PennState Dickinson Law

DICKINSON LAW REVIEW
PUBLISHED SINCE 1897

Volume 63
Issue 4 *Dickinson Law Review - Volume 63, 1958-1959*

6-1-1959

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Recommended Citation

Ralph S. Snyder & Irvin Stander, *Distributive Rights of Foreign Beneficiaries as Affected by State Action-Recent Pennsylvania Developments*, 63 DICK. L. REV. 297 (1959).
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DISTRIBUTIVE RIGHTS OF FOREIGN BENEFICIARIES AS AFFECTED BY STATE ACTION – RECENT PENNSYLVANIA DEVELOPMENTS

BY RALPH S. SNYDER * and IRVIN STANDER **

SINCE 1939, the world has been imperiled by the inability of nations to live together peaceably. In those twenty years we have witnessed a seemingly endless battle of contending forces. Political idealogies such as Nazism, Fascism and Communism, which are repugnant to the individual liberties on which our nation is founded, have been responsible for World War II and the Cold War.

The impact of these events has been recognized in many areas of the law, yet the reader may be surprised to learn their effect is also felt in the area of decedent's estates. This article discusses the right of a beneficiary residing outside of the United States to share in the distribution of a resident decedent's estate. However, problems frequently arise in this area because our nation has attracted to its shores persons who have left behind them their loved ones, the natural objects of their testamentary disposition, or their heirs under the laws of succession.

Loyalty to our own country and a natural distrust of those nations whose governments condone the promiscuous subversion of human freedoms, together with a wanton disregard of property rights has given birth to various types of state legislation designed to bring about restrictions of varying degrees governing distribution of funds to such non-resident aliens. This article deals with those legislative endeavors and with the actions of the state courts in the absence of legislation.

THE BACKGROUND OF THE LEGISLATION

At common law an alien, whether resident or non-resident, could acquire or dispose of real estate by purchase or devise, at least unless and until the sovereign demanded an escheat. However, he was precluded from taking it by operation of law, as by descent or inheritance.[1]

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[1] Fairfax's Devisee v. Hunter Lessee, 7 Cranch. 603, 619, 11 U.S. 603, (1813); Hauenstein v. Lynham, 100 U.S. 483, 488-490 (1880); 5 THOMPSON, REAL PROPERTY (1957 Revised Ed.) § 2419; 6 THOMPSON, REAL PROPERTY (Perm Ed.) § 3129.

On the other hand, an alien was capable of taking, holding and conveying personal property.[2] This included the right to bequeath it to another[3] and to receive it as next of kin or legatee.[4]

In *Techt v. Hughes* Judge, later Justice, Cardozo said: [5]

> ". . . Inheritance by aliens, says Coke, (Calvin's Case, 4 Co. Rep. 1, 19) would 'tend to the destruction of the Realm.' And if it be demanded 'wherein doth that destruction consist,' his answer is: 'First, it tends to destruction *tempore belli;* for then strangers might fortify themselves in the heart of the realm and be ready to set fire on the commonwealth,' for all which he finds example and warning in the legend of the Trojan horse. . . ."

Treaties have abrogated much of the effect of the common law rule in respect to real estate,[6] where statute had not already done so, as in Pennsylvania.[7] The rule regarding personalty was recognized by statute in nearly every jurisdiction.[8] In Pennsylvania, an action on behalf of an alien who resided in Russia was successfully maintained and distribution ordered even though the government of Russia was not officially recognized by the government of the United States at that time.[9]

Yet, when the governments of Hitler and Mussolini began to manifest their uncontrolled brutality upon the peoples of Europe, coupled with an apparent disregard of a person's property rights, the legislatures and courts of the several states were constrained to vent their displeasure. Sympathy for the persecuted under domination of those governments, touched with the Trojan horse philosophy of Lord Coke, was the impelling motive.[10]

As one court said: [11]

> "Remedial legislation became necessary when the courts supervising estate administrations found that inheritances transmitted to certain countries in Europe were withheld from the beneficiaries or confiscated in whole or in part. The devices used to deprive beneficiaries of the funds were numerous and varied even in the beginning (See Matter of Bold's Estate, 173 Misc. 545, 547 18 N. Y. S. 2d 291, 293) and they continue to assume ever differing forms. . . ."

Oregon in 1937 and New York in 1939 acted with deliberate speed to correct this obvious inequity to the beneficiaries whose rights were subject

[2] Duke of Richmond v. Milne's Executors, 17 La. 312, 36 Am. Dec. 613 (1841).
[3] Jackson *ex dem.* Fitz Simmons v. Fitz Simmons, 10 Wend. (N. Y.) 9, 24 Am. Dec. 198 (1831).
[4] Craig v. Leslie, 3 Wheat. (U.S.) 563, 16 U.S. 563 (1818).
[5] 229 N. Y. 222, 128 N.E. 185, 186 (1920).
[6] Clark v. Allen, 331 U.S. 503 (1947).
[7] PA. STAT. ANN. tit. 68, § 22 (1958).
[8] PA. STAT. ANN. tit. 68, § 23 (1958).
[9] Kucharcov's Estate, 16 Pa. D. & C. 343 (1931).
[10] Techt v. Hughes, 229 N. Y. 222, 128 N.E. 185 (1920).
[11] *In re* Wells Estate, 204 Misc. 975, 126 N.Y.S. 2d 441, 445 (1953).

to confiscation. Thus, they avoided the frustration of the decedent's intent and the use of the beneficiary's funds by governments unfriendly to the United States. The results of their efforts were different but the purpose was ostensibly the same.[12]

Some states accomplished their desired results through their courts without the benefit of statute. In the vanguard of these was Pennsylvania.

In *Stede's Estate*,[13] where the court considered and refused distribution of legatees in Germany, it was said:

> ". . . people unfortunate enough to be involved in this area are without the right to have or hold money except at the pleasure of the autocrat and all the assets of the German people are in a state of semi-confiscation or impressment for war purposes, and this whether the real owners of the assets are willing or not."

