

1967

# The Statutory Regulation of Inheritance by Nonresident Aliens

Daniel T. Murphy

*University of Richmond*, [dmurphy@richmond.edu](mailto:dmurphy@richmond.edu)

Follow this and additional works at: <http://scholarship.richmond.edu/law-faculty-publications>



Part of the [Estates and Trusts Commons](#)

---

## Recommended Citation

Daniel T. Murphy, Comment, *The Statutory Regulation of Inheritance by Nonresident Aliens*, 13 Vill. L. Rev. 148 (1967)

This Article is brought to you for free and open access by the School of Law at UR Scholarship Repository. It has been accepted for inclusion in Law Faculty Publications by an authorized administrator of UR Scholarship Repository. For more information, please contact [scholarshiprepository@richmond.edu](mailto:scholarshiprepository@richmond.edu).

## THE STATUTORY REGULATION OF INHERITANCE BY NONRESIDENT ALIENS

### I. INTRODUCTION

The right of a nonresident alien to take real or personal property through testamentary bequest or intestate succession is regulated in this country by the laws of the states in which the property is located or the estate is probated. Many of the individual states of the Union demand that a potential foreign beneficiary establish, as a condition precedent to receipt of his inheritance share, compliance with an established statutory scheme. Often these regulatory measures require the existence of circumstances over which the alien, as an individual, has no, or at best minimal, control. The nonresident alien's ability to take and enjoy his inheritance is frequently contingent upon satisfactory proof of the conformity of his nation's legal system or, more difficultly, its political ideology and economic structure, to the statutory requirements.<sup>1</sup> As written and applied by the courts the disparate requirements of these statutes impose critical obstacles to inheritance by nonresident aliens. Further, they serve to thwart the evident testamentary design of a decedent, and occasion severe problems in estate administration. An exposition and analysis of these various statutes will be attempted in this comment.

Such an endeavor must be premised on two basic propositions. First, there is no natural, inherent right to inherit; absent a constitutional or statutory fiat there can be no inheritance by a citizen or alien.<sup>2</sup> Second, these various restraints upon the nonresident alien's right to inherit, though products of political and social bias rather than legal values,<sup>3</sup> are, in the absence of a treaty or overriding federal policy such as war, a valid exercise of the states' authority.<sup>4</sup> It therefore may be presumptuous to criticize

1. These restrictions on inheritance are generally considered in relation to the contemporary world situation vis-à-vis Nazi Germany and the Communist dominated nations. It may be noted that the right of the nonresident alien Dennis Martin to inherit lands in Virginia gave rise to the constitutional conflict in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). The constitutional right of the states to enact such measures is considered in Boyd, *The Invalidity of State Statutes Governing the Share of Non Resident Aliens in Decedents' Estates*, 51 GEO. L.J. 470, 480-509 (1963).

2. "Nothing in the Federal Constitution forbids the legislature of a State to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction." *Irving Trust Co. v. Day*, 314 U.S. 556, 562 (1941).

3. *E.g.*, *Estate of Gogabashvele*, 195 Cal. App. 2d 503, 16 Cal. Rptr. 77 (1961); *In re Estate of Ginn*, 136 Mont. 336, 347 P.2d 467 (1959); *In re Estate of Spoya*, 129 Mont. 83, 282 P.2d 452 (1955); *First Nat'l Bank v. Fishman*, 7 Ohio Misc. 130, 217 N.E.2d 60 (1966).

4. *Clark v. Allen*, 331 U.S. 503 (1947). The state courts unanimously support this proposition. *E.g.*, *Estate of Reihls*, 102 Cal. App. 2d 260, 227 P.2d 564 (1951); *Lazarou v. Moraros*, 101 N.H. 383, 143 A.2d 669 (1958); *Stoich v. Kolovrat*, 220 Ore. 448, 349 P.2d 255 (1961), *rev'd sub nom.*, *Kolovrat v. Oregon*, 366 U.S. 187 (1961); *Belemecich Estate*, 411 Pa. 506, 192 A.2d 740 (1963), *rev'd sub nom.*, *Consul General of Yugoslavia at Pittsburgh v. Pennsylvania*, 375 U.S. 395 (1964).

Such restrictions placed upon the alien's right to inherit do not constitute a violation of international law. 1 C. HYDE, *INTERNATIONAL LAW* 203 (rev. ed. 1947).

the restrictions imposed by the states. For they, in the legitimate exercise of their constitutional prerogative, may place any restrictions upon the nonresident alien's right to inherit which they deem appropriate. The due process requirements of the fourteenth amendment as applied to nonresident aliens are minimal.

The common law disabilities to which aliens were subject form the historical basis of the statutes to be investigated. The fear of foreigners and national considerations of defense and foreign policy were the justifications assigned to the medieval limitations placed on an alien's right to inherit and hold land.<sup>5</sup> Among his other disabilities, an alien could only hold land subject to divestiture by the Crown through a proceeding of "inquest for office found." He had no capacity to succeed to realty by intestate succession; alienage did not confer any inheritible blood.<sup>6</sup> Though these concepts were incorporated into the common law of the several states, they have been modified over the past two centuries by constitutional provision or statute. Indeed, many of the states have completely abolished all of the general restrictions on alien ownership of land.<sup>7</sup> Despite this liberalization, however, some states have enacted specific measures which severely qualify the nonresident alien's right to inheritance proceeds, or inhibit his receipt thereof.

These repressive statutes are of two basic types. California and other western states have enacted "reciprocal right of inheritance" statutes. In New Jersey, New York, Pennsylvania, and other northeastern states the "use, benefit, and control" or "Iron Curtain" statutes are in force.

---

In general, customary practices among nations comprise, in addition to treaties, the corpus of international law. The nations of the world have reserved as an attribute of their sovereignty the right to regulate inheritance rights. Though in fact, the United States is the only western nation imposing such restrictions. Berman, *Soviet Heir in American Courts*, 62 COLUM. L. REV. 257, 263 (1962). See generally Boyd, *The Invalidity of State Statutes Governing the Share of Non Resident Aliens in Decedents' Estates*, 51 GEO. L.J. 470 (1963); Boyd, *Treaties Governing The Succession to Real Property by Aliens*, 51 MICH. L. REV. 1001 (1953); Meekison, *Treaty Provisions For the Inheritance of Personal Property*, 44 AM. J. INT'L L. 313 (1950). Section 165 of the RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1962), provides in part:

- (1) Conduct attributable to a state and causing injury to any alien is wrongful under international law if it
  - (a) departs from the international standard of justice. . . .
- (2) The international standard of justice specified in Subsection (1) is the standard required for the treatment of aliens by
  - (a) The applicable principles of international law as established by international custom. . . .

5. Lord Coke stated in Calvin's Case, 17 Eng. Rep. 377, 399 (K.B. 1607), that inheritance by aliens "tends to destruction *tempore belli*; for then strangers might fortify themselves in the heart of the realm and be ready to set fire to the commonwealth." Likewise Blackstone admonished that since aliens did not owe allegiance to the crown "the defense of the Kingdom would have been defeated" by allowing them to inherit. 1 BLACKSTONE, COMMENTARIES 372. See, *Techt v. Hughes*, 229 N.Y. 222, 128 N.E. 185, cert. denied, 254 U.S. 643 (1920).

6. Boyd, *Treaties Governing The Succession To Real Property By Aliens*, supra note 4, at 1001-05; 2 BLACKSTONE, COMMENTARIES 293.

7. See Sullivan, *Alien Land Laws: A Re-evaluation*, 36 TEMP. L.Q. 15 (1962). See generally Note, 56 YALE L.J. 1017 (1947).

## II. RECIPROCITY STATUTES

In Arizona,<sup>8</sup> California,<sup>9</sup> Iowa,<sup>10</sup> Montana,<sup>11</sup> Nevada,<sup>12</sup> North Carolina,<sup>13</sup> Oregon,<sup>14</sup> Oklahoma,<sup>15</sup> and Wyoming,<sup>16</sup> the right of a nonresident alien to take a legacy or bequest is contingent upon the grant by the domestic laws of the alien's nation of a like right to a citizen of the United States. Section 259 of the California Probate Code, the prototype of the reciprocal rights restriction, provides :

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

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

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

Enacted shortly before World War II and originally employed against the totalitarian regimes of Germany and Italy, these measures now thwart inheritance by nationals of Communist bloc states. By their terms, however, they are capable of a more general application. The legislative purpose of such enactments evinces Lord Coke's "Trojan Horse"<sup>17</sup> fear. The California court stated in *Estate of Karban* that :

[M]oney left by California decedents to relatives in those countries [engaged in or contemplating war with the United States] did not reach them, but was used by their governments . . . property and money of persons dying in this country should remain here and not be sent to foreign countries and be used in waging a war . . . against the United States.<sup>18</sup>

8. ARIZ. REV. STAT. ANN. § 14-212(c) (1956).

9. CAL. PROB. CODE § 259 (West 1956).

10. IOWA CODE § 567.8 (Supp. 1966).

11. MONT. REV. CODE ANN. § 91-520 (1964).

12. NEV. REV. STAT. §§ 134.230-134.250 (1966).

13. N.C. GEN. STAT. § 64-3 (1966).

14. ORE. REV. STAT. § 111.070 (1965).

15. OKLA. STAT., tit. 60, § 121 (1963).

16. WYO. STAT. ANN. § 2-43.1 (Supp. 1965).

17. See note 5, *supra*.

18. 118 Cal. App. 2d 240, 244, 257 P.2d 649, 652 (1953); Chaitkin, *The Rights of Residents of Russia and Its Satellites to Share in Estates of American Decedents*, 25 S. CAL. L. REV. 297 (1952).

