" who from time immemorial have had a recognized right to recoup estates forfeited propter defectum sanguinis, and the heirs sought by the recent legislative acts to be added to that class. The court refers to the latter-day possessors of the cause of action (originally either by Petition of Right, or by monstrans de droit) set forth in section 1027 and Code of Civil Procedure section 1355 as entitled to "divest" the state of its escheats; the conferring of additional powers to "divest" in persons who were strangers under the laws of succession in effect at the time of the decedent's death is seen as an alienation of public funds. The decision thus frustrates a clearly expressed legislative intent, and adopts sub silentio an anachronous and unnecessary view of the character and incidents of escheat.

The source of the confusion which has now to be resolved by our highest court may prove to be edifying or amusing. In any case, this background must be presented at this time as a basis for future discus-

---

Procedural history has rarely been so relevant to an understanding of the substantive constitutional issues a court may face.

The History of the Section 228 Amendment

In 1968, having encountered an escheat situation in the administration of an estate under the Uniform Simultaneous Death Act and having learned that the "unknown" heirs of the decedent's blood were batting only .180 during the 5-year innings accorded them by section 1027, an assemblyman introduced a remedial amendment to section 296.4. It was passed without opposition. The new law limited the circumstances in which property would escheat to the state: Prior to the amendment, if either the husband or the wife in a simultaneous death situation had no heirs, that portion of his or her estate which was formerly community property ("section 228" property) would escheat to the state; after the amendment, it went to the heirs of the other spouse.

The 1968 amending legislation also included a retroactive clause, in the following language:

Section 1 of this act shall apply to any portion of an estate which on the effective date of this act has not vested absolutely in the state or has not permanently escheated to the state whether the decedent died before or after such date.

To date, there have been no reported decisions involving the retroactive application of the 1968 legislation to situations arising under the Simultaneous Death Act where the deaths occurred within the 5-year period prior to the effective date of the 1968 statutes, chapter 1407.

11. The Unclaimed Property Officer computes total receipts from January 1966 to March 1970 at $6,017,231.00 and reports that the percentage paid was 17.5 percent. Letter from Harold N. Benton to Lawrence C. George, June 4, 1970. His report of estates of over $5,000 paid, for 1967, 1968, and 1969 shows 21, 20, and 22 successful claims respectively as of June 4, 1970. No figures are available as to the number of the estates reported in note 1, supra, which fall below $5,000; but if it is assumed that half of them are below that level, then the percentage of escheated estates recovered is remarkably uniform—at .039 percent, .033 percent, and .034 percent for the respective years even though the 5-year period has not run on any of the claims. Presumably these figures represent payments predominantly from the estates in higher dollar brackets, and the conclusion is inescapable that the odds are very much against the "unknown" heirs in any given estate. Still other percentages may be computed on the dollar ratio between estates received and estate claims paid per annum, but since disbursements may pertain to receipts of any of the past 5 years, and the figures may be skewed by a single large estate, we have accepted the averaged figure submitted by the controller's office.
14. CAL. PROB. CODE § 296.4.
This comes as no surprise. The criteria for fitting the description are sufficiently restrictive to limit the set of such escheated accounts to a number probably countable on the fingers of one hand.

The enactment of the 1968 amendment to the Simultaneous Death Act caused no great commotion, even among members of the Probate Bar. The new provisions did not, however, escape the notice of the probate checkers in the Los Angeles County Superior Court when the estate of William Goldsmith, Deceased, reached a Petition for Final Distribution. The petition filed provided for one-half of William's "section 228" property to go to the heirs of his predeceased wife May, and the other one-half to go to Mr. Houston Flournoy for lack of a more consanguineous taker. One of the checkers wondered why? If May had lived longer and if she and William had been killed simultaneously, all of the "section 228" property would have gone to May's heirs under the newly amended section 296.4. William's death was within the 5-year period of section 1027 immediately preceding the 1968 amendment to section 296.4. Should May's prior demise be the sole criterion whereby William's "section 228" property is distributed to the state rather than to May's heirs? There seemed to be no rational basis for discriminating in the policy to be followed respecting heirship in this situation as opposed to the situation of those blessed few who managed to preserve their marriage through that most difficult and personal transition from this world to the next. As matters stood, the statutory scheme was an open invitation to suttee!

The suggestion that equal protection might require equal treatment for the two kinds of decedents in the distribution of escheatable "section 228" funds was advanced by this writer on behalf of May's heirs. When the matter came before the court on objections to the Petition for Final Distribution, the presiding probate judge was unable to follow counsel's flights of constitutional rhetoric, more suited perhaps to a burning issue of civil rights than a rather abstruse quarrel over unclaimed funds. The court overruled the objections to the petition with the suggestion common in such cases, to "take it to the legislature." The order became final, and the assets of William Goldsmith were duly delivered to the representatives of Mr. Flournoy.

