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Erratum
On page 118, line 28 which read: ailen Should have read: alien.

AMERICAN HEIRS UNDER THE LAW OF POLAND

RYSZARD L. KRZYZANOWSKI*

INTRODUCTION**

American Background

THE article which follows deals with the rights of American heirs, devisees and distributees under the law of Poland. This subject and its converse, the rights of Polish citizens under American law, has become increasingly important because there has been extensive emigration from Poland to the United States resulting in inheritances and bequests from one country to the other. By way of introduction, and to place Dr. Krzyzanowski's article in a proper prospective, we will briefly trace the rights of Polish beneficiaries under American law generally and then examine their rights under New York law in particular as a possible comparison to the discussion of Polish law by the author.

Although the problem of inheritance by aliens is considered to be one of domestic law it nevertheless may affect international relations in a subtle and persistent way.[1] This accounts for Dr. Krzyzanowski's numerous references to international law terms such as reciprocity, national standard of treatment, discriminatory and retaliatory measures and diplomatic interventions.

The United States Constitution does not limit the freedom of the state legislatures to deal with the matter of aliens' rights to share in estates of resident decedents.[2] This is so in spite of the fact that laws dealing with the rights of aliens have a potential impact upon commerce with foreign nations and foreign relations.[3] Congress has chosen not to interfere with the freedom of the different states to legislate in this area.[4] The United States Supreme Court's refusal to take jurisdiction over such matters for want of substantial federal questions has completed this freedom.[5] As a result of this federal non-interference, three broad patterns have emerged, the Reciprocal Rights Rule, the Benefit Rule and the Pennsylvania Rule.

The first group of states follow the California lead and condition the granting of rights to aliens upon the granting by their own country of similar rights to American citizens.[6] Such laws are based on what Dr. Krzyzanowski refers

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** Introduction written by George Naschitz, senior, State University of New York at Buffalo, School of Law; formerly practicing lawyer in Timisoara, Rumania.

1. Ioannou v. New York, 371 U.S. 30 (1962).

2. Clark v. Allen, 331 U.S. 503 (1947).

3. Matter of Braier, 305 N.Y. 691, 112 N.E.2d 774, *appeal dismissed sub nom.*, Kalmane v. Green, 346 U.S. 802 (1953).

4. Berman, *Soviet Heirs in American Courts*, 62 Colum. L. Rev. 257, 265 (1962).

5. Ioannou v. New York, 371 U.S. 30 (1962); Kalmane v. Green, 346 U.S. 802 (1953), *dismissing appeal from* Matter of Braier, 305 N.Y. 691, 112 N.E.2d 774.

6. Ariz. Rev. Stat. Ann. § 14-212(c) (1956); Cal. Prob. Code § 259; Conn. Gen. Stat. Rev. § 47-57 (1958); Iowa Code Ann. § 567.8 (1961); Mont. Rev. Codes Ann. § 91-520

to as "the principle of reciprocity" or, as termed by American legal writers the "Reciprocal Rights Rule."[7] They state that: "If a nonresident alien cannot allege and prove reciprocity, he may not inherit under our laws,"[8] the property thereby descending to other heirs or escheating to the state. Many cases applying the Reciprocal Rights Rule remain unreported.[9] This may explain the nonexistence of reported cases involving Polish beneficiaries. However, the cases reported during the last six years concerning beneficiaries from other communist states will provide a general background for the Polish problem. Cases involving Czechoslovakian, Rumanian and Bulgarian heirs all held that no reciprocal rights exist.[10] One out of three Soviet cases found reciprocity and ordered payment,[11] the other two deciding that no reciprocal rights between the Soviet Union and the United States have been proven.[12] Finally, all Yugoslav heirs received favorable decisions on findings that reciprocal rights existed with Yugoslavia.[13] A common characteristic of all cases involving Yugoslav heirs is an abundance of proof concerning the reciprocity feature in the Yugoslavian law. One of the first decisions to hold that reciprocal rights existed furnishes a good example of how such cases were established. The following evidence was accepted: copies and translations of the Yugoslav constitution and pertinent laws, a letter to the court by an American heir that he had actually received money from Yugoslavia, American court decisions showing that Americans had received bequests and inheritances from Yugoslavia and expert testimony by a foreign law librarian with a general foreign legal background on the meaning of Yugoslavian law.[14] The article which follows explaining the Polish law and the rights of Americans thereunder may become the subject of judicial notice and help establish in American courts the fact that reciprocity exists in the case of Poland.