The construction of these statutes is logically difficult to justify. These measures assure alien beneficiaries, even if their governments are hostile to the United States, the absolute right to receive the proceeds from an inheritance. Such a concession is conditioned only upon the grant by the domestic law of the foreign nation of the same inheritance rights to American citizens as are enjoyed by its own nationals. Conceivably, even a negligible or nonexistent right of inheritance, if shared equally by United States citizens and the native population, would secure full inheritance rights here by residents of that country.<sup>19</sup>

### A. Differing Concepts of Reciprocity

Though classified together generically, when examined individually these reciprocal rights statutes exhibit marked dissimilarity. The distinctions arise in the various interpretations given to the term "reciprocity" itself.

Despite the general use of the California statute as the reciprocity prototype, only the statutes of Iowa and North Carolina join California in the liberal and somewhat illogical approach that reciprocity exists whenever nationals of the foreign country and citizens of the United States enjoy equal inheritance rights in the alien's own nation. The court in *Estate of Miller*<sup>20</sup> stated that section 259 of the California Probate Code does not demand of a foreign country a legal system identical to ours. "All that it requires is that there be no discrimination shown in inheritance matters between nationals of that country and residents and citizens of our own. . . ."<sup>21</sup> By this conception of reciprocity a nonresident alien is assured absolute equality of inheritance rights with Americans here if the domestic inheritance laws of the alien's country apply equally to its own nationals and United States citizens.

Recognizing the literal and logical deficiency of section 259, the California Supreme Court has recently interjected into its interpretation a totally new concept. Although with no statutory foundation, Mr. Justice Tobriner speaking for the majority in *Estate of Larkin* stated that:

Though section 259 requires only the demonstration of a "reciprocal right" on the part of our citizens "to take property upon the same terms and conditions" as residents of the foreign country itself, we doubt that mere equality of treatment would suffice. We would almost certainly not find the requisite reciprocity with respect to a country which permitted no inheritance at all, or which made the enforcement of inheritance subject to official whim or caprice. Though the statute speaks in terms of equal treatment, we believe that it necessarily

---

19. Nazi Germany was cognizant of this fact and took advantage of it. See *Estate of Schluttig*, 36 Cal. 2d 416, 224 P.2d 695 (1950).

20. 104 Cal. App. 2d 1, 230 P.2d 667 (1951). See also *Estate of Kennedy*, 106 Cal. App. 2d 621, 235 P.2d 837 (1951); *Estate of Reihis*, 102 Cal. App. 2d 260, 227 P.2d 564 (1951); *Corbett v. Stergios*, 256 Iowa 12, 126 N.W.2d 342 (Iowa 1964), *rev'd per curiam*, 381 U.S. 124 (1965).

21. *Estate of Miller*, 104 Cal. App. 2d at 12, 230 P.2d at 674.

imports a requirement that the inheritance rights recognized in the foreign country meet some minimal standard of economic substantiality, and that it be shown that such rights are regularly recognized in practice.<sup>22</sup>

This purely judicial definition of reciprocity may require something more than mere equality of treatment. By its terms, a nonresident alien is granted inheritance rights in this country equal to those enjoyed by United States citizens only if an American can inherit an "economically substantial interest" in the alien's nation. Thus, in contradiction to the statutory language, more favorable treatment may be required for an American than is accorded the national population by the domestic laws of the alien's country; there is no requirement that the local citizenry also be permitted to inherit such "economically substantial interests." Apparently such a determination of economic substantiality will be made on an ad hoc, case by case basis. The interesting question posed by this test has not yet been answered — "economically substantial interests" by whose standards, American or those of the alien's nation.<sup>23</sup>

While reading the statute more conservatively in this one respect, *Larkin* also overruled a narrow interpretation of reciprocal rights which, if followed, would have effectively denied inheritance to all residents of Communist controlled countries. A lower appellate court had ruled in *Estate of Gogabashvele*<sup>24</sup> that no reciprocal rights of inheritance existed between the United States and the Soviet Union since an American or Soviet citizen has no "right" or legally enforceable claim to inheritance in Russia. When the government grants only a conditional privilege of inheritance subject to unbridled discretion there is, held the court, no reciprocal "right" as the term is employed in section 259.<sup>25</sup> The *Larkin* court emphasized the notion that there is no natural right to inherit, even in this country.<sup>26</sup> And after an extensive review and recitation of the evidence it was determined by the court that Soviet citizens do in fact enjoy substantial inheritance benefits, and that Americans share these benefits on a nondiscriminatory basis. The ability of the Russian govern-

22. 65 Cal. 2d 60, 65, 416 P.2d 473, 476, 52 Cal. Rptr. 441, 442 (1966), noted in 80 HARV. L. REV. 675 (1967). Justice Tobriner reasserted this "economic substantiality" test in *Estate of Chichernea*, 66 Cal. 2d 74, 424 P.2d 687, 57 Cal. Rptr. 135 (1967). In this case it was conceded, however, that *Larkin* does not demand that one inheriting such an economically substantial interest also have the absolute right to remove the proceeds to his country. Proof that a nation denies in practice the equal inheritance rights it professes in theory was sufficient to yield a finding of no reciprocity in *Estate of Schluttig*, 36 Cal. 2d 416, 224 P.2d 695 (1950).

23. The court in *Larkin* apparently assumed, without deciding, that Americans have inherited in Russia economically substantial interests.

24. 191 Cal. App. 2d 503, 16 Cal. Rptr. 77 (1961).

25. This decision produced a spate of articles all demonstrating that Soviet citizens do in fact enjoy substantial inheritance rights. Bader, *et al.*, *Soviet Inheritance Cases in American Courts and The Soviet Property Regime*, 1966 DUKE L.J. 98; Ginsburgs, *Inheritance by Foreigners Under Soviet Law*, 51 IOWA L. REV. 16 (1965); Berman, *Soviet Heirs In American Courts*, 62 COLUM. L. REV. 257 (1962).

26. *Estate of Larkin*, 65 Cal. 2d 60, 80, 416 P.2d 473, 487, 52 Cal. Rptr. 441, 456, quoting *Estate of Simmons*, 64 Cal. 2d 217, 221, 411 P.2d 97, 100, 49 Cal. Rptr. 369, 372 (1966).

ment to alter this favorable situation was considered to be of no significance until utilized in an abusive manner.<sup>27</sup>

In contradistinction to the California statutory requirement of equal treatment for Americans and the local citizenry in the alien's nation are the Arizona and Oklahoma statutes. These measures sanction discrimination by both the state probate courts and the domestic laws of the alien's country. Any alien eligible for citizenship may take real and personal property "in the same manner that a citizen of the United States takes and holds real and personal property by devise or descent in the country of which the alien is a citizen."<sup>28</sup> Literally, the courts are empowered to award property to nonresident aliens on the same terms, and presumably under the same disabilities, as a United States citizen can take in the alien's own country. There is, contrary to the California statutory provision, neither assurance that the alien will take absolutely here nor directive that he prove equality of treatment abroad. Reciprocity is given a rather constrained definition and application by the Arizona and Oklahoma statutes. The nonresident alien's inheritance rights in this country are equal to, and precisely gauged by, those which are granted in his country to an American. There are, therefore, strictly equal inheritance rights between the alien here and the United States citizen in the alien's nation. Under the language of the California statute, equality of inheritance rights between nonresident aliens and citizens here is conditioned upon equality between Americans and the citizens of the alien's country. But there is no necessity that the right granted here be identical to and based upon that enjoyed abroad. The Arizona and Oklahoma definition of reciprocity is not equivalent to that expounded in *Larkin*. There is no requirement, in *Larkin*, that the "economically substantial interest" which an American must enjoy abroad be equal to the interest which the alien receives here.