17. Mr. Flournoy is the State Controller and is the designated distributee of all personal property other than money in an escheat case. Cal. Prob. Code § 1027, para. 4). But only Mr. Flournoy is to be named a party to independent actions filed after distribution for recovery of escheated funds. Cal. Code Civ. Proc. § 1355, para. 16.
18. Frank Yeakel, Esq., of Los Angeles.
19. Pursuant to the authority of Probate Code section 1027 alone. The At-
The legislature proved to be more receptive to the argument that in 1968 it had inadvertently created an unjust and indefensible discrimination in favor of the surviving kin of a simultaneously deceased spouse. In 1969 it passed an amendment to section 228 drafted by the writer in response to the lesson learned in the Goldsmith litigation. This amendment included by reference the retroactive application of section 296.4.20

Unsolving a New-Found Solution

In the same building where the legislature had passed the amendment to section 228, the next act of our drama was beginning to unfold. Mr. Mannheim was arguing in the Estate of Nieto21 that the legislature had just saved the court from the odious task of following the precedent learnedly set by Judge Marshall in In re Estate of William Goldsmith.22 He lost. But having a statute in hand which directed the result for which he was contending, he sought a writ of mandamus. Upon his application, the alternative writ issued and argument ensued leading to the decision to be reviewed by the California Supreme Court.

The Attorney General took the position in the Mannheim appeal23 that the retroactivity clause of the 1968 legislation could not be constitutionally applied to the estates of decedents dying before its effective date;24 as section 300 provides that the estate “passes” to the heirs upon the death of the decedent, he argued that the retroactive application of
the 1968 amendment would "divest" unknown heirs of their property rights without just compensation.\(^{25}\) It was contended that the Attorney General has no standing to assert the private claims of such quasi-hypothetical clients\(^{26}\) (would the donation of such valuable legal services to them amount to a gift of public funds?). The court of appeal found it unnecessary to reach the issues thus tendered. The "vest" which had been so elaborately woven out of "passes" in section 300 was restored to the wardrobe containing the emperor's new clothes in favor of an authentic garment found in section 1027:

If the court distributes the estate or any portion thereof to the State of California, and the distributing clause contains words otherwise creating a trust in favor of certain unknown or unidentified persons as a class, such distribution shall vest in the State of California both legal and equitable title to the property so distributed; saving, however, the right of claimants to appear and claim the estate or any portion thereof, as in this section provided.\(^{27}\)

and:

Any person who does not appear and claim, as herein required, shall be forever barred, and such property, or so much thereof as is not

---

25. CAL. PROB. CODE § 300 provides, in part: "When a person dies, the title to his property real and personal, passes to the person to whom it is devised, . . . or, . . . to the persons who succeed to his estate as provided in Division 2 ["succession" §§ 200-296.8 inclusive] of this code; but all of his property shall be subject to the possession of the executor . . . and shall be chargeable with the expenses of administering his estate, and the payment of his debts. . . ." This section is the opening provision in Probate Code Division III dealing with administration. Its reference to title which "passes to" heirs or legatees avoids the ambiguities of "vesting" while referring the reader for substantive clarification to the relevant provisions in Division II. Thus the purport of section 300 is to make explicit the fact that the executor or administrator does not take title; nothing more. But if "title" is an indestructible entity, then its diversion after the fact of "vesting" would raise a constitutional issue under the California Constitution, article I, section 14, as well as the fifth and fourteenth amendments to the United States Constitution.

26. Indeed, the assertion of such claims, based upon no more than the bare language of Probate Code section 300 and the hornbook "presumption" that every intestate has left someone entitled to claim as his heir (in re William's Estate, 37 Cal. App. 2d 181, 99 P.2d 349 (1940)) is in direct conflict with the adversary position required of the Attorney General by Code of Civil Procedure sections 1355, 1420, and 1421. Had a claiming heir appeared and sought issuance of a warrant on the State Treasury as subsequently happened in the Goldsmith matter (Saxton v. California, No. 968654 (Los Angeles Superior Court (Probate) filed Jan. 13, 1970), the diligence and ability of the People's representative would have been devoted to a diametrically opposite end, but the same result—continued possession of the fund by the state.