In approving payment of distribution on account of the claimants to the clerk of the Orphans' Court, the court said: "If nobody else is going to protect them (the legatees), the law of Pennsylvania will." [14] Other cases in Pennsylvania followed the same course.[15]

In addition to Pennsylvania, other states operated without statute to control the distribution of funds where it was believed that the beneficiary would not have the actual use, benefit or enjoyment of the funds. In this category are Michigan, Missouri, Nebraska and Vermont.[16]

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[12] The note appended to the New York bill stated that the

> "purpose of the amendment is to authorize the deposit of monies or property in the Surrogate's Court in cases where transmission or payment to a beneficiary, legatee, or other person resident in a foreign country might be circumvented by confiscation in whole or in part. The amendment authorizes the impounding of the fund by the Surrogate to await the time when payment can be made to the beneficiary for his own benefit, use and control."

The California statute, patterned after the Oregon statute, gave as its purpose:

> "A great number of foreign nations are either at war, preparing for war or under the control and domination of conquering nations with the result money and property left to citizens of California is impounded in such foreign countries or taken by confiscatory taxes for war uses. Likewise money and property left to friends and relatives in such foreign countries by persons dying in California is often never received by such nonresident aliens but is seized by these foreign governments and used for war purposes. Because the foreign governments guilty of these practices constitute a direct threat in the Government of the United States, it is immediately necessary that the property and money of citizens dying in this country should remain in this country and not be sent to such foreign countries to be used for the purposes of waging a war that eventually may be directed against the Government of the United States." (Footnote 53 Vol. 25 So. CALIF. L. REV. 304 (1952).

For a more complete discussion of these statutes see the section entitled "The Legislative Action Reviewed."

[13] 38 Pa. D. & C. 209, 211 (1939).

[14] Stede's Estate, 38 Pa. D. & C. 209, 212 (1939).

[15] Zielinski Estate, 73 Pa. D. & C. 81 (1950); Zaranco Estate, 74 Pa. D. & C. 462 (1950).

[16] Chaitkin, *The Rights of Residents of Russia and its Satellites to Share in Estates of American Decedents*, 25 So. CALIF. L. REV., 297 (1952).

THE LEGISLATIVE ACTION REVIEWED

During 1939, New York amended Section 269 of the Surrogate's Court Act to provide as follows: [17]

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

Similar statutes followed in New Jersey,[18] Maryland,[19] Massachusetts,[20] Rhode Island,[21] Connecticut,[22] Pennsylvania,[23] and Ohio.[24]

Though there are minor differences in detail, all of these statutes have the same basic features:

(1) Transmission of funds is conditioned upon the distributee's actual use and enjoyment of the property to be transferred.

(2) Upon failure of proof of circumstances insuring such actual use and enjoyment, the money is deposited for the account of the distributee.

The California statute is a striking contrast to the approach manifested by the New York statute and those that follow it.

It provides as follows: [25]

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

[17] N. Y. SURROGATE'S COURT ACT 269 (1939).
[18] N. J. PUB. LAWS (1940); N. J. REV. STAT. § 3A: 25-10.
[19] MD. CODE (Ter: Ed.) Art. 93, § 161 (1957).
[20] MASS. ANN. LAWS c. 206, § 27A (1955).
[21] GEN. LAWS OF R. I. 33-13-13 (1956).
[22] CONN. GEN. STAT. § 2946d (1955 Supp.).
[23] PA. STAT. ANN. tit. 20, § 1156 (1953); *Id.* at § 320.737.
[24] OHIO REV. CODE, § 2113.81 (1958).
[25] CAL. PROB. CODE §§ 259-259.2.

upon the part of citizens of the United States to take personal property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents. . . .

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

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

Similar legislation has also been passed by Oregon,[26] Montana,[27] Nevada,[28] and Iowa.[29]

In certain of the states the test of reciprocity has been applied differently. The construction of the California act by its courts indicates that the test is whether American citizens inherit estate within a foreign country under the same conditions as do the citizens of that country.[30] In Oregon, however, the test is one requiring a stricter construction,[31] for their test compares the rights of Americans to inherit in Germany with the rights of Germans to inherit in Oregon.

Another difference among states in this group is that some statutes expressly provide for possible escheat to the state while others do not so provide.[32]

One basic difference between the two groups of statutes is that the New York group imposes duties of conservation upon the depository for the benefit of the nonresident alien with the major test being the use and enjoyment by the distributee, whereas the California group bases the foreign beneficiary's rights on reciprocity.

Perhaps the most significant difference of the legislation of these groups is that the New York or Eastern group would not affect the ultimate right of the distributee to the funds. Therefore, it may be said that these acts are procedural. This cannot be said of the California Act, which is definitely substantive. In *Nersisian's Estate* the court said: [33] ". . . if a non-resident alien cannot allege and prove reciprocity, he may not inherit under our laws."

[26] ORE. REVISED STAT., § 111.070, ORE. LAWS (1937) c. 399 p. 607.
[27] MONT. LAWS (1939), c. 104 § 2, REV. CODE (1947) 91-520.
[28] NEV. REVISED STAT., 134.230.
[29] CODE OF IOWA, 1958, 567.8.
[30] Arbulich's Estate, 41 Cal. App.2d 86, 257 P.2d 433 (1953).
[31] *In re* Krachler's Estate, 199 Ore. 448, 263 P.2d 769 (1953).
[32] CAL. PROB. CODE §§ 259-259.2; MONT. LAWS (1939), c. 104 § 2, REV. CODE (1947) 91-520.
[33] 155 Cal. App.2d 561, 318 P.2d 168, 171 (1957).

THE ACTION OF THE STATE COURTS
IN PURSUANCE OF THE LEGISLATIVE MANDATE

In the light of the two categories of statutes which have been noted in the preceding section, a review of the cases arising out of the these statutes should also be considered.

The Eastern Group

The New York cases which are, in fact, the most numerous have followed the intendment of the legislature to protect the interest of those aliens resident in countries under whose government confiscation is possible or in which the economic life is of such a nature as to make it improbable that the full use and enjoyment of the moneys will be realized by the potential distributee.

Throughout these cases there appears reference to certain Federal action, thus making comment thereto necessary. In April, 1940, President Roosevelt issued Executive Order No. 8389,[34] prohibiting certain property transactions with specifically named countries or nationals thereof. The list has been changed from time to time.