The older Oregon law<sup>29</sup> presents a variant of the Arizona-Oklahoma concept. Reciprocity was said to exist if a United States citizen could take an estate in the alien's country on the same terms as the laws of that nation allowed the alien to take an estate probated here. This notion is also distinguished from the California law. There is no requirement that Americans enjoy complete equality of inheritance rights with the local citizenry.

---

27. Although *Larkin* has clarified the California law on this point, the Oregon courts still hold reciprocal "right" to import a legally enforceable claim. *State Land Board v. Buchanan*, 199 Or. 448, 263 P.2d 769 (1953). See also *State v. Pekarek*, 234 Or. 74, 378 P.2d 734 (1963); *Stoich v. Kolovrat*, 220 Or. 448, 349 P.2d 255 (1960), *rev'd sub nom.*, *Kolovrat v. Oregon*, 366 U.S. 187 (1961).

28. ARIZ. REV. STAT. ANN. § 14-212(c) (1956); see *Podret v. Superior Ct.*, 80 Ariz. 182, 294 P.2d 670 (1956). In 1965 Texas amended its laws to grant aliens complete equality with citizens as regards inheritance rights. TEX. REV. CIV. STAT. ANN., art. 166A (Supp. 1966). Prior to this enactment the Texas law was identical to that of Arizona.

29. Law of March 11, 1937, ch. 399, § 1 [1937] Ore. Laws 1937 (amended 1951). This law may still have some vitality, since the statutory requirements to be considered are those extant at the time of the testator's death, not at the time of probate or litigation. *Mullart v. State Land Board*, 222 Or. 463, 353 P.2d 531 (1960); *Clostermann v. Schmidt*, 215 Or. 55, 332 P.2d 1036 (1958); *State Land Board v. Buchanan*, 199 Or. 448, 263 P.2d 769 (1953); Note, 45 ORE. L. REV. 221 (1965).

Instead, it requires the law of the alien's nation to allow an American to inherit an estate there on the same terms as it allows one of its nationals to take an estate here.

The present Oregon statute, as well as the laws of Montana and Nevada, compound the California concept of equal treatment of Americans and nationals of a foreign country in that nation with the requirement that the American have the absolute right to receive payment, in this country or its territories, of funds derived from his estate share.<sup>30</sup> It means very little, said the court in *State Land Board v. Rodgers*,<sup>31</sup> to give the American an equal right to take if the foreign exchange laws frustrate delivery of the proceeds in the United States. These statutes, therefore, require more favorable treatment for the American under the laws of the alien's country than the alien himself may receive. Under the laws of Montana and Nevada there is no necessity of concomitant proof that the alien will receive the full proceeds of an estate share in his own country. Oregon, however, requires, in addition to equal treatment and the unimpaired right of an American to receive the proceeds from an inheritance, proof that the alien will have the full use, benefit, and control of the funds in his own country.<sup>32</sup>

### B. Burden of Proof

Without exception, these reciprocity statutes place the onus of establishing the existence of reciprocal rights upon the potential foreign beneficiary. This arbitrary imposition is based upon the rationale that he is in a better position to prove the features of his own nation's law.<sup>33</sup> Though

---

30. ORE. REV. STAT. § 111.070 (1965):

(1) The right of an alien not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this state by succession or testamentary disposition, upon the same terms and conditions as inhabitants and citizens of the United States, is dependant in each case:

(b) Upon the rights of citizens of the United States to receive by payment to them within the United States or its territories money originating from the estates of persons dying within such foreign country. . . .

31. 219 Or. 233, 347 P.2d 57 (1959). The argument was advanced in this case that the "right to receive payment" requirement could be met by transferring the funds from Bulgaria to a bank in a third country, and then drawing on that account in this country. The court refused to authorize this procedure stating that the right to receive payment in the United States envisions a delivery here of the funds directly from someone in the foreign country who is authorized to disburse decedent's estates.

32. These three requirements make Oregon's inheritance law the most stringent in the nation. The Wyoming statute merely states that a nonresident alien will not be permitted to inherit an estate here if "the laws of the country of which such nonresident alien is a citizen do not allow citizens of the United States to take real property by succession or by testamentary disposition." WYO. STAT. ANN. § 2-43.1(a) (Supp. 1965). In the absence of any judicial decisions it is difficult to determine how this ambiguous phrase will be construed.

33. *Estate of Gaspor*, 128 Mont. 383, 275 P.2d 656 (1954). At one time section 259 of the California Probate Code cast the burden on the state, or challenging party. Proceeding on the assumption that foreign law was the same as that of California, reciprocity was presumed to exist. Law of July 9, 1945, ch. 1160, § 1 [1945] Cal. Laws 1945 (repealed 1947). Chaitkin, *The Rights of Residents of Russia and Its Satellites to Share in Estates of American Decedents*, 25 S. CAL. L. REV. 297, 307-12 (1952).



ostensibly just, such a requirement may be latently inconsistent with the accepted norms of procedure. Assume that a testator dies survived by a brother in Russia and cousins in this country, and that a bequest of the entire estate is made to the brother. Under section 259 of the California Probate Code the brother must, before he can take the inheritance, establish the requisite reciprocity. Should he fail, the property passes to the cousins or escheats. It may, in some instances, be improper to demand that the brother prove his right to inherit. Normally the moving party, he who challenges or alleges, must bear the burden of proof.<sup>34</sup> Yet in these cases the challenge of the state or a distant relative would thrust the affirmative burden of proof on the alien.<sup>35</sup>

Reciprocity is to be demonstrated by the alien as a question of fact,<sup>36</sup> despite the proposition found in the evidence law of at least one reciprocity jurisdiction that matters of foreign law constitute questions of law concerning which a court may take judicial notice.<sup>37</sup> This apparent incongruity is justified on the grounds that it is often extremely difficult to determine with precision the laws of the countries involved (usually those of the Soviet bloc). The court in *Estate of Kennedy* expressed this rationale thusly:

[Judicial notice] . . . extends no further than . . . the general system of . . . [law that] prevails, without taking notice of details. . . . [T]he form of government of that nation gives us no knowledge of the "details" of the jurisprudence of that country. . . .<sup>38</sup>

Furthermore, these statutes require proof not only of the abstract legal proposition, but also of the law's regular and nondiscriminatory application.

A treaty, however, is regarded as the supreme law of the land. If the alien introduces evidence that a treaty containing provisions regulating inheritance exists between his nation and the United States, then the determination of the alien's right to inherit becomes a question of law.<sup>39</sup> Hence the alien must establish reciprocity either through proof of the existence of relevant treaty provisions, or by introducing expert testimony as to the law of the foreign nation in question and lay testimony to the

34. 9 W. WIGMORE, EVIDENCE § 2486 (3d ed. 1940).

35. *E.g.*, *Estate of Larkin*, 65 Cal. 2d 60, 416 P.2d 473, 52 Cal. Rptr. 441 (1966); *Mullart v. State Land Board*, 222 Or. 463, 353 P.2d 531 (1960).

Concededly, if the case is one in which the nonresident alien is bringing a proceeding for determination of heirship, then he, as the moving party, should bear the burden of proof. *Zschernig v. Miller*, 243 Or. 567, 412 P.2d 781 (1966); *prob. juris. noted*, 386 U.S. 1030 (1967).

36. *Estate of Schneider*, 140 Cal. App. 2d 710, 296 P.2d 45 (1956); *Estate of Schluttig*, 36 Cal. 2d 416, 224 P.2d 695 (1950).

37. CAL. EVID. CODE §§ 310, 450 (West 1966).

38. 107 Cal. App. 2d 621, 626, 235 P.2d 837, 840-41 (1951). *Estate of Eng*, 228 Cal. App. 2d 160, 39 Cal. Rptr. 254 (1964), held that judicial notice may be taken only of things certain. The precise provisions of foreign law were said to be uncertain. Also, see *Estate of Feierman*, 202 Cal. App. 552, 20 Cal. Rptr. 883 (1962).