27. CAL. PROB. CODE § 1027, quoted in 7 Cal. App. 3d at 633, 86 Cal. Rptr. at 903-04 (emphasis added). The court ignores the explicit provision that it is distribution, not the fact of death, which "vests" legal and equitable title in the state, as appears in the opinion: "The amended statute, if applied to this estate, would divest the state of its interest existent at the time of decedent's death." Id. at 634, 86 Cal. Rptr. at 904.
claimed, shall vest absolutely in the State. 28

The court found that this language, together with the reference to “escheats” in section 231 29 and the 1969 amendment to section 228, raises an ambiguity requiring judicial resolution. Does the “escheat” which the 1969 amendment to section 228 was designed to prevent refer to the escheat at the time of death referred to in section 231, to the provisional escheat which “vests” funds in the state upon distribution under section 1027, or to the escheat which shall “vest absolutely” in the state after 5 years without claimants as provided in section 1027? 30

28. 7 Cal. App. 3d at 633, 86 Cal. Rptr. at 904 (emphasis added).
29. CAL. PROB. CODE § 231 provides, in part: “If a decedent . . . leaves no one to take his estate . . . the same escheats at the time of his death in accordance with this article.”
30. These alternatives are not exhaustive, although the appellate court’s opinion does not appear to consider the interesting distinction between “vesting” and “escheating” contained in Code of Civil Procedure section 1420. That section recognizes that some estates may be subject to claim by the Attorney General by reason of “having escheated” (presumably as that term is defined in section 231 of the Probate Code). But nothing has vested by virtue of the escheat until such claim is duly established upon notice of an Order to Show Cause “why such estate should not vest in the State” CAL. CODE CIV. PROC. § 1420. Hence, it may be inferred that the use of “escheats” in section 231 should be understood as fixing the date for closing the class of surviving heirs and for determining entitlement to mesne rents, profits, and accruals.

It should also be noted that by allowing Code of Civil Procedure section 1420, to continue on the books without any meaningful cross-referencing to Probate Code section 1027, the legislature has arguably evidenced an intent to forbid the vesting of escheated property for at least the 2-year limitation period (from date of death, not distribution) mentioned in section 1420. A court asked to distribute to Mr. Flournoy would therefore have the right (and perhaps a duty) to refuse to hear a petition filed under section 1027 of the Probate Code except when the distribution will occur no sooner than 2 years after the decedent’s date of death. In short, the reference in Probate Code section 1027 to “such time thereafter to which the matter may be continued” is conceivably part of a scheme which limits final escheat to a period no sooner than 7 years after date of death (and possibly much longer, if administration is protracted). This suggestion is buttressed by consideration of the esthetic symmetry of an arrangement that treats “unknown” heirs on a par with “missing” persons. CAL. PROB. CODE §§ 280-94. During 2 of the 7 years, no one knows to whom the estate has “passed.”

The Attorney General’s argument in favor of the presumptive vestee, the “unknown” heirs, appears to have had some influence upon the Mannheim court’s thinking, if only to raise the spectre of a vanishing title. That is, the court appears to have thought that some natural principle on the order of the conservation of matter would be violated if it could not point at all times to an entity having sufficient rights in the estate so that defeat thereof by novel legislation would be a “taking” or at least the relinquishment thereof would amount to an “appropriation” (or, if privately held, a gift), or at the very least, so that requirements of procedural due process, in its disposition would entail a far better notice procedure than is contemplated in the regular course of probate (CAL. PROB. CODE § 1200); perhaps a procedure like that in Code of
The court of appeal read the escheat proviso of the amended section 228 to refer to one of two kinds of property: (1) the property that escheats to the state as of the date of the decedent's death in accordance with the language of section 231; or (2) the property that escheats to the state only after the lapse of the 5-year period without claimants in accordance with the language of section 1027. The court found the decision an easy one:

. . . it appears that the “would otherwise escheat” test of Section 228 can only be applied after the property has been held by the state for five years, and the unallocated half of the estate can only be distributed pursuant to Section 296.4 at that time.

Consequently, the court found that the escheat proviso of section 228 only came into operation after the 5-year period. Then, and only then, did the proviso operate to require distribution of the property pursuant to section 296.4. To follow the reasoning of the court, it would not know if the estate “would otherwise escheat” unless it actually waited for 5 years to see if there were any claimants; if there were none, then clearly this was property which “would otherwise escheat” and the proviso of section 228 would apply; but then, the property would have escheated to the state and the application of section 228 would divest the state of property to which it had acquired an indefeasible right—the legislature would have made a gift of public funds to the “new” heirs.