Of equal, if not greater, importance are Regulations issued under the authority of Section 5 of an Act approved October 9, 1940,[35] entitled, "To restrict or regulate the delivery of checks drawn against funds of the United States, or any agency or instrumentality thereof, to addresses outside the United States, its Territories and possessions, and for other purposes."

The prohibition, therefore, is the delivery of checks or warrants drawn against funds of the United States or any agency or instrumentality thereof

> ". . . in which the Secretary of the Treasury determines that postal, transportation, or banking facilities in general, or local conditions in the country to which such check or warrant is to be delivered, are such that there is not a reasonable assurance that the payee will actually receive such check or warrant and be able to negotiate the same for full value. . . ." [36]

The Secretary of Treasury has from time to time made such determinations,[37] the most recent change as of June 7, 1957.[38]

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[34] 31 C.F.R. §§ 127.9-127.17 (1949).
[35] 54 STAT. 1087 (1940), 31 U.S.C. § 123 (1946).
[36] *Id.* § 1.
[37] Department (Treasury) Circular 655.
[38] Supplement No. 11 provides:
"The Secretary of the Treasury hereby determines that postal, transportation, or banking facilities in general or local conditions in Albania, Bulgaria, Communist-controlled China, Czechoslovakia, Estonia, Hungary, Latvia, Lithuania, Rumania, the Union of Soviet Socialist Republics, the Russian Zone of Occupation of Germany, and the Russian Sector of Occupation of Berlin, Germany, are such that there is not a reasonable assurance that payee in those areas will actually receive checks or warrants drawn against funds of the United States, or agencies or instrumentalities thereof, and be able to negotiate the same for full value."

Manifestly, no other single factor has been given such great weight as this determination. The courts of New York, while maintaining their independent judgment,[39] have admitted that where no counterveiling evidence is adduced, the determination by the Secretary has sufficed to make it appear that the legatee would not have the benefit, use or control of the money.[40] Recently, when the order of June 7, 1957, was released deleting Poland from the list, the New York courts immediately began to distribute the funds of resident decedents to Polish distributees.[41] This was not the first time that the New York courts had reversed themselves on policy. In 1945 the court had ordered distribution to Russian beneficiaries despite earlier cases which had refused payment to Russian citizens.[42] Still later cases indicate a return to the former policy.[43]

The New York statute has been invoked in innumerable cases where the courts have decreed the payment of the money under the custodial features of that Act.[44]

The New York courts have also indicated their reluctance to honor assignments of the rights of alien distributees to persons within their jurisdiction. This is believed to be a device to defeat the intendment of the Act.[45]

The courts of New Jersey have not had reason to use their statute frequently.[46]

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[39] *In re* Doktor's Will, — Misc. 2d —, 183 N.Y.S.2d (1959).

[40] *In re* Wells' Estate, 204 Misc. 975, 126 N.Y.S.2d 441 (1953); *In re* Yee Yoke Ban's Estate, 200 Misc. 499, 107 N.Y.S.2d 221 (1951); *In re* Getream's Estate, 200 Misc. 543, 107 N.Y.S.2d 225 (1951); *In re* Best's Estate, 200 Misc. 332, 107 N.Y.S.2d 224 (1951); *In re* Thomae's Estate, 199 Misc. 940, 105 N.Y.S.2d 844 (1951).

[41] *In re* Doktor's Will, *supra* note 39.

[42] Alexandroff's Estate, 61 N.Y.S.2d 866 (1945).

[43] *In re* Geiger's Estate, 12 Misc. 2d 1043, 175 N.Y.S.2d 588 (1958), Hungary; *In re* Herz Estate, 7 Misc. 2d 217, 163 N.Y.S.2d 349 (1957), Hungary; *In re* Baranski's Estate, 11 Misc. 2d 1062, 171 N.Y.S.2d 980 (1958), Poland; *In re* Siegler's Will, 284 App. Div. 436, 132 N.Y.S.2d 392 (1954), Hungary; *In re* Lauraitis' Estate, 134 N.Y.S.2d 907 (1954), Lithuania; *In re* Nezold's Will, 1 Misc. 2d 611, 148 N.Y.S.2d 197 (1956), Russian Zone of Germany; *In re* Grossman's Will, 2 Misc. 2d 876, 148 N.Y.S.2d 771 (1956), Poland; *In re* Wells' Estate, 204 Misc. 975, 126 N.Y.S. 441 (1953), Czechoslovakia; *In re* Perlinsky's Estate, 22 Misc. 351, 115 N.Y.S. 549 (1952), Russian Sector of Berlin; *In re* Getream's Estate, 200 Misc. 543, 107 N.Y.S.2d 225 (1951), Russian; *In re* Best's Estate, 200 Misc. 332, 107 N.Y.S.2d 224 (1951), Russia; *In re* Yee Yoke Ban's Estate, 200 Misc. 499, 107 N.Y.S.2d 221 (1951), Republic of China; *In re* Thomae's Estate, 199 Misc. 940, 105 N.Y.S.2d 844 (1951), Russian Zone of Occupation of Germany; *In re* Geffen's Estate, 199 Misc. 756, 104 N.Y.S.2d 490 (1951), Lithuania.

[44] *Ibid.*

[45] *In re* Geiger's Estate, 12 Misc.2d 1043, 175 N.Y.S.2d 588 (1958); *In re* Perlinsky's Estate, 202 Misc. 351, 115 N.Y.S.2d 545, 549 (1952).

[46] *In re* Volencki Estate, 35 N.J. Super. 351, 114 A.2d 26 (1955), where monies were to be paid under the statute on account of distributees of Hungary. To the same effect see Url's Estate, 7 N.J. Super. 455, 71 A.2d 665 (1950), where a gift to an orphanage was paid to the custodian under the statute.

The Western Group

In reviewing the California statute, bearing in mind that the sole test is reciprocity of inheritance rights, the only matter of special significance is a sometime apparent conflict in the decisions of the courts.[47] This is due to the determination of foreign law as a question of fact by the court.