39. *Estate of Arbulich*, 41 Cal. 2d 86, 257 P.2d 433, *cert. denied*, 346 U.S. 897 (1953); *Zschernig v. Miller*, 243 Or. 567, 412 P.2d 781 (1966); *Stoich v. Kolovrat*, 220 Or. 448, 349 P.2d 255 (1960), *rev'd sub nom.*, *Kolovrat v. Oregon*, 366 U.S. 187 (1961).

effect that other United States citizens have in fact received bequests from estates probated in that country.<sup>40</sup>

Since the issue of reciprocity is to be resolved as a question of fact, *stare decisis* is of no assistance to the alien. Consequently, reciprocal inheritance rights may be found to exist with a particular nation in one case, and not to exist at the same period of time in another.<sup>41</sup> And the alien's right to inherit often turns upon his ability to acquire persuasive expert witnesses.<sup>42</sup>

Although repeatedly asserting that reciprocity is to be determined as a matter of fact, in cases of this type the appellate courts frequently exceed their traditional role. It is not uncommon for them to indulge in a re-evaluation of the evidence and to make an independent determination of the existence *vel non* of reciprocity on the basis thereof.<sup>43</sup>

These reciprocal rights statutes are a matter of substantive law since they condition the potential beneficiary's ultimate right to the proceeds of the estate. "If a nonresident alien cannot allege and prove reciprocity, he may not inherit under our laws."<sup>44</sup> Hence, reciprocity, and under the Oregon statute the right to receive the proceeds, must be shown to have obtained at the time of the testator's or intestate's death,<sup>45</sup> for it is at that time that the property conceptually passes to the heir. This notion provides the theoretical basis for the wording of the statute — "the right to take." The property passes to the nonresident alien on the death of the testator. His substantive right to take the inheritance is, however, conditioned upon proof of reciprocity. Failure to meet this burden effects a divestiture of his interest in the estate and a transfer of it to other heirs or the state.<sup>46</sup> Curiously, opinions such as *Larkin* discuss in detail the inheritance provisions of the foreign nation's present legal system without demonstrating their existence at the time of the testator's death.

---

40. In *Estate of Ginn*, 136 Mont. 338, 347 P.2d 467 (1959), the court rejected the contention that the alien could not receive any amount in excess of that previously granted without proof of reciprocity for the amount claimed. Once reciprocity is proven, said the court, there is no limit to the amount to be received.

41. Reciprocity was found to exist with Germany on April 22, 1942, *Estate of Miller*, 104 Cal. App. 2d 1, 230 P.2d 667 (1951), but not to exist on June 3, 1943, *Estate of Thramm*, 80 Cal. App. 2d 756, 183 P.2d 97 (1947).

42. Comment, *The Application of the Reciprocal Rights and Benefit Rules to Foreign Legacies*, 36 TUL. L. REV. 799, 811 (1962).

43. *E.g.*, *Estate of Gogabashvele*, 195 Cal. App. 2d 503, 16 Cal. Rptr. 77 (1961); *Estate of Spoya*, 129 Mont. 83, 282 P.2d 452 (1955). The dissent in *Estate of Arbulich*, 41 Cal. 2d 86, 257 P.2d 433, *cert. denied*, 346 U.S. 897 (1953), stated that it is improper to reverse a lower court's finding of fact on the matter of reciprocity when it is supported by conflicting evidence. *See also* *Estate of Schulttig*, 36 Cal. 2d 416, 224 P.2d 695 (1950). In *State v. Pekarek*, 234 Or. 74, 378 P.2d 734 (1963), the appellate court evaluated the testimony of Czechoslovakian embassy officials which tended to prove that the alien would receive the use, benefit, and control of the proceeds of an estate as required by ORE. REV. STAT. § 111.070(c) (1965). Their testimony was found not to be trustworthy.

44. *Estate of Nersisian*, 155 Cal. App. 2d 561, 566, 318 P.2d 168, 171 (1957).

45. *E.g.*, *Estate of Arbulich*, 41 Cal. 2d 86, 257 P.2d 433, *cert. denied*, 346 U.S. 897 (1953); *Estate of Spoya*, 129 Mont. 83, 282 P.2d 452 (1955); *Zschernig v. Miller*, 243 Or. 567, 412 P.2d 781 (1966).

46. *Estate of Schneider*, 140 Cal. App. 2d 710, 296 P.2d 45 (1956); *Mullart v. State Land Board*, 222 Or. 463, 353 P.2d 531 (1960).

### C. Failure to Comply

Often the state, seeking to benefit through the escheat provision of these statutes, is a party to the dispute. The property escheats, however, only as a final alternative. "[I]f no heirs other than such aliens are found eligible to take such property. . . ."47 it shall escheat. Literally this clause appears to authorize disposal of the property in accordance with the state's rules of intestate succession. In *Estate of Bevilacqua*,48 an intestate was survived by a wife and children in Italy and remote cousins in this country. The wife was unable to prove the requisite reciprocity. It was determined by the court that her inability to take did not authorize an escheat of the property, but rather it devolved to those next entitled to take as though the first heirs had not existed. In *Kramer v. Superior Court*,49 the testator's will provided that the residue of his estate should be divided equally between his wife, a California resident, and certain other relatives living in East Germany. These latter were unable to prove reciprocity. Contrary to *Bevilacqua*, the court ordered an escheat of that portion of the estate bequeathed to these relations. Such a holding gives testimony to the fact that the courts, in applying these statutes, do not consider as the paramount factor the intent of the testator, for it seems unreasonable to assume that he would prefer automatic escheat to distribution among alternative beneficiaries.

### III. USE, BENEFIT, AND CONTROL STATUTES

In contrast to the reciprocity statutes which substantively condition the nonresident alien's right to take an inheritance, Connecticut,<sup>50</sup> Florida,<sup>51</sup> Maryland,<sup>52</sup> Massachusetts,<sup>53</sup> Michigan,<sup>54</sup> New Jersey,<sup>55</sup> New York,<sup>56</sup> Pennsylvania,<sup>57</sup> Ohio,<sup>58</sup> and Rhode Island<sup>59</sup> have enacted custodial measures designed to control the transmission of estate proceeds to nonresident aliens. Section 2218-1 of the New York Surrogate Court Procedure Act, the archetype of these statutes, provides:

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

47. CAL. PROB. CODE § 259.2 (West 1956).

48. 31 Cal. 2d 580, 191 P.2d 752 (1948).

49. 36 Cal. 2d 159, 222 P.2d 874 (1950). See also *In re Estate of Stoian*, 138 Mont. 384, 357 P.2d 41 (1960).

50. CONN. GEN. STAT. ANN. § 45-278 (1960).

51. FLA. STAT. ANN. § 731.28 (1964).

52. MD. ANN. CODE art. 93, § 161 (1964).

53. MASS. ANN. LAWS ch. 206, § 27A (Supp. 1966).

54. MICH. STAT. ANN. § 27.3178 (306a) (1962).

55. N.J. REV. STAT. § 3A:25-10 (1953).

56. N.Y. SURR. CT. PRO. ACT § 2218 (McKinney 1967). This statute is a re-enactment of section 269-a of the New York Surrogate Court Act under which all the cases discussed herein were decided.

57. PA. STAT. ANN. tit. 30, §§ 320.737, 1156 (Supp. 1966).

58. OHIO REV. CODE ANN. § 2113.81 (Baldwin 1958).

59. R.I. GEN. LAWS ANN. § 33-13-13 (1956).

it desirable that such payment should be withheld, the decree may direct that such money or other property be paid into the surrogate's court for the benefit of such legatee, distributee beneficiary of a trust or such person or persons who may thereafter appear to be entitled thereto. Such money or other property so paid into court shall be paid out only by the special order to the surrogate or pursuant to the judgment of a court of competent jurisdiction.

The nonresident alien's absolute right to ownership is formally guaranteed by these statutes. Ostensibly, their purpose is to afford the alien's inheritance further protection. Its transmission is withheld until receipt of proof that conditions in his own country will allow him to have full use, benefit, and control of the funds. Such a procedure is thought to effectuate, as far as possible, the testator's intent. Although not primarily retributive measures enacted against the Communist dominated nations,<sup>60</sup> these statutes, as an allegedly subordinate aim, prevent the confiscation by, and enrichment of, governments whose political ideologies differ from our own.<sup>61</sup> An examination of the provisions of these statutes, however, leads to the conclusion that the latter purpose is in fact paramount. As drafted and applied the intent of the testator and the welfare of the nonresident claimant become secondary considerations.<sup>62</sup>

By their terms these measures are inherently vague and uncertain. A testator attempting to draw his will in contemplation of these statutes is unable to determine whether or not it shall appear that the beneficiary will have full use, benefit, and control or whether "other special circumstances make it desirable that such payment should be withheld. . . ."<sup>63</sup> In contrast to the reciprocity statutes which require the determination to be made on the basis of facts existing at the time of the testator's death, satisfaction of these custodial requirements must be proven whenever transfer of the proceeds abroad is attempted. Thus the intent of the testator is not seriously considered. The statutes proceed on the assumption that the testator would desire the beneficiary to obtain the maximum benefit from the bequest. Based upon this premise it is concluded that the testator

60. *In re Estate of Wells*, 204 Misc. 975, 126 N.Y.S.2d 441 (Sur. Ct. 1953).