This conclusion seems prima facie anomalous in view of the retroactivity clause incorporated by reference to the 1968 amendment to section 296.4. It seems more plausible that the legislature’s use of the phrase “would otherwise escheat” was never intended to precisely define the time at which the proviso becomes operative. Rather, it seems that the proviso merely refers to the nature of the property to which it applies, i.e., property that “would otherwise escheat” to the state “because there is no relative, including next of kin of the decedent or of his predeceased spouse.”

Civil Procedure section 1420. But the assumption that estates are perpetual in some such fundamental sense is unwarranted; there is nothing historically or conceptually wrong with defining the notion of “escheat” to mean that an estate has come up for grabs “as of the date of death” and as further meaning that its restoration to full vigor will depend upon the passage of a number of steps, some of them subject to arbitrary modification by the King's whimsical successors.

During the 5 years after distribution, it is “vested” in the state subject to divestment by a class whose membership can presumably be altered by legislative act without violating any constitutional ban on uncompensated takings, much less any ban on gifts of funds which are not, ex hypothesi, yet part of the public revenues.

31. 7 Cal. App. 3d at 633-34, 86 Cal. Rptr. at 904.
32. Id. at 634, 86 Cal. Rptr. at 904.
33. CAL. PROB. CODE § 228 (emphasis added).
Although it may be argued that the nature of the property referred to by the "would otherwise escheat" proviso can only be ascertained after escheat has occurred, this argument is specious at best. Surely the state does not demurely avert its covetous gaze until its right to the property has become absolute under section 1027 and only then perceive the nature of its prize.

Mr. Mannheim's decedent, like William Goldsmith, had died before the remedial legislation's effective date, but at least the 1969 revision had become effective before distribution of the estate; it was therefore entirely proper for the court to consider what "otherwise escheat" as used (mea culpa) in the 1969 code amendment might mean. One might ask, however, whether the legislative phraseology conferred a license to go so far beyond the legislation for enlightenment, in view of the clarifying language of the retroactivity clause.

In any case, the court did not purport to base its reading of the statute on such considerations as the legislative intent or the manifest policy of both the 1968 and 1969 amendments in favor of getting funds distributed, taxes determined, and estates settled with reference to ascertained flesh and blood claimants. Rather, it felt compelled to its conclusion by the interpretation placed on section 1027 of the Probate Code by the court in In re Lindquist's Estate.\footnote{1944}

**The Lindquist Rule**

Lindquist, a veteran of the United States Navy, was declared incompetent. Shortly thereafter the Veterans' Administration awarded him a pension which was paid to his guardian. At the time of Lindquist's death, his estate, consisting entirely of unexpended pension payments, was turned over to the public administrator. The residue of the estate was ordered to be distributed to the State of California as escheated property.\footnote{1944}

The United States contended that in accordance with section 450(3) of title 38 of the United States Code, any funds derived from such pension payments which would otherwise escheat to the state would escheat to the United States.\footnote{1944} Therefore, inasmuch as section 231 provided that property escheats to the state as of the date of the death of the decedent and that a distribution of the estate had been ordered to be made to the State of California as escheated property, the United

---

35. *Id.* at 700, 154 P.2d at 881.  
36. *Id.* at 700-01, 154 P.2d at 881.
States claimed an immediate right to the possession of the property.\textsuperscript{37}

The California Supreme Court acceded to the basic claim of the United States, \textit{i.e.}, the right to the estate upon escheat.\textsuperscript{38} It held, however, that section 1027 was controlling as to the time when the escheat would actually occur.\textsuperscript{39} Though property escheats to the state as of the date of the death of a decedent, this use of the term was not a technical one; the property was actually held by the state as trustee for claimants until the statute of limitations (section 1027) expired to give an unassailable title to the state. Consequently, the United States would have to wait until the expiration of the 5-year period provided for in section 1027 in order to assert its claim to the estate.

Concededly, \textit{Lindquist} stands for the proposition that escheat does not occur, in the technical sense of the term, until the expiration of the 5-year period established by section 1027. The court in \textit{Mannheim}, however, not only followed the \textit{Lindquist} rule to determine when the escheat was absolute, but also declared that the "would otherwise escheat" proviso of section 228 could only then come into operation. How would the court otherwise know if the property "would otherwise escheat" unless it waited 5 years to see if any claimants appeared? If none did, the property "would otherwise escheat" and then the language of section 228 would come into effect to distribute the property in accordance with section 296.4.

The \textit{Mannheim} court correctly recognized the \textit{Lindquist} rule. The problem to be resolved by the rule in \textit{Mannheim} was, however, much different from the problem in \textit{Lindquist}. The nature of the property in \textit{Lindquist} was clearly identified—an unexpended balance of pension payments.\textsuperscript{40}

In \textit{Mannheim}, legal sophistry has transmuted "when" into "what." The question which did not even occur to the \textit{Lindquist} court—what property was affected—is the burning issue before the court in \textit{Mannheim}. The court is impeccably correct that the estate would not finally escheat until the 5-year period provided by section 1027 expires; however, this should not prevent the court from ascertaining the property that will be subject to the escheat provisions.