Other states in this group have recognized that the California rule must be considered in the light of the conflict that can thereby arise.[48] In Oregon, as we have already noted, the test is not as liberal as in California.[49] In the cases involving Germany it has been found that no reciprocity existed.[50] In Montana, the court has held that citizens of Rumania were entitled to receive their inheritance under the statute.[51]

Summary

Though the intention of the states in enacting legislation of this type is nearly identical, it has been demonstrated that the legislative result of the two groups has been strikingly dissimilar. Similarly, the cases which have been decided by the courts indicate the contrast between the two.

In applying the strict tests of reciprocity to affect the substantive rights of succession, the Western cases have condoned transmission of funds to persons living under domination of governments suspect of confiscatory aims.[52] On the other hand, the New York group would seem to use the better method

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[47] *Germany:*

In re Reihs' Estate, 102 Cal. App.2d 260, 227 P.2d 564 (1951), no reciprocal rights as of Nov. 24, 1946; *In re* Thramm's Estate, 80 Cal. App.2d 756, 183 P.2d 97 (1947), no reciprocal rights as of July 7, 1943; *In re* Schiuttig's Estate, 36 Cal.2d 416, 224 P.2d 695 (1950), no reciprocal rights as of April 3, 1945; *In re* Miller's Estate, 104 Cal. App.2d 1, 230 P.2d 667 (1951), reciprocal rights existed as of April 22, 1942; *In re* Leefers' Estate, 127 Cal. App.2d 550, 274 P.2d 239 (1954), no reciprocal rights as of Jan. 15, 1944; *In re* Schneider's Estate, 140 Cal. App.2d 710, 296 P.2d 45 (1956), reciprocal rights as of March 31, 1945.

China:

In re Nepogodin's Estate, 134 Cal. App.2d 161, 285 P.2d 672 (1955), reciprocity existed Jan. 13, 1949.

Yugoslavia:

In re Arbulich's Estate, 41 Cal.2d 86, 257 P.2d 433, cert. den. 346 U.S. 897 (1953), no reciprocal rights as of March 21, 1947.

Czechoslovakia:

In re Karban's Estate, 118 Cal. App.2d 240, 257 P.2d 649 (1953), no reciprocity existed as of June 22, 1948.

Italy:

In re Bevilacqua's Estate, 31 Cal.2d 580, 191 P.2d 752 (1948), no reciprocity existed as of Jan. 28, 1944; *In re* Giordano's Estate, 85 Cal. App.2d 588, 193, P.2d 771 (1948), no reciprocity existed as of Jan. 17, 1945.

[48] *In re* Krachler's Estate, 199 Ore. 448, 263 P.2d 769, 780 (1953).

[49] *In re* Krachler's Estate, *supra* note 48.

[50] Closterman v. Schmidt, — Ore. ——, 332 P.2d 1036 (1958), as of April 24, 1945; *In re* Krachler Estate, *supra* note 48, as of December 8, 1943.

[51] *In re* Gaspar's Estate, 128 Mont. 383, 275 P.2d 656 (1954).

[52] *In re* Nepogodin's Estate, 134 Cal. App.2d 161, 285 P.2d 672 (1955), China; *In re* Gaspar's Estate, 128 Mont. 383, 275 P.2d 656 (1954), Rumania.

which is more likely to carry out the purposes of the legislation. The only criticism that can be made of the New York cases is that they reflect the growing tendency of those courts to rely on the Federal government's determinations, which are too often made as a result of foreign policy rather than possibilities of lack of actual use and enjoyment.

THE CONSTITUTIONALITY OF THE STATUTES

That the states have entered an area wherein their legislative process affects the relationship of our country to foreign nations presents an anomaly. The conduct of foreign affairs is vested securely in the federal government free from state interference. However, under the Tenth Amendment to the Constitution of the United States, a part of the residue of sovereignty retained by the states is the power to determine all matters regarding descent and devolution.[53]

This definite overlapping has been examined by the Supreme Court of the United States in *Clark v. Allen*,[54] where the court considered this type of legislation as it existed in the State of California. The California statute was specifically challenged on the grounds that such legislative action constituted an "... extension of state power into the field of foreign affairs, which is exclusively reserved by the Constitution to the federal government. . . ." Mr. Justice Douglas said:[55]

> "... *Rights of succession to property are determined by local law. . . . Those rights may be affected by an overriding federal policy, as where a treaty makes different or conflicting arrangements. . . . Then the state policy must give way. . . .* But here there is no treaty governing the rights of succession to the personal property. Nor has California entered the forbidden domain of negotiating with a foreign country, ... or making a compact with it contrary to the prohibition of Article I, Section 10 of the Constitution. What California has done will have some incidental or indirect effect in foreign countries. But that is true of many state laws which none would claim cross the forbidden line. . . ." (Emphasis added.)

A similar question of constitutionality was also raised in *Petition of Mazurowski*[56] and *In re Braier's Estate*.[57]

While the California statute has been before the Supreme Court of the United States, the statutes of the New York group have not. It must be remembered, however, that the California statute is more drastic in its scope and

[53] U.S. v. Burnison, 339 U.S. 87 (1950).
[54] 331 U.S. 503 (1947).
[55] 331 U.S. at 517.
[56] 331 Mass. 33, 116 N.E.2d 854 (1954).
[57] 305 N.Y. 148, 111 N.E.2d 424 (1953).

is designed to affect substantive rights of inheritance. *Clark v. Allen* held that its constitutionality was dependent upon the lack of positive treaty action by the federal government.

Whether that same qualification would apply to the custodial or procedural statute of the New York group is doubtful. No substantive rights are affected but the property is specifically earmarked for conservation for the benefit of the distributee.

It therefore appears clear that while the constitutionality of both types of statutes has been established, the New York group is far more secure in that position than is its Western counterpart.

PENNSYLVANIA TREATMENT OF THE RULE

We have noted the position taken by the Pennsylvania Courts prior to the enactment of the Act of 1953.[58]

The act provides as follows:

> "Whenever it shall appear to the court that if distribution were made a beneficiary would not have the actual benefit, use, enjoyment or control of the money or other property distributed to him by a fiduciary, the court shall have the power and authority to direct the fiduciary (a) to make payment of the share of such beneficiary at such times and in such manner and amounts as the court may deem proper, or (b) to withhold distribution of the share of such beneficiary, convert it to cash, and pay it through the Department of Revenue into the State Treasury without escheat."