61. *In re Estate of Uri*, 7 N.J. Super. 455, 71 A.2d 665 (P. Div.), *appeal dismissed*, 5 N.J. 507, 76 A.2d 249 (1950).

62. Statements such as those found in *First Nat'l Bank v. Fishman*, 7 Ohio Misc. 130, 217 N.E.2d 60 (1966), and *Belemecich Estate*, 411 Pa. 506, 192 A.2d 740 (1963), *rev'd sub nom.*, *Consul General of Yugoslavia at Pittsburgh v. Pennsylvania*, 375 U.S. 395 (1964), are frequent in the opinions.

If this court permits the transmission of the residue of this estate to Russia, the Communist Government of that country will acquire the bulk of the residue by means of unfair currency exchange regulations, outright confiscation or otherwise, and the probabilities are that all or part of this money will be used to finance such further activities as the Berlin Wall, Korea Conflict and Viet Nam.

*First Nat'l Bank v. Fishman*, *supra* at 133, 217 N.E.2d at 63.

All the known facts of a Sovietized state lead to the irresistible conclusion that sending American money to a person within the borders of an Iron Curtain country is like sending a basket of food to Little Red Ridinghood in care of her "grandmother."

*Belemecich Estate*, *supra* at 511, 192 A.2d at 742.

63. N.Y. Surr. Ct. Pro. Act § 2218 (McKinney 1967).

would prefer that the bequest be withheld if full use, benefit, and control is not presently possible. An equally valid and possibly more sensible conclusion is that the testator would desire the legatee to receive whatever immediate benefit the laws of his nation allow him to derive from the estate share.

When the indefinite and inconsistent methodology employed by the courts in implementing these statutes is considered, the task confronting an alien attempting to remove his estate share from this country indeed appears awesome. By the majority of the cases, the nonresident claimant bears the burden of persuading the court that he will enjoy, in his country, the full use, benefit, and control of the inheritance proceeds.<sup>64</sup> The statutes appear to become effective at the pleasure of the court, with vast discretion granted to the individual judge concerning the degree of certainty to which the alien will be held in proving that he will have full use, benefit, and control. Since these statutes are precautionary measures,<sup>65</sup> the claimant must establish not only that his government has not confiscated or placed excessive taxes upon inheritance proceeds in the past, but also that it will not do so in his particular case. Numerous cases have ordered a withholding of the proceeds if it seems contingently possible that full use, benefit, and control of the funds would not be granted by the claimant's government.<sup>66</sup>

Once the court determines to invoke the statute it may take judicial notice of the political and economic disabilities prevalent in the alien's nation.<sup>67</sup> Occasionally judicial investigation will proceed no further.<sup>68</sup> In other cases, a virtually irrebuttable presumption that residents of certain nations will not have full use, benefit, and control of the funds arises from a Treasury Department directive.<sup>69</sup> This statement prohibits the drawing of government checks in favor of persons residing in specified nations of the Communist bloc, since there is no assurance that the named payee will

---

64. *In re Estate of Greenberg*, 46 Misc. 2d 883, 261 N.Y.S.2d 176 (Sur. Ct. 1964); *In re Estate of Miller*, 115 N.Y.S.2d 255 (Sur. Ct. 1952).

65. *In re Estate of Volencki*, 35 N.J. Super. 351, 114 A.2d 26 (P. Div. 1955).

66. *In re Estate of Braier*, 305 N.Y. 148, 111 N.E.2d 424 (1953); *In re Estate of Reidl*, 23 App. Div. 2d 171, 259 N.Y.S.2d 217 (Sup. Ct. 1965); *In re Estate of Weidberg*, 172 Misc. 524, 15 N.Y.S.2d 252 (Sur. Ct. 1939); Berman, *Soviet Heirs In American Courts*, 62 COLUM. L. REV. 257, 263 (1962).

67. *Sobko Estate*, 88 Pa. D. & C. 76, 77 (Phila. County Ct. 1954):

Volumes have been written concerning the deplorable plight of the people residing in the Union of Soviet Socialist Republic and the other nations dominated by the Soviet police state. From such information as is available to us . . . there would appear to be little doubt that these unfortunate people have been enslaved by a vicious government which deprives them of . . . the fundamental right of private ownership of property. It is fairly to be inferred . . . that funds transmitted to citizens of these countries are confiscated or diverted by the state or its officials and fail to reach the intended beneficiaries. All this is so much a matter of common knowledge that the auditing judge will take judicial notice of it. . . .

The court in *In re Estate of Volencki*, 35 N.J. Super. 351, 114 A.2d 26 (P. Div. 1955), stated that the common knowledge of the obstacles in the path of such full use, benefit, and control should be given judicial notice.

68. *In re Estate of Volencki*, 35 N.J. Super. 351, 114 A.2d 26 (P. Div. 1955).

69. 16 Fed. Reg. 1818 (Feb. 27, 1951).

receive its full value.<sup>70</sup> In such cases, the courts refuse to consider whether or not transmission of the estate share through private channels would enable the beneficiary to enjoy its full use, benefit, and control.

Contrary to the approach of these courts is the opinion of the New York appellate division in *In re Estate of Reidl*.<sup>71</sup> It was held in that case that judicial notice of the Treasury Department directive or proof of the political and economic structure of the alien claimant's nation is in itself insufficient to warrant a withholding of the inheritance proceeds. Evidence of specific instances in which alien beneficiaries were deprived of full use, benefit, and control must be adduced before the provisions of section 269-a become operative. Under this rationale the burden of producing evidence is effectively shifted to the state. There is, however, no effective way in which the alien claimant can be apprised of the approach that a particular court will employ in his case until the final determination is made.

The courts, in determining if the alien claimant will have full use, benefit, and control, occasionally attempt an evaluation of the fiscal policy and currency exchange rates of the nation involved.<sup>72</sup> The series of cases concerning the Czechoslovakian Tuzex certificates exemplifies the contradictions rampant in this area of economic evaluation. The Czechoslovakian government maintains a merchandising enterprise known as the Tuzex Foreign Trade Corporation.<sup>73</sup> Through an outlet in this country one may purchase articles at the standard American price and have them delivered to a consignee in Czechoslovakia. Alternatively, certificates may be purchased here and transmitted to the Czechoslovakian resident. These vouchers may be exchanged by him either for a variety of commodities or for the official Czechoslovakian currency at a rate higher than that offered for direct exchange of the American dollar. An attempt was made by the administrator in *In re Estate of Reidl*<sup>74</sup> to convert the inheritance fund into these certificates and to transmit them to the heir. Refusing to sanction this procedure, the surrogate court stated, "[I]t appears to this court that the use of Tuzex gift vouchers could very well be further ingenious attempts by Iron Curtain countries to circumvent [section] 269-a

---

70. *In re Estate of Markewitsh*, 62 N.J. Super. 407, 163 A.2d 232 (P. Div. 1960); *In re Estate of Best*, 200 Misc. 332, 107 N.Y.S.2d 224 (Sur. Ct. 1951); *In re Estate of Getream*, 200 Misc. 543, 107 N.Y.S.2d 225 (Sur. Ct. 1951).

71. 23 App. Div. 171, 259 N.Y.S.2d 217 (Sup. Ct. 1965). See also *In re Estate of Saniuk*, 40 Misc. 2d 437, 243 N.Y.S.2d 47 (Sur. Ct. 1963), in which it was stated that proof of the treasury regulation was not the exclusive indication of the beneficiary's ability to have full use, benefit, and control of the funds; other information may be employed by the Surrogate in reaching his conclusion.

72. The Surrogate, prior to deciding the case *In re Estate of Tybus*, 28 Misc. 2d 278, 217 N.Y.S.2d 913 (Sur. Ct. 1961), visited Poland, investigated the laws, observed its banking system, and became familiar with its rather intricate system of foreign currency exchange. On the basis of this first hand experience he determined that the Polish heirs would have the full use, benefit, and control of their inheritances.

73. Several other Communist countries have similar enterprises: Corecon in Bulgaria, discussed in *In re Estate of Petroff*, 49 Misc. 2d 233, 267 N.Y.S.2d 8 (Sur. Ct. 1966); the P.K.O. Bank in Poland, discussed in *In re Estate of Tybus*, 28 Misc. 2d 278, 217 N.Y.S.2d 913 (Sur. Ct. 1961).