The \textit{Mannheim} court gains yet another, more firm grip upon its bootstraps when it loosens its hold on section 1027 and grasps the precarious security of section 231. Having determined that the property

\begin{itemize}
\item \textsuperscript{37} \textit{Id.} at 710-11, 154 P.2d at 886.
\item \textsuperscript{38} \textit{Id.} at 712, 154 P.2d at 887.
\item \textsuperscript{39} \textit{Id.} at 711-12, 154 P.2d at 887.
\item \textsuperscript{40} \textit{Id.} at 700, 154 P.2d at 881.
\end{itemize}
cannot be ascertained, much less finally come to rest in the state coffers until the expiration of the 5-year period provided by section 1027, the court concludes: "The state's right to this portion of the estate became fixed and determined as of the date of death." This change of grip, from the "vest" of section 1027 to the "escheat" of section 231, is not only confusing, it results in completely unacceptable and spurious alternatives: (1) the property either cannot be identified as property which "would otherwise escheat" until after the expiration of the 5 years; or, (2) the property escheated to the state at the death of the decedent. The first alternative assumes the property is not identifiable until after the conditions of section 1027 are satisfied and the property has escheated to the state; the second construes the "escheat" of section 231 to be equivalent to the "vest" of section 1027, and again the property has escheated to the state. Either alternative requires the court to conclude that the retroactive application of section 228 will result in an unconstitutional legislative gift of public funds.

*Lindquist* does stand for an important proposition about the character of modern escheat. No longer an incident of the theory of feudal tenures, escheat is now a doctrine of inheritance, and the *Lindquist* opinion makes it clear that regardless of the use of such hoary notions as "vesting," appropriate to the ancient origins of the concept of escheat, the sovereign takes only a contingent (or indeed, a fiduciary) right in the estate as of date of death, or decree of distribution. The confluence of doctrines having their origin in the incidents of tenure with those having a root in policies concerning limitation of actions is discernible in the operation of escheat in present California practice. The sovereign obtains complete mastery of such property only by default; never by claim of right.

To understand the confusing ambiguities of doctrine which constitute a veritable mine-field of false dichotomies for resolution in the *Mannheim* case, it may be helpful to note the varied occurrences of the magic word in our jurisprudence. "Escheat" is used substantively to refer to an estate, as in the dictum in *State v. Savings Union Bank & Trust Co.*: "some States [but not California] holding to the doctrine that title to an escheat vests immediately in the state. . . ." The same word is more commonly used as the past participle of a verb of very indefinite tense; thus, in *People v. Folsom*: " . . . the king cannot

42. *Id.* at 636, 86 Cal. Rptr. at 906.
43. 186 Cal. 294, 299, 199 P. 26, 28 (1921).
take upon himself the possession of an estate said to have escheated, until the fact is judicially ascertained..." 44 It is used adjectivally to qualify a certain kind of action, as in Code of Civil Procedure section 1420, captioned "Escheat Actions." Used as a verb describing something that happens to an estate, "escheat" may refer to the time of a decedent's death (section 231) or to something that is about to happen (Code of Civil Procedure section 1421), 45 presumably other than Volpone's last illness. The common denominator in these varying expressions, if any exists, is a concept of the state as alternate beneficiary (qualified to assert the contingencies which establish failure of devolution of the intestate estate upon the primary beneficiary) of the legislature's bounty.

**Escheat: Expansion of a Policy**

The common law administration of escheat is doubtless an historically legitimate ancestor of the California statutory scheme. The termination of a feudal tenure upon failure of heirs 46 (as opposed to forfeitures for treason or other attainder) resulted in an automatic reversion of the estate to the lord of the fee, who was not necessarily the sovereign, but could be an intermediate lord in the feudal chain. The ultimate proprietor or grantor was the king, and his taking was always recognized to be in his proprietary ("private") capacity 47 so that upon the appearance of an heir, the property would be returned by a petition of right or, more commonly, by a monstrans de droit tried in the petty-bag office in the court of chancery. 48 Furthermore, even though escheat was thought to occur as at death, the king could not possess his "escheat" except after a proceeding with jury trial called Inquest of Office, and Blackstone remarks:

> With regard to real property, if an office be found for the king, it puts him in immediate possession, without the trouble of a formal