The second group of states grants the foreign heir or devisee substantive rights equal to American citizens' but conditions the enjoyment of these benefits by providing that there will be no transmittal of the bequeathed, devised or inherited property to the foreign heir unless he proves that he will have in his homeland the complete use and control of his share. Failure of proof

(1964); Okla. Stat. Ann. tit. 60, § 121 (1949) (personal property only); Ore. Rev. Stat. § 111.070 (1959) (applies Reciprocal Rights and Benefit rules); Tex. Rev. Civ. Stat. Ann. art. 177 (1921).

7. See Atkins, *The Application of the Reciprocal Rights and Benefit Rules to Foreign Legacies*, 36 Tul. L. Rev. 799, 805 (1962).

8. Matter of Nersisian, 155 Cal. App. 2d 561, 318 P.2d 168, 171 (1957).

9. See Berman, *supra* note 4, at 257 n.1.

10. Matter of Hosova, 143 Mont. 74, 387 P.2d 305 (1963) (Czech); State v. Pekarek, 234 Or. 74, 378 P.2d 734 (1963) (Czech); Matter of Stoian, 138 Mont. 384, 357 P.2d 41 (1960) (Rumanian); Matter of Christoff, 219 Or. 233, 347 P.2d 57 (1959) (Bulgarian).

11. Matter of Kasendorf, 222 Or. 463, 353 P.2d 531 (1960).

12. Matter of Larkin, 44 Cal. Rptr. 731 (Cal. App. 1965); Matter of Gogabashvele, 195 Cal. App. 2d 503, 16 Cal. Rptr. 77 (Cal. App. 1961).

13. Kolovrat v. Oregon, 366 U.S. 187 (1961); Matter of Spehar's Estate, 140 Mont. 76, 367 P.2d 563 (1961); Matter of Ginn's Estate, 136 Mont. 338, 347 P.2d 467 (1959).

14. Matter of Spoya's Estate, 129 Mont. 83, 282 P.2d 452 (1955).

on this point will result in a temporary safekeeping of the property by the court.[15] This is referred to as "the Benefit Rule."[16] New York is presently the leading jurisdiction applying this test.

Finally, a third group of states applies what is called "the Pennsylvania Rule."[17] Under this rule, although there is no substantive or procedural legislation limiting the aliens' rights, judicial decisions have led to the impounding of funds due beneficiaries behind the Iron Curtain on the ground the beneficiary will not enjoy the use of the funds. The theory is apparently that by restricting payments, the courts carry out the real intent of the testator or the policy of the state's intestacy laws.[18] The reason for impounding funds due citizens of certain countries is quite similar to that given by the courts of the states applying the Benefit Rule, namely to avoid "confiscation" by the native country of the beneficiary. An early Pennsylvania case seems to establish this with respect to a beneficiary in Poland.[19]

Although Dr. Krzyzanowski's article indicating the existence of reciprocity is most relevant to the states following the California test, his remarks may also reflect on the question of whether a Polish heir will enjoy the benefits of an American inheritance. This may be seen in the following discussion of the status of the Polish heir under New York law.

Polish Heirs Under the Law of New York

New York, a state with a large Polish-extraction population, offers a good example of a transition from the Reciprocal Rights to the Benefit Rule and from generally unfavorable to favorable results for the Polish heir. For over 120 years, aliens have been permitted to take personal property unconditionally; land could be taken by will or by intestacy upon filing of a declaration of intention to become a citizen.[20] For the last ninety years, they could take personal property without any formality, and land could pass unconditionally by will but the declaration had to be filed to take land by intestacy.[21] In 1897, a statute was enacted to the effect that:

> Any citizen of a State or Nation which by its laws confers similar privilege on citizens of the United States may take, acquire, hold or convey land or real estate within this state in the same matter and with

15. Fla. Stat. Ann. § 731.28 (1960); Md. Ann. Code art. 93, § 161 (1961); Mass. Ann. Laws ch. 206, § 27B (Supp. 1964); Mich. Stat. Ann. § 27.3178(306a) (1954); N.J. Stat. Ann. § 3A:25-10 (1953); Ohio Rev. Code Ann. § 2113.81 (Baldwin 1964); R.I. Gen. Laws Ann. § 33-13-13 (1956); Wis. Stat. Ann. § 318.06(8)(b) (1958).

16. Atkins, *supra* note 7, at 800.

17. Pennsylvania, Mississippi, Nebraska and Vermont; see Chaitkin, *The Rights of Residents of Russia and Its Satellites to Share in Estates of American Decedents*, 25 So. Cal. L. Rev. 297, 313.

