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International Law-Treaties-Inheritance Rights of Residents of Yugoslavia

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INTERNATIONAL LAW—TREATIES—INHERITANCE RIGHTS OF RESIDENTS OF YUGOSLAVIA—All the heirs at law of a Pennsylvania resident who died intestate resided in Yugoslavia. The Orphans' Court found that the distributees would not have the actual benefit, use, enjoyment or control of their intestate shares. In accordance with a state statute providing for such contingency,¹ the funds were ordered paid, without escheat, into the state treasury. On appeal, *held*, affirmed, one judge dissenting. Because the statute is custodial rather than confiscatory, it is not repugnant to the most-favored-nation clause of the treaty between the United States and Yugoslavia which provides for reciprocal rights of inheritance between citizens of the two nations. *In re Belemechich's Estate*, 411 Pa. 506, 192 A.2d 740 (1963), *rev'd per curiam sub nom. Consul General of Yugoslavia v. Pennsylvania*, 375 U.S. 395 (1964).

By customary international law, aliens have no right to inherit property.² The individual states in the United States have traditionally been regarded as having the dominant interest in determining the extent

¹ PA. STAT. ANN. tit. 20, §§ 1155-59 (Supp. 1962). Two alternatives are provided when it appears to the court that the distributee would not have the use of the property: (a) to make payments in such manner and amounts as the court may deem proper, or (b) to withhold distribution, convert the share into cash, and pay it into the state treasury without escheat.

² 3 HACKWORTH, DIGEST OF INTERNATIONAL LAW § 290 (1940); 1 HYDE, INTERNATIONAL LAW § 203 (2d ed. 1945); 1 OPPENHEIM, INTERNATIONAL LAW § 321 (8th ed. 1955).

to which aliens can inherit property within their jurisdiction.³ This power has so far been restricted only by the exercise of the federal treaty power.⁴ A number of states have limited the right of aliens residing in "Iron Curtain" countries to inherit property of which the state has jurisdiction.⁵ This legislation has followed one of two basic patterns. The first, "reciprocal rights" legislation, provides for escheat of property which would otherwise pass to citizens of a foreign country if that country's inheritance laws discriminate against heirs in America.⁶ The second, "benefit rule" legislation of the type involved in the principal case, provides that nonresident alien heirs must prove that they will receive the benefit, use, enjoyment, or control of the property before the state will release it to them.⁷

In the leading case of *Clark v. Allen*,⁸ the United States Supreme Court summarily dismissed the argument that reciprocal rights laws are unconstitutional as an infringement on the exclusive federal power over foreign affairs.⁹ In a recent case involving benefit rule legislation, however, two Justices dissented from a decision dismissing an appeal for lack of a substantial federal question.¹⁰ They argued that if the purpose of such statutes is to preclude unfriendly governments from obtaining funds, as it appears to be,¹¹ this would seemingly be an unlawful attempt to regulate foreign affairs.¹² The practical impact of these statutes on foreign affairs has changed since *Clark*,¹³ and there are some indications that the attitude

³ Boyd, *Treaties Governing the Succession to Real Property by Aliens*, 51 MICH. L. REV. 1001 (1953).

⁴ *Id.* at 1005.

⁵ Chaitkin, *The Rights of Residents of Russia and Its Satellites to Shares in Estates of American Decedents*, 25 SO. CAL. L. REV. 297 (1952). In most states, such legislation was originally passed in response to the menace of Nazi Germany, and is not limited in its terms to Iron Curtain countries. *Id.* at 298.

⁶ See, e.g., CAL. PROB. CODE § 259; ORE. REV. STAT. § 111.070 (1951). These statutes cast the burden of proof of reciprocity on the alien heir. Chaitkin, *supra* note 5, at 307. Conceivably, therefore, these statutes could work an injustice even on citizens of friendly countries. See *id.* at 317.

⁷ See FLA. STAT. ANN. § 731.28 (Supp. 1960); MD. ANN. CODE art. 93, § 161 (1961); MASS. GEN. LAWS ANN. ch. 206, § 27B (Supp. 1961); N.J. STAT. ANN. § 3A:25-10 (1953); N.Y. Surr. CT. ACT § 269; OHIO REV. CODE § 2113.81 (1958); PA. STAT. ANN. tit. 20, § 1156 (Supp. 1962); R.I. GEN. LAWS ANN. § 33-13-13 (1956); WIS. STAT. ANN. § 318.06(8) (1958).

⁸ 331 U.S. 503 (1947).

⁹ *Id.* at 504.

¹⁰ Justices Black and Douglas, dissenting in *Ioannou v. New York*, 371 U.S. 30 (1962).