74. 39 Misc. 2d 805, 242 N.Y.S.2d 105 (Sur. Ct. 1963).

of the Surrogate's Court Act."<sup>75</sup> The appellate division of the supreme court,<sup>76</sup> in modifying the lower court's ruling, allowed transmission of the inheritance by means of the Tuzex certificates. It found this method to be in wide use, and no evidence was presented that this method had ever resulted in confiscation of the funds. Distribution of an estate through the Tuzex program was subsequently authorized on the basis of this supreme court opinion in *In re Estate of Karman*.<sup>77</sup> But consent to a similar petition was denied by the surrogate court in *In re Estate of Shefsick*<sup>78</sup> with the court determining that Tuzex certificates did *not* give the claimant the full use, benefit, and control of his inheritance. Their purchasing power was said to be over evaluated in relation to the American dollar. This is concededly true, but it may be quite irrelevant. When one American dollar is transferred into Tuzex certificates, and these certificates are subsequently exchanged for Czechoslovakian crowns, the rate of exchange is twice as favorable as when a dollar is exchanged directly for crowns.<sup>79</sup> Hence by this maneuver the value of each crown in relation to the dollar is indeed less, since twice as many are exchanged per American dollar. The Czechoslovakian resident's purchasing power in his country is, however, twice as great, for every one crown he now has two.

As a "temporary" withholding procedure, these statutes entitle an alien to take the estate share whenever he can establish a shift in the political and economic conditions which will allow him full use, benefit, and control of the funds.<sup>80</sup> Since such a determination is a question of fact, a claimant can repeatedly institute suit employing different and more persuasive experts and evidence, though in fact the conditions may not have changed.<sup>81</sup>

Although allegedly preserving the alien's unqualified ownership of the inheritance share,<sup>82</sup> these statutes do not confer complete use of, and benefit from, the funds. Until the alien meets the burden of the statute, the estate share is by the terms of several of these measures deposited in the state treasury. It is not necessarily provided, however, that the funds be invested in an interest bearing account with subsequent payment, with all accrued interest, being made to the alien upon satisfactory proof of full

---

75. *Id.* at 807, 242 N.Y.S.2d at 107.

76. *In re Estate of Reidl*, 23 App. Div. 2d 171, 259 N.Y.S.2d 217 (Sup. Ct. 1965).

77. 51 Misc. 2d 707, 273 N.Y.S.2d 685 (Sur. Ct. 1966).

78. 50 Misc. 2d 293, 270 N.Y.S.2d 34 (Sur. Ct. 1966).

79. It was stated in *Shefsick* that at the official rate of exchange \$1 could be exchanged for 7.14 Czechoslovakian crowns. A Tuzex certificate or crown purchased here for \$1 could be exchanged in Czechoslovakia for 14.3 standard crowns.

80. *In re Estate of Wayland*, 25 App. Div. 836, 270 N.Y.S.2d 59 (Sup. Ct. 1966). The lower court ordered a deposit of the funds with the state treasurer. On appeal the supreme court held, per curiam, that conditions in Hungary allowed an heir to have the full use, benefit, and control of the funds. The court in *In re Estate of Getream*, 200 Misc. 543, 107 N.Y.S.2d 225 (Sur. Ct. 1951), determined that a Hungarian resident would not, in 1951, have the requisite full use, benefit, and control.

81. See *In re Estate of Kuzmic*, 23 Misc. 2d 604, 206 N.Y.S.2d 297 (Sur. Ct. 1960).

82. The court in *In re Estate of Rawski*, 28 Misc. 2d 253, 218 N.Y.S.2d 1111 (Sur. Ct. 1961) released the money to the legatee, a Polish national, who was visiting this country.

use, benefit, and control in his country. The Pennsylvania statute<sup>83</sup> directs that the alien will receive the principal sum with two percent interest, although the share might well have been more profitably invested. In Connecticut, the state treasurer is to invest the money at his discretion.<sup>84</sup> Only in Massachusetts is there a specific directive that the funds be deposited in a savings bank or trust account.<sup>85</sup> Under the Maryland statute, the money withheld remains in the state treasury for seven years. If the alien is unable to successfully establish the requisite use, benefit, and control within that period, the funds are placed at the disposal of the city of Baltimore. A subsequent showing of the necessary proof will entitle the alien to a re-conveyance of the funds with, however, no interest.<sup>86</sup> More drastic than the possible loss of interest are the provisions of several of these statutes which allow a complete forfeiture of the estate share if it is not authorized to be withdrawn within twenty one years.<sup>87</sup> If the alien is unable to prove the full use, benefit, and control within that period, the estate share is divided among the other heirs or is escheated. Despite the statutes' guarantee of the beneficiary's right to the property, the courts in several cases have made an alternative disposition of the funds upon the initial failure of the claimant to prove use, benefit, and control.<sup>88</sup>

A provision of the Massachusetts law<sup>89</sup> presents the most enlightened variant of the use, benefit, and control statute. It provides a workable dialectic of any legitimate interest which the state may have in controlling the flow of inheritance proceeds to politically hostile nations and the intent of the testator and the welfare of the beneficiary. Under this law, if the claimant is not able to prove that he will have full use, benefit, and control of the inheritance proceeds, the executor of the estate may petition the court to have the estate share paid to him. He in turn will purchase with the funds food, clothing, medicine, etc., and transmit these to the beneficiary through a public or private agency.

#### IV. DISABILITIES OF ALIENAGE STATUTES

Although the "reciprocal rights" and the "use, benefit, and control" statutes are the specific types enacted to regulate inheritance, the general disabilities of alienage imposed by other states serve the same purpose. The statutes of Kentucky,<sup>90</sup> Illinois,<sup>91</sup> Indiana,<sup>92</sup> Mississippi,<sup>93</sup> and

83. PA. STAT. ANN. tit. 20, § 320.737 (Supp. 1966).

84. CONN. GEN. STAT. ANN. § 45-278 (1960).

85. MASS. ANN. LAWS ch. 206, 27A (Supp. 1966).

86. MD. ANN. CODE art. 93, § 161 (b) (1964).

87. E.g., MASS. ANN. LAWS ch. 206, § 28 (1955).

88. *In re Estate of Von Der Heid*, 33 Misc. 2d 812, 227 N.Y.S.2d 807 (Sur. Ct. 1958); *In re Estate of Muckl*, 174 Misc. 35, 19 N.Y.S.2d 1009 (Sur. Ct. 1940).

89. MASS. ANN. LAWS ch. 206, § 27B (Supp. 1966).

90. KY. REV. STAT. ANN. § 381.320 (1963).

91. ILL. ANN. STAT. ch. 6, §§ 1-7 (1966).

92. IND. ANN. STAT. § 56-502 (1962).

93. MISS. CODE ANN. § 842 (1957).



Nebraska<sup>94</sup> provide that an alien may initially inherit land located in their respective territory. Proceeding on the distrust of absentee ownership of land, he is granted a specified number of years within which to sell the land and have the proceeds invested here or transferred abroad. Failure to sell within the prescribed period effects either a forced sale by the state or an escheat to it. In Georgia,<sup>95</sup> Kentucky,<sup>96</sup> and Virginia<sup>97</sup> the right to succeed to and hold property is conferred upon any alien who is a national of a country which is at peace with or not an enemy of, the United States. A construction of such statutes requiring the existence of a formal state of war would render them futile today,<sup>98</sup> however, any other interpretation of the terms "enemy" and "peace" would foster political bias and speculation. Under the law of Kansas<sup>99</sup> any alien eligible for citizenship in this country can inherit real or personal property on the same terms as United States citizens. Arkansas,<sup>100</sup> Delaware,<sup>101</sup> New Mexico,<sup>102</sup> South Dakota,<sup>103</sup> Texas,<sup>104</sup> Utah<sup>105</sup> and West Virginia<sup>106</sup> appear to unequivocally grant liens, resident and nonresident, complete equality of inheritance rights.

#### V. FEDERAL QUESTIONS

Several constitutional concepts must be considered in order to judge the validity of these repressive measures and to ascertain their current vitality. Their legitimacy must be justified in relation to the due process clause and the exclusively federal power over foreign affairs. Furthermore, under the supremacy clause their application is circumscribed by the federal treaty-making power.<sup>107</sup>

The "reciprocity" and "use, benefit, and control" statutes are occasionally attacked as being violative of the due process clause of the fourteenth amendment. Such an assault has been successfully countered by several arguments. The United States Supreme Court in *Yick Wo v.*

---

94. NEB. REV. STAT. § 76-402 (1958).

95. GA. CODE ANN. § 73-303 (1963) (applies only to real property).

96. KY. REV. STAT. ANN. § 381.320 (1963) (applies only to personal property).

97. VA. CODE ANN. § 55-1 (1959) (applies only to real property).

98. In *Fehn v. Shaw*, 201 Ga. 520, 40 S.E.2d 541 (1946), the Georgia Supreme Court held that a German National could take a legacy. The testator died in 1941, and as of that date the United States was not at war with Germany.