18. Chaitkin, *supra* note 17, at 313.

19. Matter of Zielinski's Estate, 73 Pa. D.&C. 81 (1950).

20. N.Y. Sess. Laws 1845, ch. 115.

21. N.Y. Sess. Laws 1874, ch. 261; see also McCormack v. Coddington, 184 N.Y. 467, 77 N.E. 979 (1906); George v. People, 40 N.Y.S.2d 830, 834 (1943), *aff'd*, 47 N.Y.S.2d 681, 267 App. Div. 575 (1944).

> life effect as if such person were at the time a citizen of the United States.[22]

This requirement of reciprocity was abandoned in 1944 upon the recommendation of the Law Revision Commission.[23] A new provision enabled all, even enemy aliens, to take, hold, transmit or dispose of real property in the same manner as citizens. In this respect it conformed the law of real property to that of personal property.[24] Thus, it can be said that Polish citizens enjoy under New York law treatment equal to American citizens; that is, their substantive rights have not been dependent upon reciprocity of treatment, or upon relations between the national governments. This is referred to by Dr. Krzyzanowski's article as a national standard of treatment.

No attempt is made to affect the substantive rights of aliens by this new legislation. Although section 269-a of the New York Surrogate's Court Act is designed to protect these rights, ironically, it is the main subject of aliens' criticisms. The purpose of this section is to avoid confiscation of alien property by safekeeping this for the alien's benefit.[25] This section's predecessor was originally enacted in 1939.[26] Its stated purpose was the deposit of properties in the surrogate's court where their transmission to a beneficiary in a foreign country might be circumvented in whole or in part.[27] Section 269-a(1) provides that the court must wait until payment can be made to the beneficiary for his own benefit, use and control.[28] Section 269-a(2) places upon the foreign legatee, distributee or beneficiary the duty to come forward with proof that he would receive the benefit of the property due to him, whenever there is uncertainty in this respect.[29] The courts have read this statute as creating a strong presumption that behind the Iron Curtain, property would at least be partially confiscated, and have thus made it difficult if not impossible for the beneficiaries from

22. N.Y. Sess. Laws 1897, ch. 593 § 5a; see also Haley v. Sheridan, 190 N.Y. 331, 83 N.E. 296 (1907); Hayden v. Sugden, 48 Misc. 108, 96 N.Y. Sup. 681 (Sup. Ct. 1905); Fay v. Taylor, 31 Misc. 32, 63 N.Y. Sup. 572 (Sup. Ct. 1900).

23. N.Y. Sess. Laws 1944, ch. 272.

24. N.Y. Legis. Doc. (1944) No. 65(M); Reports Recomm. and Studies (1944) 455.

25. N.Y. Sess. Laws 1960, ch. 975.

26. Added by N.Y. Sess. Laws 1939 Ch. 343 (deleted in 1960 with the enactment of § 269-a).

27. 14 Nichols-Cahill, Ann. N.Y. Civil Practice Acts 398 (1939).

28. N.Y. Surr. Ct. Act § 269-a(1): "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 a 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 of the surrogate or pursuant to the judgment of a court of competent jurisdiction."

29. N.Y. Surr. Ct. Act § 269-a(2): "In any such proceeding, where it is uncertain that an alien legatee, distributee or beneficiary of a trust, not residing within the United States or its territories, would have the benefit or use or control of the money or other property due him, the burden of proving that such alien legatee, distributee or beneficiary of a trust will receive the benefit use or control of the money or other property due him shall be upon him or on the person claiming from, through or under him."

communist countries to carry such a burden of proof.[30] The origin of this presumption seems to be a 1951 United States Treasury Regulation stating that there is no assurance that payees of government checks residing in communist countries will be able to negotiate those checks for full value.[31] Although the Treasury Regulation had nothing to do with transmission of devised, bequeathed or inherited property, it was interpreted as official federal policy with respect to transmission of funds from whatever source derived.[32] Illustrations of the almost irrebutable presumption of confiscation and its origin in the Treasury Regulation can be found in the cases decided in New York surrogate's courts between 1951 and 1959, involving beneficiaries from Poland. All cases were decided against the Polish beneficiary. In one case, the court refused transmission of funds "in view of the policy expressed in [this] Regulation of the Treasury Department . . . ."[33] A second case gave no reason for finding the transmission of funds impracticable.[34] Another court created such a strong presumption of confiscation that it could not be overcome by the impressive evidence presented on behalf of the Polish beneficiary. The court stated:

> . . . [A] court may take judicial notice of facts which are universally known and recognized. It is a matter of general agreement that Poland is one of the so called "iron curtain" countries; that it has Communist government; and that denial of the right to the private ownership of property is a basic feature of Communist doctrine. Taking judicial notice of these facts and with no proof whatever to the contrary, the court concluded that this was a proper case for the payment of funds into court. . . .
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> It is said in the present papers that the situation in Poland has changed and that both the Federal and the New York State governments now approve the remission of funds to Poland. . . . All of these things may be true. But they are not satisfactorily established by the papers now before the court, which consist of copies of alleged press releases and a letter from the State Department of Insurance. Copies of two purported judicial determinations are likewise furnished, but this Court had no knowledge of the evidence on which they were based. The attorney who makes the supporting affidavit does not disclose the source of his information. But in any event, assuming the truth of everything the attorney says, it appears extremely doubtful that the distributees receive the free use of funds under the procedure described in the affidavit.[35]

Since 1959, two events have caused a radical change in favor of the Polish beneficiary. First, in May 1958, Poland was removed from the list of countries to which the Treasury Regulation applied.[36] This deletion was interpreted as a

30. Berman, *supra* note 4, at 264.
31. 31 C.F.R. § 211.3.
32. Berman, *supra* note 4, at 265; Note, 12 Buffalo L. Rev. 631.
33. Matter of Rysiakiewicz, 114 N.Y.S.2d 504 (Surr. Ct. 1951).
34. Matter of Baranski, 11 Misc. 2d 1062, 171 N.Y.S.2d 980 (Surr. Ct. 1958).
35. Matter of Buszta, 18 Misc. 2d 716, 717, 186 N.Y.S.2d 192, 193-94 (Surr. Ct. 1959).
36. 22 F.R. 4134 (1957), amending C.F.R. § 211.3.

contrary presumption, *i.e.*, no confiscation by the Polish government. Three years later, Surrogate Moss allowed the transmittal of funds in *Matter of Tybus* only after a voyage to Poland.[37] He concluded after an on-the-spot investigation of the situation in Poland that the Polish beneficiary would receive the use of the fund to be transmitted. Even though determinations of benefit, use and control do not constitute stare decisis (being factual), Poland's removal from the Treasury List and the findings in the *Tybus* case completely ended the difficulty of proof for the Polish heir. As a result, all such cases in New York during the last six years were decided in favor of the Polish heir. One court, prior to the *Tybus* decision, relied on the modified Treasury List.[38] The temporary presence of the Polish beneficiary in the United States explains the favorable result in another case.[39] In the rest of the cases ordering transmittal of funds to the Polish citizen, the surrogate's courts based their decision either solely on the *Tybus* findings, or in conjunction with Poland's removal from the Treasury List.[40]

The *Tybus* findings are much concerned with the rate of exchange from the American dollar to the Polish zloty. They are to the effect that the Polish government pays fair rates and gives to the Polish heir the full benefit of the funds transmitted. As Dr. Krzyzanowski points out, the existence of foreign exchange control laws in Poland is a major reason for American disbelief in the existence of reciprocal rights. However, it might be noted that it is not currency controls which generate American skepticism in regard to the fairness of the exchange but rather the consequences of these controls. The zloty, being limited to a purely internal market, is an internal currency that cannot be converted to values on an open market abroad. This means that there is no official rate of exchange, only a very fluctuating "black market" rate.[41] Such a "black market" rate makes the objective determination of fair monetary exchange very difficult, if not impossible, and may lead to an inference that the applied rate of exchange is in effect confiscatory.[42] Another difficulty in dealing with whether a beneficiary is really enjoying the benefits of the funds is created when the beneficiary, as is often the case, requests that his benefits be paid to him in the form of food packages.[43]