The reported decisions of the Pennsylvania courts since the passage of this act indicate the court's continuing reluctance to make distribution to those countries suspected of abuse of property rights by confiscation.[59] Now, however, the law of Pennsylvania does protect those beneficiaries and heirs of such countries.[60]

Despite the fact that Pennsylvania's Act,[61] like the other acts in the Eastern group, confers only custodial duties upon a governmental body (herein,

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[58] PA. STAT. ANN. tit. 20, §§ 1156-1158 (1953); Stede's Estate, 38 Pa. D. & C. 209 (1939); Zielinski Estate, 73 Pa. D. & C. 81 (1950); Zaranco Estate, 74 Pa. D. & C. 462 (1950).

[59] Sobko Estate, 88 Pa. D. & C. 76 (1954), where distribution under a power of attorney was denied; Estate of Wozniak, 44 Pa. Luzerne Legal Register 227 (1954); Gregory Estate, 6 Pa. Fid. Rep. 165 (1955), where a bequest to a charitable organization within the U.S.S.R. was paid into the state treasury; Demczuck Estate, 8 Pa. D. & C.2d 462 (1956), where the court refused to honor a power of attorney on behalf of a Russian claimant; Volenski Estate, 12 Pa. D. & C.2d 560 (1956); Graf Estate, 8 Pa. Fid. Rep. 692 (1958), where monies were paid to the state treasury for the benefit of residents of Rumania.

[60] Stede's Estate, 38 Pa. D. & C. 209 (1939).

[61] PA. STAT. ANN. tit. 20, §§ 1155-1159 (1953).

"Upon receipt of the money directed to be paid into the State Treasury, the Commonwealth shall assume the custody of such money for the benefit of such beneficiary. The fiduciary, by making

the State Treasurer), the Attorney General of the Commonwealth, together with the Department of Revenue, not as an adversary but in the nature of *amicus curiae,* conducted a series of impartial investigations regarding the wisdom of transmission of funds to the countries of Europe under Soviet domination.[62]

The Philadelphia Orphan's Court, which has had numerous cases before it involving this question, was the proper forum for a series of test cases at which time it was proposed that the evidence gathered by the two previously mentioned departments would be adduced.

The first of these cases was Zupko Estate.[63] The decedent's estate consisted of approximately $50,000.00, which was claimed under powers of attorney presented at the audit of the executor's account on behalf of the Soviet beneficiaries in favor of counsel for the Soviet Embassy. The claimants contended that the Act of 1953 was unconstitutional and that they *would* have the actual use and enjoyment of the property transmitted either in money or parcels.

The excellent opinion of Judge Robert V. Bolger of the Orphan's Court upheld the constitutionality of the Act.[64]

When one considers the four hundred pages of testimony heard by the court, including the testimony of the witnesses for the claimants and that offered by the Commonwealth, regarding Soviet law, economics and political system, the veiled facade of the so-called "people's democracy" is destroyed. The Commonwealth's principal witness was Dr. Vlademir Gsovski, Chief of the European Law Division of the Library of Congress since 1931; lecturer at Georgetown University; author of two volumes on Soviet Civil Law; Director of Mid-European Law Project; editor of "Highlights of Mid-European Law and Activities"; graduate of the University of Moscow, 1913; Law School, University of Bratislava 1926; and a former Russian lawyer and judge. He testified at great length about the insecurity and actual danger in the ownership of private property in the Soviet. He documented his testimony by citing

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such payment, shall thereafter be relieved of and released from any and all liability for any claim or claims which then exist or thereafter arise with respect to such money.

Any beneficiary or person, legally entitled to any money which has been paid into the State Treasury under the provisions of this act, may at any time petition the court which directed such payment into the State Treasury for repayment of the same. Upon 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 the court shall enter a decree directing the Board of Finance and Revenue to make an order for repayment, payable out of funds in the State Treasury appropriated for that purpose, with interest thereon at the rate of two percentum per annum from the date when the said money was paid into the State Treasury to the date of repayment thereof."

[62] Though the cases decided prior to the Zupko case manifest the court's desire to apply the act, their decisions were based upon little or, in some cases, no evidence of its application. Rather, they took judicial notice of the legal and economic life in countries behind the "Iron Curtain."

[63] 15 Pa. D. & C.2d 442 (1958). No exceptions were filed.

[64] Judge Bolger relied upon Clark v. Allen, 331 U.S. 503 (1947); Petition of Mazurowski, 331 Mass. 33, 116 N.E.2d 854 (1954); *In re* Braier Estate, 305 N.Y. 148, 111 N.E.2d 424 (1953).

"Chapter and Verse" from the Soviet Constitution, Civil Code, Criminal Code, published decisions of cases and writings of legal authors.

The following important references to his voluminous testimony serve to illustrate how fully he proved the fact that Soviet beneficiaries would not have the benefit, use, enjoyment or control of their distributive shares:

(a) He quoted from Professor Malitsky's book "Civil Code of the Soviet Republics" which states:

> "Here lies a basic difference between Communist law and capitalistic law. The capitalist law is based upon the abstract (natural) rights of the individual. It places the individual in the center of the world, surrounds him with a cult, and therefore establishes limits to the State . . . however, the proletarian State limits the acts not to itself but to its citizens. . . . The proletariat bestowed rights upon the citizens of the State, but set for each person limits to private liberty to be observed in the exercise of private initiative."

(b) The Soviet Constitution, though it uses the term "private ownership" in only one place, provides that all private ownership of the means of production are abolished.

(c) Section 4 of their Constitution calls for the liquidation of the capitalist system of economy and the abolition of private ownership of the "instruments and means of production".

(d) Section 5 of their Constitution places the ownership of all property in either the form of State ownership or the form of ownership of cooperatives or collective farms.

(e) The only form of ownership given to individuals is not of *"private property"* but *"personal ownership"* of their earned income, savings, dwellings, household effects and utensils, objects of personal consumption and comfort and the right of succession in personal ownership under Section 10 of the Constitution.

(f) The conduct of business for gain is prohibited since it involves ownership of the "instruments or means of production", except for artisans who do not employ hired labor.