44. 5 Cal. 379 (1855).
45. And whatever the happening is that constitutes an immediate, or imminent escheat, the statutes also recognize that it may be provisional, or permanent. "[M]oney or other property . . . if not claimed within five years from the date of distribution] is permanently escheated to the State. . . ."
46. CAL. CODE CIV. PROC. § 1441 (emphasis added); see id. § 1350.
48. "[W]here the owner of land died without competent heirs to take the property . . . because there was no one else to take it, the land reverted to and vested in the King, who 'was [sic] esteemed in the eye of the law [sic] the original proprietor of all the lands in the kingdom. 1 Cooley's Blackstone, *302. . . .'" State v. Savings Union Bank & Trust Co., 186 Cal. 294, 298, 199 P. 26, 28 (1921).
49. See 3 W. BLACKSTONE, COMMENTARIES *256-57.
entry, provided a subject in the like case would have had a right to enter; and the king shall receive all the mesne or intermediate profits from the time that his title accrued.\(^{49}\)

The conditional nature of the king's taking, and the paramount right of the true heirs to receive the escheated funds was recognized long before section 1027 dealt with this subject. Thus statutes 2 and 3 Edward VI, chapter 8, provided that:

Where an Heir of full age is found within Age, he shall have a Write of \textit{Aetate probanda}, and may proceed to sue out his Livery, or \textit{Ouster le main} (as his case is) and receive the Profits of his Lands, Notwithstanding such Office found.

And after a jury trial established escheat by reason of the absence of known heirs (\textit{de quo vel de quibus etc. ignorant}, or \textit{Per quae servitia ignorant}) the same statute provided that such a verdict shall not make a tenure of the king nor a tenure \textit{in Capite}; in short, the rights of the true heirs were so respected that even the king's grantee after escheat could be ousted. Blackstone gives the flavor of the attitudes held toward escheat by the common lawyers:

These inquests of office were devised by law, as an authentic means to give the king his right by solemn matter of record; without which he in general can neither take, nor part from anything. (y) For it is a part of the liberties of England, and greatly for the safety of the subject, that the king may not enter upon or seize any man's possessions upon bare surmises without the intervention of a jury. . . .\(^{50}\)

Also:

In order to avoid the possession of the crown, acquired by the finding of such office, the subject may not only have his \textit{petition of right}, which discloses new facts not found by the office, and his \textit{monstrans de droit}, which relies on the facts as found; but also he may (for the most part) \textit{traverse} or deny the matter of fact itself, and put it in a course of trial by the common law process of the court of chancery: . . . These \textit{traverses}, as well as the \textit{monstrans de droit}, were greatly enlarged and regulated for the benefit of the subject, by the statutes before mentioned, and others.\(^{51}\)

This historical digression, it will be seen, is relevant to the issue of when, if ever, an escheat becomes "public money;" possession of such estates by the public's representatives not being \textit{per se} an aspect of sovereignty in the same sense that the public revenues are held by and for the general uses of the sovereign.

**Constitutional Implications?**

By using the approach of the \textit{Lindquist} rule, the court has a ready

---

49. \textit{Id.} at \textit{*260}.

50. \textit{Id.} at \textit{*259}.

51. \textit{Id.} at \textit{*260}.
answer for the contention of the Attorney General that by expanding the class who can take in lieu of escheat, the unknown heirs are deprived of property without just compensation.52 The court's answer would be: if the newly created intestate successors to "section 228" property must wait like the federal government in Lindquist until the section 1027 claiming period for the old "unknown" intestate successors has expired, then the 1969 law does nothing more than issue a few new passes to the queue at the State Treasurer's window—behind the next of kin of the decedent, but ahead of Governor Reagan.53 The unknown next of kin would have nothing to complain of as to such junior claimants. The court's refusal to so hold54 is apparently based upon the conclusion that after the time limit of section 1027 expires, the teller's window is irrevocably closed, for it agrees with Mr. Mannheim's argument against the Attorney General's putative clients:

The legislation in question does not affect any rights which were vested in the "unknown" heirs prior to its enactment. Under the law in effect at the time of decedent's death, the "unknown" heirs of decedent must come forward to divest the state of its interest in the estate at the end of the five year period, and the property would vest absolutely in the state.55

This conclusion, aside from the awkwardness of the idea that the state holds escheats for 5 years come hell or highwater ("at the end of" having been used for "during," which would comport better with the statutory scheme), makes hard work for the court in getting its views on vesting harmonized with its views on escheating. For the implication of its adoption of the Lindquist test is that the 1969 and 1968 amendments must extend, and pro tanto overrule, the 5-year limit of section 1027, or be nugatory. Reasoning that the state, rather than the "unknown heirs," is the provisional vestee as of date of death (i.e., that section 231 prevails over section 300), the court is forced to agree that: "Application of the amended statutes in this case would increase the class of persons entitled to divest the state of its right to the property."56 It therefore follows that whatever rights are conferred by the