99. KAN. GEN. STAT. ANN. § 59-511 (1964). In *Hughes v. Kerfoot*, 175 Kan. 181, 263 P.2d 226 (1953) the concept "eligible for citizenship" was interpreted to encompass not only those individuals who have been approved for entrance to this country or for citizenship and are awaiting passage or naturalization, but also nationals of those countries who are capable of becoming citizens upon compliance with the immigration laws.

100. ARK. STAT. ANN. § 61-106 (1947).

101. DEL. CODE ANN. tit. 25, § 306 (1953).

102. N.M. STAT. ANN. § 70-1-24 (1961).

103. S.D. CODE § 56.0120 (1939).

104. TEX. REV. CIV. STAT. ANN. art. 166a (Supp. 1966).

105. UTAH CODE ANN. § 74-4-24 (1953).

106. W. VA. CODE ANN. § 36-1-21 (1966).

107. U.S. CONST. art. II, § 2.

*Hopkins*<sup>108</sup> stated that both clauses of the fourteenth amendment<sup>109</sup> are of universal application to all individuals, citizen or alien, within the territorial jurisdiction of the state. This is thought to be the outer limits of the due process requirement. In other areas of the law, such as the regulation of entrance into the country, it is generally conceded that nonresident aliens may be subjected to severe restrictions without violation of the due process clause.<sup>110</sup> Such a rationale may be applied to inheritance by nonresident aliens.

Courts also have asserted, as in *Estate of Bevilacqua*,<sup>111</sup> that since the right to inherit is purely a statutory creature it may be changed, limited, or abolished by legislative action. Such an argument appears to beg the question. It proceeds upon the dubious assumption that a statutory right, since it may be freely qualified, need not comply with due process standards. Yet, in fact, any enactment or alteration of statutory law must be justified against the due process requirement. The use, benefit, and control statutes are defended against due process attacks on the ground that there is in fact no taking of property, but only a temporary withholding.<sup>112</sup> It might be contended that the withholding of interest payments or the eventual disposal of the property by alternative bequest constitutes<sup>113</sup> a taking of property without due process of law.<sup>114</sup> This argument would be countered with statements, as in *Bevilacqua*, that a state may impose any restrictions on the right to inherit. But the situations are critically different. The use,

108. 118 U.S. 356, 369 (1886).

109. U.S. CONST. amend. XIV, § 1. "Nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law" (emphasis added).

110. United States *ex rel.* Knuff v. Shaughnessy, 338 U.S. 537 (1950); United States *ex rel.* Stellas v. Esperdy, 366 F.2d 266 (2d Cir. 1966). See generally Boyd, *The Invalidity of State Statutes Governing the Share of Non Resident Aliens in Decedents Estates*, 51 Geo. L.J. 470, 480-500 (1963).

111. 31 Cal. 2d 580, 191 P.2d 752 (1948).

112. Zupko Estate, 15 Pa. D.&C.2d 442 (Phila. County Ct. 1958). See also *Petition of Mazurowski*, 331 Mass. 33, 116 N.E.2d 854 (1954); *In re Estate of Braier*, 305 N.Y. 148, 111 N.E.2d 424 (1953).

113. See p. 162 and notes 85-90 *supra*.

114. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 185 (1962) might consider such a taking of property without compensation to be a violation of international law. In traditional public and private international law this point is much disputed. See G. CHESIRE, *PRIVATE INTERNATIONAL LAW* 32 (5th ed. 1957); A. DICEY, *CONFLICT OF LAWS* 11 (6th ed. 1949).

The United States Supreme Court dismissed per curiam for want of a substantial federal question an appeal involving the constitutionality of New York's "Iron Curtain" statute, New York Surrogate Court Act 269-a, in *Ioannou v. New York*, 371 U.S. 30 (1962). In this case a Czechoslovakian beneficiary was unable to prove that she would have full use, benefit, and control of her estate share. She then assigned her share to a niece residing in the United Kingdom. The assignee applied to the Surrogate for a withdrawal of the funds. The Surrogate, the Supreme Court, in *In re Estate of Marek*, 217 N.Y.S.2d 1010 (Sup. Ct. 1961), and the Court of Appeals, 11 N.Y.2d 740, 181 N.E.2d 456, 226 N.Y.S.2d 444 (1962), refused this petition finding that conditions had not changed in Czechoslovakia. Mr. Justice Douglas dissented from the United States Supreme Court dismissal, finding two federal questions. First, he questioned whether or not the New York statute might possibly be invalid since it conflicted with the exclusive federal power over foreign affairs; secondly, he asserted that refusal to recognize the assignment constituted a violation of due process.

benefit, and control statutes purport to preserve the alien's right to the property, whereas the reciprocity statutes condition this right.

The constitutional validity of these statutes is also assailed on the grounds that they effect a forbidden intrusion into the exclusively federal sphere of the conduct of foreign affairs. Such an hypothesis was advanced by the critics of the California reciprocity statute in *Clark v. Allen*,<sup>115</sup> and the Supreme Court rejected this contention as being "farfetched."<sup>116</sup> At the time that this case was decided the purpose of the reciprocity statutes was conceded to be that evidenced by the legislative intent — prevention of the enrichment of governments hostile to the United States.<sup>117</sup> The Supreme Court recognized that the California measure would have some incidental and indirect effect on foreign relations, but since California had not attempted direct negotiation with, or a compact among, foreign nations, the statute was held to be constitutional.

Subsequent cases have attributed to the reciprocity statutes a purpose other than that of the legislature. It is now stated that their function is to induce foreign nations to grant Americans inheritance rights equal to those enjoyed by their own citizens.<sup>118</sup> Conceptually, this aim does constitute an incursion of state action into the sphere of foreign affairs. If it be shown that considerations of national policy demand a unified approach to questions of inheritance by nonresident aliens, state action may be precluded by a binding decision of the Supreme Court under the concept of federal common law. In *Banco Nacional de Cuba v. Sabbatino*<sup>119</sup> the Supreme Court's interpretation and application of the "act of state" doctrine was held to be binding upon the lower courts, state and federal, as a matter of federal common law. It was determined that the "act of state" doctrine was "intrinsically federal" since diverse state construction and employment of the concept was detrimental to national foreign policy. Further, the Court was concluded to share, in conjunction with the executive and legislative branches, the power of defining and regulating foreign affairs.<sup>120</sup> Should the Supreme Court take under advisement in the future a case involving the application of these repressive inheritance statutes, it could under the *Sabbatino* rationale, prescribe the regulation of inheritance by nonresident aliens under the concept of federal common law. If it be concluded by the Court that the diverse treatment received by aliens under the various state statutes worked to the disadvantage of Americans attempting to share in estates probated abroad, or otherwise affected

---

115. 331 U.S. 503 (1947).

116. *Id.* at 517.

117. See p. 150 and note 18 *supra*.

118. *E.g.*, *Clostermann v. Schmidt*, 215 Or. 55, 332 P.2d 1036 (1958); Comment, *State Reciprocity Statutes and the Inheritance Rights of Non Resident Aliens*, 1963 DUKE L.J. 315.

119. 376 U.S. 396 (1964).

120. See generally Henkin, *The Foreign Affairs Power of the Federal Courts: Sabbatino*, 64 COLUM. L. REV. 805, 819 (1964); Comment, *Judgments Rendered Abroad — State Law or Federal Law?*, 12 VILL. L. REV. 618, 621-25 (1967).

national foreign policy, a unitary procedure could be asserted. Such an approach, be it of the "reciprocity," "use, benefit, and control," or a novel type, would, under *Sabbatino*, bind the states and abrogate any conflicting state regulation. However, the countries to which these statutes are principally directed are those of the Communist bloc. It may be unlikely that they would change their ideological concepts and laws in response to regulation here, and although the avowed purpose of the use, benefit, and control statutes is to inhibit the flow of inheritance funds to hostile nations, they have been held not to violate the federal power over foreign affairs.<sup>121</sup>

The most regular contact that these repressive measures have with the federal prerogative is with the exclusive federal treaty-making power. Given the existence of treaty provisions detailing the rights of inheritance between the contracting parties, any conflicting state regulation must fall.<sup>122</sup> The Iowa Supreme Court in *Corbett v. Stergios*<sup>123</sup> found that the requisite statutory reciprocity did not exist. A treaty existing between the United States and Greece<sup>124</sup> provided that a Greek national would receive full inheritance rights here, but it conferred upon the Greek government the ability to regulate the inheritance by United States citizens of lands along the frontier and coast. American citizens were thus not assured inheritance rights in Greece equal to those enjoyed by Greek nationals. The Supreme Court reversed per curiam,<sup>125</sup> holding that the treaty suspended application of the Iowa reciprocity statute and provided the exclusive statement of the inheritance rights existing between Greek and American citizens. In *Kolovrat v. Oregon*<sup>126</sup> the Supreme Court rejected an interpretation made by the Oregon Supreme Court<sup>127</sup> of a treaty existing between the United States and Yugoslavia.<sup>128</sup> The Oregon court had interpreted the treaty provisions to apply only to resident aliens; a Yugoslavian in this country could inherit property here on the same terms as an American in Yugoslavia could inherit property there. The Supreme Court construed the treaty provision to encompass both resident and non-resident aliens, and authorized the transmission of inheritance proceeds to a resident of Yugoslavia. The provision of the Oregon statute requiring proof that an American will have the absolute right to withdraw pro-

121. *Ioannou v. New York*, 371 U.S. 30 (1962); *In re Estate of Braier*, 346 U.S. 802 (1953).