(g) Despite the continued presence in the Soviet of some few independent farmers, the farmer is not permitted to own more than one cow, and two calves. He may not own a draft horse or oxen since these are instruments of production.

(h) Even artisans are proscribed in their activities. A tailor may produce a suit for a given customer, but is prohibited from any production for the market.

(i) The sale of goods in the open market by an individual subjects him to prosecution for committing the crime of "speculation". The crime of "speculation" carries with it heavy penalties of banishment, imprisonment and confiscation of property.

(j) There is no system of legal precedents in the enforcement of laws and few decisions are published, since one of the basic doctrines in the Soviet system is "dialectic materialism", under which the government does not want to have its own actions limited by its own courts or its own laws. This is a process of alternate progress and retreat dictated by circumstances.

(k) The criminal code can be applied *ex post facto* against acts which were not in violation when performed.

(l) The criminal code permits the prosecution of an act of a citizen as a *"crime by analogy"* to other offenses, leaving the interpretation of the analogy solely in the hands of the public prosecutor.

(m) Speaking of personal ownership, Dr. Gsovski stated: "My general conclusion is that personal ownership is in the darkest corner of the Soviet legal system, fenced in from all sides."

(n) Section 147 of the Criminal Code makes any contract invalid when "directed to the obvious prejudices of the State", and renders the contract unenforceable and the goods subject to confiscation. Any transaction involving a sale for unearned income would come under this category.

(o) A recent development in the Soviet has been the enactment of anti-parasitic laws in many Russian states which subject persons *"living on unearned income"* to banishment in a proceeding by public judgment of the persons living on his street, in his apartment house, or in his collective farm.

(p) Russian citizens may not enter into any transactions involving foreign currency since this is a monopoly of the State Bank.

(q) Any foreign currency received by a Russian must be deposited in the State Bank where he receives rubles at the official rate of exchange.

(r) There is no system of redress by a private citizen against the government or its administrative agencies, merely a right of complaint.

(s) There still exists the power in the Ministry of the Interior to banish persons for "dangerous activity" without any specified definition of the crimes involved, or guarantees of fair trial or right of appeal.

(t) The Soviet Constitution itself has been amended by various bodies without proper notice or the guarantees usually associated with changes to a basic charter.

(u) When asked specifically his opinion regarding the right of a Russian national to the actual use, enjoyment, benefit and control of moneys which might be sent from a Pennsylvania decedent's estate, Dr. Gsovski stated:

> "The restrictions are so numerous and so indefinite that the actual use, enjoyment and control is reduced to a minimum and the such small portion of the money which the recipient would get under the exchange regulations, could only be used in a very limited way for a very limited purpose and for articles of personal consumption only."

(v) Private ownership of land is prohibited in Russia, although a person can buy a small house and place it on land assigned to him.

(w) Dr. Gsovski concluded by pointing out the various perils facing Soviet citizens who receive a sum of money from the United States, even though it be a small portion of the money sent because of the currency regulations. These perils include:

> (1) Possibility that the money may be considered "unearned income" which is not protected by the Soviet Constitution.
>
> (2) The use of the money to purchase articles which are not strictly necessary may be deemed "dangerous activity, prejudicial to the State."
>
> (3) The attempt to sell any excess belongings purchased with this money might be subject to prosecution as "speculation."
>
> (4) The mere use of the money for living purposes might be subject to prosecution for parasitism because it would be considered as living on "unearned income."

The Commonwealth's expert witness on the restrictions imposed by the Soviet economic system and the Soviet currency regulations on foreign bequests was a specialist in the Soviet economy, Leon H. Herman, Economic Analyst for the United States Library of Congress. Mr. Herman is a trained economist who has published and lectured extensively on the Soviet economy. He reads and speaks the Russian language and uses for his source material Russian newspapers and economic publications, as well as official dispatches from the various

United States officials in Russia. His prior experience includes almost ten years of service in the United States Department of Commerce where he rose to the position of Chief of the U.S.S.R. section in the Bureau of Foreign Commerce.

Mr. Herman testified at length regarding the shipment of parcels to Russia, exchange regulations, purchasing power of the Russian ruble and standards of living in Russia and covered the following salient points: [65]

(a) Parcels may be sent to Russia with certain limitations as to size, value and content. While they can be sent duty free this method imposes an insurmountable burden of paying the prohibitive duties on the recipient, and therefore the common method is to send the package with duty prepaid by the sender in United States dollars.

(b) One of the most troublesome limitations imposed by the Russians is that the parcel may not contain saleable merchandise.

(c) Since October 1, 1957, used clothing cannot be shipped in parcels to Russia.

(d) Prepaid duties on parcel shipments range from 25% to 250% of the value of the goods sent; on clothing the duty is 100% and on shoes 75%. On coffee, tea and cocoa that duty is 100% of value.

(e) The duties are prepaid in United States dollars and these go to the Soviet government through the State Bank.

(f) There are five additional charges on the sending of parcels levied by the Soviet government for commissions, inspection fee, insurance fee, and two service charges by the shipping company.

(g) These prepaid duties collected by the Soviet government on parcels shipped from the United States totaled $1,700,000.00 during 1956. They were considerably higher in 1957 and amount to more than $2,000,000.00

(h) Shipment of dollars to Russia is prohibited and the recipient receives rubles, not dollars. Until April 1957 the recipient received four rubles per dollar, which is the official rate of exchange. Since then the United States Embassy has indicated that the Russian State Bank would pay recipient ten rubles per dollar, but this is not the official rate, so the State Bank can resume the official rate at any time.

(i) Studies of the purchasing power of the ruble show that it is quite low, e.g. four rubles ($1.00) for a pound of sugar; eight rubles for a dozen eggs ($2.00); twelve rubles ($3.00) for a pound of butter.

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[65] *Cf.* Zubko Estate, 12 Pa. D. & C.2d 557 (1957); Dopierala Estate, 7 Pa. Fid. Rep. 262 (1957).