¹¹ See, e.g., Boyd, *The Invalidity of State Statutes Governing the Shares of Non-resident Aliens in Decedents' Estates*, 51 GEO. L.J. 470, 488 (1963). The argument is sometimes advanced that decedents' intentions are effectuated by the statutes. *Id.* at 487. Some writers feel, however, that these statutes usually defeat the decedent's intention. See, e.g., Heyman, *The Nonresident Alien's Right to Succession Under the "Iron Curtain Rule,"* 52 NW. U.L. REV. 221, 236 (1957). Other writers have attacked the underlying assumption of the statutes, for they feel that Soviet heirs do in fact receive the benefit of foreign distributions. See, e.g., Berman, *Soviet Heirs in American Courts*, 62 COLUM. L. REV. 257, 263 (1962).

¹² *Ioannou v. New York*, 371 U.S. 30, 34 (1962).

¹³ Increasing capital emigration and growing national interest in foreign investment have changed the problem from one primarily of aliens seeking property rights in the

toward the magnitude of that impact has also changed.¹⁴ Nevertheless, it is impossible to predict whether these considerations will eventually bring about a reversal of *Clark*, and, at least by implication, benefit rule legislation would seem to be secure for the present from attack on constitutional grounds.¹⁵

In determining in the principal case that the heirs would not have the actual benefit or control of the decedent's estate, the court relied heavily upon an extraordinary use of judicial notice of conditions in Yugoslavia.¹⁶ Other courts, however, have determined this question by relying principally on previous judicial decisions and on official federal publications defining federal policies.¹⁷ With respect to Yugoslavia, two lower Pennsylvania courts had previously determined that a Yugoslavian heir would receive the benefit of his share.¹⁸ Moreover, Treasury Department regulations, and State Department reliance upon them, seem to reflect a federal determination that funds will reach their destination in Yugoslavia.¹⁹ The decision in the principal case, therefore, seems to be a deviation from the established pattern of decision in this area.

It is elementary that a state statute cannot be given effect if it conflicts

United States to one of Americans seeking property rights in foreign countries. *Boyd*, *supra* note 11, at 514.

¹⁴ *Ibid.* It is interesting to note that Mr. Justice Douglas, who wrote the opinion for the Court in *Clark*, also wrote the dissent in *Ioannou*. The State Department has found the administration of the benefit rule statutes to be a constant source of embarrassment. See *Heyman*, *supra* note 11, at 237.

¹⁵ See notes 9-10 *supra* and accompanying text.

¹⁶ See principal case at 509, 192 A.2d at 742. Several other courts have employed this technique. See *Heyman*, *supra* note 11, at 233. Generally, only when a matter is not disputable, and is well established and authoritatively settled, can it properly be a matter of judicial notice. 20 AM. JUR. EVIDENCE § 19 (1939). The unusual employment of judicial notice in this area has been prompted in large part by the difficulty of obtaining evidence and by a desire to prevent the determination from becoming a battle of experts. *Snyder & Stander, Distributive Rights of Foreign Beneficiaries as Affected by State Action—Recent Pennsylvania Developments*, 63 DICK. L. REV. 297, 307 (1959). However, in *In re Zupko's Estate*, 15 Pa. D. & C.2d 442 (Orphans' Ct. 1958), the court compiled over 400 pages of expert testimony, intending that it be employed in similar cases. Use of such testimony, supplemented periodically, would seem to obviate the necessity for any haphazard use of judicial notice in the sensitive area of foreign relations.

¹⁷ Note, 36 TUL. L. REV. 799, 809 (1962). Courts have often relied on 31 C.F.R. § 211.3(a) (Cum. Supp. 1963), which lists the countries in which there is not a reasonable assurance that a payee of a check drawn in the United States will be able to negotiate it for full value. See, e.g., *In re Braier*, 305 N.Y. 148, 157, 111 N.E.2d 424, 428 (1953). The New York courts immediately began to distribute funds to Polish distributees when that country was removed from the list. See *In re Doktor's Will*, 18 Misc. 2d 223, 183 N.Y.S.2d 60 (Surr. Ct. 1959).

¹⁸ See *In re Aras' Estate*, 16 Pa. D. & C.2d 635 (Orphans' Ct. 1960); *In re Piscak's Estate*, 108 PRR. LEG. J. 309 (Allegheny County Orphans' Ct. 1960).