122. *Clark v. Allen*, 331 U.S. 503 (1947); *Estate of Arbulich*, 41 Cal. 2d 86, 257 P.2d 433, cert. denied, 346 U.S. 897 (1953); *Guiseppe v. Cozzani*, 238 Miss. 273, 118 So. 2d 189 (1960); *Zschernig v. Miller*, 243 Or. 567, 412 P.2d 781 (1966). See generally Boyd, *Treaties Governing The Succession to Real Property by Aliens*, 51 MICH. L. REV. 1001 (1953); Meekison, *Treaty Provisions for The Inheritance of Personal Property*, 44 AM. J. INT'L L. 313 (1950).

123. 256 Iowa 12, 126 N.W.2d 342 (1964).

124. 5 U.S.T. 1829, T.I.A.S. No. 3057.

125. *Corbett v. Stergios*, 381 U.S. 124 (1965).

126. 366 U.S. 187 (1961).

127. *Stoich v. Kolovrat*, 220 Or. 448, 349 P.2d 255 (1960). The Oregon court in its interpretation relied heavily on *Estate of Arbulich*, 41 Cal. 2d 86, 257 P.2d 433, cert. denied, 376 U.S. 897 (1953).

128. 62 Stat. 2658, T.I.A.S. 1803.

ceeds from an estate probated abroad<sup>129</sup> was held to be in violation of the spirit of the treaty. The currency restrictions imposed by the Yugoslavian government were thought by the Court to be in accord with the policy of an international agreement to which both the United States and Yugoslavia were parties.<sup>130</sup> It was held by the Court that the restriction of the Oregon statute must yield to such expressed policies. The Pennsylvania Supreme Court in *Belemecich Estate*<sup>131</sup> held that there was no inconsistency between the treaty interpreted in *Kolovrat* and the requirements of the use, benefit, and control statutes. Both assure the right of a Yugoslavian national to inherit in this country; the use, benefit, and control statute merely imposes an additional requirement. Although the United States Supreme Court reversed *Belemecich*,<sup>132</sup> the Pennsylvania court in the subsequent case of *Wanson Estate*<sup>133</sup> stated that this reversal did not affect its former decision. The New York Surrogate Court, however, in the case of *In re Estate of Primorac*<sup>134</sup> held the Supreme Court interpretation of the treaty in *Kolovrat* to suspend application of its use, benefit, and control statute.

Occasionally an alien will claim protection of a treaty concluded between the United States and a government no longer controlling the geographic region in which he resides. Numerous cases have held that residents of the China mainland<sup>135</sup> or East Germany<sup>136</sup> are not covered by treaties concluded between the United States and the Republic of China or the German Republic. Such individuals must, therefore, prove compliance with the statutory requirements. Contrary to the rationale of these cases is the New Hampshire Supreme Court's decision in *Hanafin v. McCarthy*<sup>137</sup> which held that a treaty between the United States and the United Kingdom should continue to regulate inheritance by residents of the more recently formed Irish Free State.<sup>138</sup>

129. ORE. REV. STAT. 111.070(1b) (1965).

130. The International Monetary Fund (Bretton Woods) Agreement of 1945, 60 Stat. 1401, T.I.A.S. 1501. The Supreme Court in its interpretation of the Treaty with Yugoslavia, and the policies of the Bretton Woods Agreement, gave great weight to the meanings given them by the executive department. 366 U.S. at 194. See RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 152 (1962).

The California Court in *Estate of Arbulich*, 41 Cal. 2d 86, 257 P.2d 433, cert. denied, 376 U.S. 897 (1953), stated that although the interpretation of a treaty is a matter of law, evidence of its construction and application by the other contracting party is a question of fact. However, the Oregon Supreme Court in *In re Kasendorf's Estate*, 222 Or. 463, 353 P.2d 531 (1960) assumed that a treaty statement would be considered as the supreme law of the land by the other nation.

131. 411 Pa. 506, 192 A.2d 740 (1963).

132. *Consul General of Yugoslavia at Pittsburgh v. Pennsylvania*, 375 U.S. 395 (1964).

133. 419 Pa. 109 n.7, 213 A.2d 631 n.7 (1965).

134. 51 Misc. 2d 166, 272 N.Y.S.2d 457 (Sur. Ct. 1966).

135. *Estate of Eng*, 228 Cal. App. 2d 162, 39 Cal. Rptr. 254 (1964); *In re Estate of Yee Yoke Ban*, 200 Misc. 332, 107 N.Y.S.2d 221 (Sur. Ct. 1951); *In re Estate of Wong Hoen*, 199 Misc. 1119, 107 N.Y.S.2d 407 (Sur. Ct. 1951).

136. *Zschernig v. Miller*, 243 Or. 567, 412 P.2d 781 (1966).

137. 95 N.H. 36, 57 A.2d 148 (1948).

138. See generally O'Connell, *State Succession and Problems of Treaty Interpretation*, 58 AM. J. INT'L L. 41 (1964).

## VI. CONCLUSION

The foregoing discussion evidences the inconsistent and contradictory procedures imposed by these repressive measures upon an alien attempting to claim an inheritance share. It further demonstrates the frustration which they may work on the testamentary scheme of the decedent and the confusion in estate administration which they may precipitate.

The statutory requirements of both the "reciprocal rights" and the "use, benefit, and control" measures must be proven as questions of fact. The inapplicability of *stare decisis* is advantageous to an alien under the adjective law "use, benefit, and control" statutes since it enables him to repeatedly institute suit. Contrarily, the reciprocity statutes substantially condition the claimant's right to the inheritance upon satisfactory proof of compliance with the statutory scheme on the initial attempt, and the claimant unqualifiedly bears the burden of proof. The use, benefit, and control statutes, however, appear to sanction the individual court's discretionary allocation of the burden of proof and determination of the degree of certainty necessary to meet this burden. Excuse for this vague and unsettled procedure may be offered on the grounds that suit may be reinstated. However, when the loss of interest and possible forfeiture of the funds, as well as the increased cost of reinstatement of suit, are recalled such equivocal methodology seems totally unjustified.

Even though a testator is presumed to have drawn his will in cognizance of these statutes, the intent evidenced by his testamentary scheme is often overlooked or frustrated by their application. This is exemplified by the bifurcated and contradictory approach of the courts under the reciprocity statutes. Assuming the failure of the named beneficiary to prove the requisite reciprocity, it is not unreasonable to believe that the testator wills the estate share to pass by succession to his other heirs. It is a strained and unwarranted assumption that he intends and wills an absolute escheat upon such a failure. The "use, benefit, and control" statutes gratuitously assume that the testator wills the funds be held in abeyance until political and economic factors permit their maximum enjoyment, a condition which the testator may well believe will not exist within his beneficiary's lifetime. The alternative disposition of the funds or their eventual escheat are made in complete derogation of both the intent of the testator and the formal guarantee of ownership which these statutes provide.

Realizing that real property passes by the law of the state in which it is situated, and personal property by the law of the probating state, these various forms of repressive statutes necessarily give rise to increased expense and hardship on estate administration. Should a will probated in a state employing a "use, benefit, and control" statute contain a bequest to a nonresident alien of land located in a "reciprocity" state, the alien, in order to receive the proceeds from the sale of such land, would be forced to comply with both statutory schemes. The attendant expense of two court determinations may often be prohibitive.

The plight imposed upon the alien by these conflicting requirements is not likely to be soon alleviated. There is no movement among the states toward adoption of a uniform procedure, and the Supreme Court has consistently termed all these regulations legitimate state action. Should the Supreme Court determine that the diverse procedures and holdings extant under the state laws run counter to national foreign policy considerations, it could extend the concept of federal common law to encompass the inheritance rights of nonresident aliens and adopt a uniform procedure which would be binding on the states. However, the most effective method of countering the effect of these statutes appears to be treaties which precisely delineate the inheritance rights to be enjoyed by nationals of the contracting parties.

*Daniel T. Murphy*