(j) An analysis of the purchasing power of the ruble compared to the United States dollar shows that in the class of *survival food items* and *luxury goods* the ruble purchases from 1/10th to 1/15th as much as the dollar, which is a comparable ratio. However, in the class of *non-survival items* needed for everyday living such as wearing apparel, yard goods, suits, shirts, shoes, etc., the ruble's purchasing power drops to 1/50th of the dollar and buys, on the average, only *two cents worth* of goods although its official exchange value is *twenty-five cents.*

(k) In this class of goods, the Soviet controls consumption by imposing a *hidden "turnover" tax* which is reflected only in the increased selling price.

(l) The hidden turnover tax is used by the Soviet for its new capital expenditures and for the support of its military establishment. It represents from 40% to 60% of the total government revenue in Russia.

(m) The prepaid duties on parcels provide the Soviet government with a sizable fund ($2,000,000.00) per year for purchase of goods in the United States and for propaganda purposes.

(n) The Soviet has devalued and debased its currency many times. In April 1957, it suspended payments on government bonds for 20 to 25 years and thus wiped out over half of the currency value held by all Russians.

(o) The "free" market in rubles, which exists in many European countries and in the United States, quotes current exchange rates at 33 to 60 rubles for the United States dollar. Contrasted with the official rate of four rubles and the so-called premium rate of ten rubles per dollar the "free" market fairly reflects the actual purchasing power of two cents per ruble in most cost-of-living items.

(p) Because the ruble has a two cents purchasing power in exchange for the dollar, the recipient of a money bequest would not get the actual use, control, benefit or enjoyment of the funds which might be sent to him from the United States. The balance of the value of the dollars sent will be used for other non-economic purposes of the Soviet government.

(q) Because of the heavy duties and other charges imposed by the Soviet, the recipient of any parcel from the United States would receive a *maximum* of only 50% of the true value of the United States dollar used to purchase the goods in the United States, and the balance of the true value will be paid to the Soviet government in the form of duties and charges.

The principal witness for the claimants was Professor Harold J. Berman, teacher of comparative Soviet and American Law at the Harvard Law School

and the Russian Research Center of Harvard University. Professor Berman testified at length regarding the Soviet legal system and form of government. While he attempted to show a growing system of legal procedure in Russia, his testimony clearly revealed the shortcomings of their legal system in failing to protect the rights of the individual from governmental oppression and terrorism. Here are some of the pertinent admissions made by him on this subject during his direct and cross-examination.

(a) There is no effective constitutional restraint upon the power of the top leadership to change the law.

(b) *Ex post facto* laws can be and have been enacted in the field of criminal law.

(c) The top leadership of the Soviet can change any law under "effective" Soviet law.

(d) Most of his opinions as to the "progress" of the Soviet legal system were derived from conversations with judges, lawyers and citizens and not from the usually accepted sources of the Constitution, statutes and reported decisions of the courts. His testimony was almost entirely devoid of documentation.

(e) No Russian may purchase goods for resale without being guilty of the crime of "speculation."

(f) The private ownership of real estate is limited to a private homestead *without* title to the land under the house.

(g) Ownership of the "means of production" is prohibited. If a loom or sewing machine is owned, the Soviet citizen can use it only to make his own clothes and he can employ no one to help him or to sell the products to others for gain.

(h) Foreign currency must be turned in to the State Bank for redemption into rubles at the official exchange rate.

(i) There is a provision in Soviet law for escheat to the State for nonclaimer of inheritances after six months from date of death.

(j) The rights of non-residents of the Soviet are determined by the existence of treaties with the country of their nationality and there is no such treaty between U.S.S.R. and the United States.

(k) There is considerable doubt in Soviet law as to whether an American can *inherit and receive* moneys from a Russian estate.

(l) Banishment of a person for being "socially dangerous" still exists in the Soviet without any definition as to the elements of the crime.

(m) He admitted that, "one of the most vicious aspects of the Soviet legal system" is the "enactment in some instances of laws which are not published."

(n) The Criminal Code in Russia states that a person may be convicted of a crime "analogous" to other crimes in the code, without further definition of the nature of the crime.

(o) Anti-parasitic laws are now being enacted in many Soviet states which make it a crime to live on "unearned income". Trial is conducted by the neighbors of the accused and the penalty is banishment from two to five years. This law, the witness admitted, was "a violation of everything they had been proclaiming" about the progress of their legal system.

(p) The system of "voluntary" purchase of government bonds out of salaries was abolished in 1957 after an edict by the government postponing the maturity date of these bonds for 25 years. This repudiation or postponement involved 253 billion rubles of currency in Russia and amounted to one-half of the currency in circulation at that time.

(q) The United States government prohibits the sending of any remittances from the United States Treasury of pensions, retirement funds, etc., to beneficiaries who reside in the Soviet.

(r) Berman affirmed a quotation from his own book "Justice In Russia", reading as follows:

> "The restoration of law since 1936 although still *a movement rather than an accomplished fact* is one of the most significant internal developments in Soviet Russia since 1917." (Emphasis added.)

(s) He also affirmed a quotation from his own article in the YALE LAW JOURNAL of July 1957, stating as follows: [66]

> "Yet law and order cannot now be considered entirely secure in the Soviet Union. They can never be out of danger so long as the leadership endorses the philosophy that law is basically an instrument of force and that where the instrument fails, force must use more ruthless means. Nor can law be completely secure while the leadership believes that all social institutions and processes are essentially products of the time, of a given stage of historical development, and that there is nothing beyond the given stage, nothing sacred."

(t) The prepaid duties on parcels and the currency exchange rules on the remittance of moneys to Russia confer a distinct and substantial benefit to the Soviet government.

[66] Berman, *Soviet Law Reform—Dateline Moscow*, 1957, 66 YALE L. J. 1191, 1214 (1957).

One of the claimant's witnesses was Thomas V. Zug, Trust Officer of the Provident Tradesmans Bank and Trust Company. Mr. Zug testified that he was in charge of the administration of this estate. He found four bolts of cloth in decedent's apartment and indications that these were to be sent to brothers and sisters in Russia. These were shipped to Russia through the Globe Parcel Service. Cross-examination revealed the extent of the prepaid duties and charges on these articles as follows:

(a) On a shipping invoice on which the cost value of the goods was $38.10, the prepaid duty and shipping charges totaled $45.10, over 125%.