53. The nearest thing we have to the king envisioned by the sovereignty concepts of feudal tenure—perhaps identical, considered from the viewpoint of the actor.
54. 7 Cal. App. 3d at 634, 86 Cal. Rptr. at 904.
55. Id. Thus, there is an implicit distinction drawn between the "passes" of Probate Code section 300, which passes nothing; and the "escheats" of section 231, which passes whatever the court wishes to make of it—a miracle which surpasseth mortal understanding. Section 231 may pass anything, but not "permanently." CAL. CODE CIV. PROC. § 1441.
56. 7 Cal. App. 3d 634-35, 86 Cal. Rptr. at 904.
1969 legislation, they are on a par with the rights granted "legitimate claimants" pursuant to section 1027 insofar as any right of the state is concerned. 57

The legislature has said nothing about the relative priorities of "legitimate" vis-à-vis "new" claimants; surely a most lamentable oversight. 58 Unless, of course, the court has been caught assuming its conclusion when it read "would otherwise escheat" to mean that section 231 must be deemed to have already applied, rather than that its provisions threaten to apply. Such an interpretation necessarily assumes that the "legitimate" claimants are barred and that the legislature intended a preferential distribution to spousal heirs in cases such as Mr. Mannheim's. 59 This indeed is the conclusion at which the court has arrived: it reasoned that the "legitimate" claimants are not adversely affected—rejecting the Attorney General's argument. It is the state coffers which are being drained.

The other alternative, however, fixing the right of the state at the end of the 5-year period provided by section 1027, does not necessarily raise the fifth amendment problems conjured up by the Attorney General. The blood relations of the decedent could have prevailed via a petition under article 3, chapter 3, title X of the Code of Civil Procedure relating to the payment of claims against the state. 60 If the property had already been distributed to the spousal heirs, it would most prob-

57. The court's conclusion here is clearly correct if the writer may cite himself as involved in the legislative history of this amendment. The language chosen by the court to characterize the preamendment claimants, "... though title has vested in the state, it is subject to divestment by the appearance of legitimate claimants" (Id. at 634, 86 Cal. Rptr. at 904), is, however, an indication of its true basis for finding a constitutional flaw in what amounts after all to no more than a legislative tinkering with the beneficiary clauses in the 5-year trust required by Probate Code section 1027.

58. The "mea culpa" of the text above is most sincerely felt, although it is easy to remain convinced that the court might reasonably have read the new proviso of section 228 to mean that the unclaimed fund was subject to claim by either "genuine" or spousal heirs, the race to the swiftest; but in the event of simultaneous claims, the word "otherwise" would indicate a preference to heirs of the blood. Adequate retribution for the draftsman's oversight would seem to have been provided absent the Mannheim decision by the filing of a petition under Code of Civil Procedure section 1355 on behalf of alleged blood relations of William Goldsmith (Saxton v. California, No. 968654 (Los Angeles Supreme Court (Probate) filed Jan. 13, 1970) before the claims of May Goldsmith's heirs could be adjudicated under the "Goldsmith Act of 1969."

59. The Mannheim case went up on a writ of mandate to test the validity of a per-distribution interlocutory order denying Mannheim's motion to reconsider the probate court's determination of heirship in light of the 1969 amendment to Probate Code section 228. 7 Cal. App. 3d 631, 86 Cal. Rptr. at 902.

60. CAL. CODE CIV. PROC. §§ 1350-56.
ably be deemed a constructive trust in favor of the "legitimate" heirs.\textsuperscript{61}

The court, for reasons unstated, elected to treat the matter before it in \textit{Mannheim} as one in which the state's right had already become fixed. By so doing, the court falls into an avoidable logical error, for it fails to take account of the fictional nature of the "vesting as of date of death"\textsuperscript{62} with which both code sections are arguably concerned. It is of course necessary for a number of good reasons to establish when a class of intestate successors is closed to further entry or exit by birth or by death, and both section 231 and section 300 purport to do this by establishing the date of death as the critical time. They speak in the present tense of what happens to the estate at that time: An estate "passes" or it "escheats;" but it goes without saying, although it is worth careful attention, that the legal consequences of the operation of these or any other code sections must be determined by a court at a later time based upon the establishment of contingent facts (e.g., the absence during administration of "known heirs") that justify a reference to a particular statute. The referenced statute, be it section 231 or section 300, may not be assumed to apply just because if it were to apply it would possibly offer an answer to the question. Reference to the statute \textit{in vacuo} begs the question. The court which refuses to realize this is in danger of losing its perspective and of confusing the difference between a case in which section 231 has been applied, and one in which it threatens to \textit{be} applied.