¹⁹ See, e.g., 31 C.F.R. § 211.3(a) (Cum. Supp. 1963). For examples of cases in which courts relied on letters from the State Department which apparently adopted the policies of this regulation, see, e.g., *Petition of Mazurowski*, 331 Mass. 33, 38, 116 N.E.2d 854, 858 (1954); *Estate of Markewitsh*, 62 N.J. Super. 407, 409, 163 A.2d 232, 233 (Passaic County Ct. 1960).

with a federal treaty.²⁰ In reversing the principal case, the United States Supreme Court apparently found that the Pennsylvania statute, although custodial, violated a treaty of 1881 between the United States and Serbia,²¹ as that treaty had been interpreted by the Court in the recent case of *Kolovrat v. Oregon*.²² This treaty is recognized by the federal government as being currently in force with Yugoslavia, successor sovereign of Serbia.²³ Article II of this self-executing treaty²⁴ provides for unconditional most-favored-nation treatment of inheritance rights.²⁵ An unconditional most-favored-nation clause in a treaty grants to each signatory nation the broadest rights and privileges which the other nation grants by any present or future treaty.²⁶ Most significant to the present case is a treaty of 1853 between the United States and Argentina.²⁷ Article IX of that treaty provides for very broad reciprocal rights of inheritance on the same basis and in the same manner as native citizens.²⁸ In *Kolovrat*, the Supreme Court stated that the provisions of the Argentine treaty are incorporated into the Serbian treaty, and that the inheritance rights of citizens of Yugoslavia are consequently to be identical with those of American citizens.²⁹

This construction of the 1881 Serbian treaty is also strongly supported by traditional judicial methods of treaty interpretation. In addition to a marked tendency to overrule any state law inimical to the general purpose of a treaty,³⁰ American courts have long recognized and employed the

²⁰ See, e.g., *Hines v. Davidowitz*, 312 U.S. 52 (1941); *Hauenstein v. Lynham*, 100 U.S. 483 (1879).

²¹ Treaty With Serbia for Facilitating and Developing Commercial Relations, Oct. 14 1881, 22 Stat. 963, T.S. No. 319.

²² 366 U.S. 187 (1961). A possible second ground for the *Kolovrat* decision, that a reciprocal rights statute violates federal foreign policy as expressed in the International Monetary Fund Agreement, although having wide implications, would not control the principal case, since the benefit rule is not concerned solely with the exchange rates.

²³ See Settlement of Pecuniary Claims Against Yugoslavia Agreement With Yugoslavia, July 19, 1948, art. V, 62 Stat. 2658, T.I.A.S. No. 1803. For the official United States attitude toward the continuing effect of the treaty as to property rights, see Myers, *Contemporary Practice of the United States Relating to International Law*, 55 AM. J. INT'L L. 150 (1961).

²⁴ Treaties giving aliens the right to inherit have always been held self-executing. Henry, *When Is a Treaty Self-Executing*, 27 MICH. L. REV. 776, 781 (1929).

²⁵ "Article II. In all that concerns the right of acquiring, possessing or disposing of every kind of property, real or personal, citizens of the United States in Serbia and Serbian subjects in the United States, shall enjoy the rights which the respective laws grant or shall grant in each of these states to the subjects of the most favored nation." For a view that this article provides unconditional most-favored-nation treatment, see *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961); Meekison, *Treaty Provisions for the Inheritance of Personal Property*, 44 AM. J. INT'L L. 313, 314 (1959).

²⁶ See, e.g., *Kolovrat v. Oregon*, 366 U.S. 187, 193 (1961).

²⁷ Treaty of Friendship, Commerce, and Navigation, With the Argentine Confederation, July 27, 1853, 10 Stat. 1005, T.S. No. 4.

²⁸ "In whatever relates to . . . acquiring and disposing of property of every sort and denomination, either by sale, donation, exchange, testament, or in any other manner whatsoever, . . . the citizens of the two contracting parties shall reciprocally enjoy the same privileges, liberties, and rights, as native citizens . . ." *Ibid*.

²⁹ 366 U.S. 187, 191 (1961).

³⁰ See, e.g., *Nielsen v. Johnson*, 279 U.S. 47 (1929); *Jordan v. Tashiro*, 278 U.S. 123

doctrine favoring liberal construction of treaties.³¹ This doctrine was applied in *Kolovrat* in interpreting the scope of the Serbian treaty broadly.³² Seemingly, its application here would dictate absolutely equal rights with American citizens, a reasonable as well as possible reading of the treaty. Moreover, courts usually give considerable weight, though not controlling influence, to the construction placed upon a treaty by the political department of the federal government.³³ Federal interpretation clearly recognizes that inheritance rights are reciprocal without regard to domicile.³⁴ Further, the objectives of the parties in negotiating a treaty are often relied upon by a court in interpreting the treaty.³⁵ Specific provisions of the Serbian treaty,³⁶ as well as the history of the negotiations,³⁷ definitely indicates a desire to facilitate the most liberal sort of exchange between the two nations.