(b) On a shipping invoice on which the cost value of the goods was $16.40, the prepaid duty and shipping charges totaled $29.95, over 175%.

(c) On a shipping invoice on which the cost value of the goods was $32.90, the prepaid duty and shipping charges totaled $42.69, over 130%.

(d) On a shipping invoice on which the cost value of the goods was $40.10, the prepaid duty and shipping charges totaled $46.40, over 115%.

From the testimony presented to the Court, it appeared abundantly clear that the shipment of money or goods to Soviet beneficiaries is subjected to prohibitive charges for duties and currency exchange manipulations which serve only to fatten the Soviet exchequer. The benefit to the Soviet citizen is minimal and incidental. In the shipment of money the beneficiary receives rubles at a rate having a purchasing power of about two cents instead of the theoretical twenty-five cents produced by the official rate of exchange. Thus, the recipient gets only 1/12th to 1/5th of the United States dollar sent, and the Soviet government gets the rest.

In the matter of packages, the testimony clearly established that the duties on the most desirable goods range from 100% upward and the packages are limited as to value and content. Further additional charges are imposed for the benefit of the Soviet government so that the actual benefit to the recipient is between 25% and 50% of the value of the purchase price of the goods sent, the balance going to the Soviet government.

Over-riding in these considerations, the testimony clearly established that the ownership of private property, as we know it, is extremely hazardous and tenuous in the Soviet Union. The Soviet laws, published or unpublished, existing or suddenly imposed on an *ex post facto* basis, and "subject to change without notice" are designed to discourage the ownership of personal property. Thus, Soviet beneficiaries of Pennsylvania bequests may be harmed rather than helped by the receipt of money from an estate.

Based on the overwhelming testimony of the Commonwealth's witnesses Judge Bolger made the following trenchant observations in his opinion:

> "It is our opinion that although the testator gave his bounty to his brothers and sisters, residents of the U.S.S.R., that he did not intend them to be used as pawns through whom the government of Russia would enrich itself at their expense so that they would receive little, if any, benefit under his will.
>
> "The use of personal ownership and property rights is not only unprotected by Soviet Law, but is also prosecuted.
>
> "The finding is inescapable that minimal benefits would flow to the distributees and maximum benefits to the Soviet Government and would be available for uses inimical to the United States were the claimant's request granted."

In John Aras Estate,[67] adjudication by Judge Bolger, a portion of the balance of the distributive assets of the estate were awarded to the Consul General of the Federal People's Republic of Yugoslavia. The court said every case in this category is *sui generis.* It then proceeded to outline the situation, particularly in the light of the Zupko case. The court considered the following facts:

> ". . . U. S. Treasury Regulations which forbid the transmittal of funds to Russia and other satellite countries do not include Yugoslavia; while remittances in dollars may be made to such citizens, they cannot use them in that form, but must exchange them for *dinars;* there is no ceiling on the amount of them and according to the Director of the European Division O.F.A. Bureau of Foreign Commerce of the Department of Commerce, remittances from inheritances receive the favorable rate of exchange of 600 to the dollar as compared with the usual rate of 300 and the tourist rate of 400, without tax when the inheritance tax is paid at the source; that consumer goods, including food, clothing and shelter, are available in Yugoslavia at favorable prices; that gift parcels not exceeding $66.66 per package are not subject to import duties, only a nominal fee of 67¢ being levied. The uncontradicted testimony of Save Temer, the Yugoslav Consul, that should these beneficiaries receive these funds they will be at liberty to live off of them, they can retire in a resort place and live there as long as the money lasts. They can even build a house for themselves, rent it, alienate it and at death devise it. Much of this information is confirmed by the United States Department of State. Ownership of private property, real and personal, is legal, realty holdings being limited to 40 acres. The law there recognizes inheritances except as to the 40 acre limit on real estate, and inherited bank accounts are exempt from inheritance taxes. They have no such crime as parasitism nor is it a crime against the State to possess personal property in any amount. The economy permits of small private factories employing not more than three persons. In accordance with a bulletin issued by the United States Department of Health Education and Welfare, Yugoslavia is one of the several countries which have Old Age Survivors and Disability Insurance."

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[67] 9 Pa. Fid. Rep. 323 (1959).

The courts of Yugoslavia operate in a narrow area but they can and do protect property rights. There are no laws authorizing confiscation of property for parisitism.

Though the court recognized that ". . . much can happen if the top power cracks down on the people . . ." it also maintained that there was no indication that the government would do so.

Judge Bolger concluded that,

> ". . . The record here consists of trustworthy and credible evidence which all points to the conclusion that funds and goods sent to Yugoslavia not only reach the beneficiaries in substantial amount and quantity, but such recipients are at liberty to use and enjoy such gifts without fear of confiscation or reprisal. . . ."

CONCLUSION

In dealing with the right of foreign beneficiaries or legatees of resident decedents as affected by state action we have seen that the impelling motive of the legislatures and the courts has been the effectuation of the intent of the decedent by insuring that his intended beneficiary or heir will receive the full benefit of the moneys to be transmitted, as well as preventing confiscation of those funds by unfriendly governments.

Legislative and judicial history of this type of regulation has indicated merit. Further evidence of this is demonstrated by the number of states which have adopted such statutes.

However, the writers are constrained to conclude that the statutes of the Western group have not proved as effective as those of the Eastern group. We believe that this is occasioned by the severe tests of reciprocity upon which those Western statutes are conditioned. There is no doubt that the intention of both groups can better be carried out by the flexible approach of the type adopted by New York and Pennsylvania.

Though these acts are popularly referred to as the "Iron Curtain Acts", the Pennsylvania Act, as well as those of its sister states in the Eastern group, is broad enough to apply to any country where the legal or economic life might serve to diminish substantially the value of the property to be transferred. Only the future will determine whether the latter contingency will occur. We cannot believe that it will.

Rather, we believe that the Trojan Horse philosophy of Lord Coke, an aversion to the aid of unfriendly nations, will continue to guide the courts, and only these countries will be subjected to careful scrutiny.[68]

[68] While the Zupko and Aras cases have been extensively treated, we believe this was necessary to acquaint the bench and bar with the facts before the court. It is hoped this article will aid both in future cases.