In any event, the court's consideration of section 231 for its bearing on the phrase "otherwise escheat" in the amended section 228 is understandable. Surely the "escheat" of section 231 is that which would otherwise occur if the provisions of section 296.4 were not applied as directed to prevent such a fate. But section 296.4 was also intended to prevent the loss by "escheat" of any portion of an estate which has not "permanently escheated" and has not "vested absolutely;" witness its retroactivity clause. The crucial issue is, when does the evitable event, "escheat," occur?\textsuperscript{63} The answer, based upon the court's confla-

\textsuperscript{61} It should be noted that the administrative complexities involved in the actual distribution are identical whether the amendment is applied retrospectively or prospectively.

\textsuperscript{62} As noted above at note 55, "vesting" is the court's, not the legislature's construct as applied to date of death. The legislature leaves "vesting" to occur at the date of distribution; but once that magic term is deemed to be the key, it is of course "necessary" to posit a continuity going back to the only certainty in the whole theoretical framework—death. (This discussion does not purport to deal with the tax consequences of this legislation.)

\textsuperscript{63} A silly question, as noted in note 24 supra, if posed in an effort to discover whose title is tarnished if the amendatory provision of section 228 is invoked. The
tion of the various references in section 1027, section 231, and Lindquist to "escheats," "passes," and "vests," is never: for whenever a determination is made that there is to be an escheat, the statute directs that it be regarded as having already taken place, thus demonstrating to the court's satisfaction the survival of the original medieval concept in nearly pristine purity. An escheat is something that has either happened or it never will. The only problem with such a comfortable kind of conceptualism is that it is difficult in such a context to make sense of the words "would otherwise." For even a fictional past event appears to have participated in the process of history that underlies the use of such phrases, couched in terms of the passage of time by the high priests of the law.

The Mannheim opinion in the court of appeal manages to pass through the foregoing metaphysical morass undaunted and unscathed, emerging with bootstraps so muddied as to be virtually invisible, to face the question whether retroactive application of section 296.4 (as directed by section 228) to open up "the class of persons entitled to divest the state of its right" to the property would be constitutional. 64 To ask the question is to suggest the answer:

"... relinquishment of rights vested in the state, when not made for a public purpose, constitutes an unconstitutional gift of public funds. 65

There is, apparently, no public purpose served in allowing these "vested"

court, of course, assumes without proof or examination that someone's title will be tarnished by carrying out the legislature's intent. It is a more pertinent question, however, when the mesmerizing effect of section 231's time reference is overcome and full weight is given to section 4 of chapter 1407 of the 1968 statutes. For the reference of the latter statute to its effective date may be used to justify a relation-back kind of avoidance of any provisional escheat which may have occurred subsequent to its effective date under a section 1027 distribution. For example, the Goldsmith distribution order (May 1969) was after the enactment of the amended section 296.4. The later incorporation of section 296.4 by reference in section 228 could be argued to relate back to the effective date of the amendment to section 296.4 just as section 231 relates back to the time of death, thereby making the provisional escheat erroneous, however pardonable the probate court's failure to prophesy the nunc pro tunc extension of legislative abhorrence of forfeitures. Moreover, such relation back would obviously be in conformity with the legislative intent to give the widest possible effect to its anti-escheat provisions; but the exercise would also be a bit of supererogatory sophistry, since both the 1968 and the 1969 code amendments were intended to cover all funds and property, "escheated" or not, and distributed or not, which were short of the 5-year limit for final and "absolute" control by the sovereign.

64. 7 Cal. App. 3d at 634-35, 86 Cal. Rptr. at 904-05.
65. Id. at 635, 86 Cal. Rptr. at 905. The court's invocation of the California Constitution, article 13, section 25, is based upon a concept of "vesting" that is thought sufficient proof of what constitutes "public money" and also upon an equation of escheat procedures with the incidents and effects of taxes and tax liens.
funds to be snatched away by in-laws in the absence of family members.

The "vest" of section 1027 has become the "escheats" of section 231, and both have been woven into a constitutional straitjacket. The retrospective concept of continuity of title is allowed to defeat the retroactive intent of the legislature to renounce claims to funds which literally fall into the state's control without exercise of the taxing or other power. In the face of such legerdemain, one can only wonder by what sleight of hand the "legitimate" heirs of section 1027 have avoided the same bar.