Residents of Pennsylvania do not have to prove that they will "hear the merry jingle in their pockets of the money left them"³⁸ before being entitled to receive it.³⁹ By establishing such a requirement for alien heirs, however, the Pennsylvania benefit rule statute clearly treats Yugoslavian heirs differently from American heirs. Although a custodial statute is certainly less harsh than a confiscatory one,⁴⁰ and theoretically may be termed procedural as compared to the clearly substantive reciprocal rights statutes,⁴¹ the practical result may equally be the eventual loss of the property to the Yugoslavian heir. A drastic change in Yugoslavian policies

(1928). See also *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937).

³¹ See, e.g., *Bacardi Corp. v. Domenech*, 311 U.S. 150, 163 (1940); *Jordan v. Tashiro*, 278 U.S. 123, 128 (1928).

³² 366 U.S. 187, 194 (1961).

³³ *Meekison*, *supra* note 25, at 326. See, e.g., *Factor v. Laubenheimer*, 290 U.S. 276, 294 (1933); *Terrace v. Thompson*, 263 U.S. 197, 223 (1923).

³⁴ See S. REP. NO. 800, 81st Cong., 1st Sess. 4 (1950).

³⁵ CHANG, *THE INTERPRETATION OF TREATIES BY JUDICIAL TRIBUNALS* 181 (1933).

³⁶ The commercial relations established between the two nations, facilitated by the freedom of residency of citizens in each other's territory, would be seriously hampered if one accumulating property were denied the gratification of leaving the property to whom he pleased. See *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961); *Santovicenzo v. Egan*, 284 U.S. 30, 37 (1931).

³⁷ The 1881 treaty was one of a series of treaties negotiated with the purpose of obtaining reciprocal national treatment for property rights. See, e.g., Report on Negotiations dated Nov. 30, 1850, 5 MILLER, *TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES* 861 (1937); D.S. 15 Instructions, Argentina, 19-26, 6 MILLER, *op. cit. supra* at 219.

³⁸ Principal case at 512, 192 A.2d at 743.

³⁹ PA. STAT. ANN. tit. 20, § 1156 (Supp. 1962).

⁴⁰ Especially is this true of the Pennsylvania statute, which provides 2% interest per annum on funds held in custody. See PA. STAT. ANN. tit. 20, § 1158 (Supp. 1962).

⁴¹ *Snyder & Stander*, *supra* note 16, at 301. Alternative (a) of the Pennsylvania statute, summarized in note 1 *supra*, is even more clearly procedural than alternative (b), which was used by the court in the principal case. But alternative (a) also treats Yugoslavian heirs differently, limiting the right to immediate possession which the heir would have if an American.

can not be reliably predicted for the foreseeable future. Inevitably claims will be forgotten,⁴² or the difficulty of proof will become insurmountable for the claiming distributee.⁴³ Regardless of these practical effects, however, the statute clearly discriminates against alien heirs.⁴⁴ Because such discrimination in relation to Yugoslavian heirs violates the equal treatment guaranteed them under the 1881 treaty,⁴⁵ the Supreme Court was undoubtedly correct in reversing the decision of the Pennsylvania high court. Having been decided on these narrower grounds, however, the principal case failed to provide an opportunity for attacking all state alien succession statutes on broader constitutional grounds, a problem which may be expected to arise in the course of future litigation.

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⁴² Attempts to circumvent the benefit rule statutes have not been successful. The courts have refused to honor assignments of the rights of alien distributees even to persons who certainly would receive the benefit of the distribution. See, e.g., *In re Geiger's Estate*, 12 Misc. 2d 1043, 175 N.Y.S.2d 588 (Surr. Ct. 1958); *In re Perlinsky's Estate*, 202 Misc. 351, 115 N.Y.S.2d 545 (Surr. Ct. 1952).

⁴³ Before custody of the property will be given to the distributee, he must provide "proof to the satisfaction of the court of the petitioner's ownership of such money and that he will have the actual possession, benefit, use, enjoyment or control, thereof." PA. STAT. ANN. tit. 20, § 1158 (Supp. 1962).

⁴⁴ Besides the obvious discrimination in withholding distribution from the Yugoslavian heirs, consider the additional discriminations possible in alternative (b) of the Pennsylvania statute, summarized in note 1 *supra*. Land, or a family heirloom, descending to a Yugoslavian resident, will be converted into cash. This will be not only a loss of a valued family possession, but likely a financial loss as well.

⁴⁵ See notes 29-30, 34, 36-37, 39 *supra* and accompanying text.