37. Matter of Tybus, 28 Misc. 2d 278, 217 N.Y.S.2d 913 (Surr. Ct. 1961).
38. Matter of Doktor, 18 Misc. 2d 233, 183 N.Y.S.2d 60 (Surr. Ct. 1959).
39. Matter of Rawski, 28 Misc. 2d 253, 218 N.Y.S.2d 111 (Surr. Ct. 1961).
40. Tebin v. Moldock, 19 A.D.2d 275, 241 N.Y.S.2d 629, 640 (1st Dep't 1963); Matter of Samolewicz, 38 Misc. 2d 420, 237 N.Y.S.2d 285 (Surr. Ct. 1962); Matter of Groncky, 230 N.Y.S.2d 181 (Surr. Ct. 1962); Matter of Moore, 33 Misc. 2d 1060, 227 N.Y.S.2d 702 (Surr. Ct. 1962); Matter of Swiderski, 29 Misc. 2d 480, 217 N.Y.S.2d 918 (Surr. Ct. 1961); Matter of Moroz, unreported, Surr. Ct. Massena, N.Y. Feb. 10, 1961, Sur. Wells, cited by Berman, *supra* note 4, at 259 n.13; Matter of Rawski, 28 Misc. 2d 253, 218 N.Y.S.2d 111 (Surr. Ct. 1961).
41. See Berman, *supra* note 4, at 266-67.
42. For a rate of exchange from dollar to zloty see *Matter of Tybus*, 28 Misc. 2d 278, 217 N.Y.S.2d 913 (Surr. Ct. 1961) (Polish nationals entitled to merchandise at a ratio of 24 zlotys to the dollar); also see *Petition of Mazurowski*, 331 Mass. 33, 116 N.E.2d 854 (1954) (U.S. government personnel in Poland are paid at a rate of 25 zlotys to the dollar.
43. Matter of Geiger, 7 N.Y.2d 109, 164 N.E.2d 99, 195 N.Y.S.2d 831 (1959); Matter

How can we compute the "fairness" of transactions in nonconvertible currencies when they are further converted into charitable food packages? At times, the communist government itself will offer merchandise in exchange for American dollars.[44] This makes the determination of fairness as opposed to confiscation even more difficult. As commonly known, every country has some merchandise which is cheaper and some which is more expensive than similar products of other countries. Therefore, the foreign exchange rate, which is an excellent way of determining fairness when applied to a country with a capitalistic economy, proves worthless when applied to communist countries.

Dr. Krzyzanowski's opinion is that American and other foreign heirs have a privileged position in Poland. The converse is also true in New York, in the sense that Polish beneficiaries under New York Law are privileged when compared with beneficiaries from other communist countries. In the last six years, funds in all reported cases were transmitted to Polish heirs, but all funds due to Czech, Bulgarian and East German heirs were paid into court.[45] Furthermore in only one third of the decisions involving Soviet or Hungarian citizens the funds were transmitted.[46] One Yugoslav received a favorable decree; no Rumanian or Albanian case has arisen.[47]

Among American scholars there is a conflict of opinion on the desirability of withholding payments to beneficiaries of communist countries.[48] The weight of authority opposes the restrictive practices, stating serious arguments against

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of Torsky, 36 Misc. 2d 101, 232 N.Y.S.2d 183 (1961); Matter of Braun, 36 Misc. 2d 692, 233 N.Y.S.2d 398 (Surr. Ct. 1962).

44. Matter of Reidl, 39 Misc. 2d 805, 242 N.Y.S.2d 105 (Surr. Ct. 1963); Matter of Tybus, 28 Misc. 2d 278, 217 N.Y.S.2d 913 (Surr. Ct. 1961).

45. Matter of Marek, 11 N.Y.2d 740, 181 N.E.2d 456, 226 N.Y.S.2d 444 (1962), *appeal dismissed sub nom.*, Ioannou v. New York, 371 U.S. 30 (1962) (Czech); Matter of Draganoff, 43 Misc. 2d 233, 252 N.Y.S.2d 104 (Surr. Ct. 1964) (Bulgarian); Matter of Reidl, 39 Misc. 2d 805, 242 N.Y.S.2d 105 (Surr. Ct. 1963) (Czech); Matter of Braun, 36 Misc. 2d 692, 233 N.Y.S.2d 398 (Surr. Ct. 1962) (Czech); Matter of Waessel, 27 Misc. 2d 694, 210 N.Y.S.2d 648 (Surr. Ct. 1960) (East German).

46. Matter of Geiger, 7 N.Y.2d 109, 164 N.E.2d 99, 195 N.Y.S.2d 831 (1959) (Hungarian, transmittal denied); Matter of Szabados, 40 Misc. 2d 1072, 244 N.Y.S.2d 575 (Surr. Ct. 1963) (Hungarian, transmittal ordered); Matter of Saniuk, 40 Misc. 2d 437, 243 N.Y.S.2d 47 (Surr. Ct. 1963), *aff'd*, 21 A.D.2d 922, 251 N.Y.S.2d 204 (3d Dep't 1964) (Soviet, transmittal ordered); Matter of Kapocius, 36 Misc. 2d 1087, 234 N.Y.S.2d 392 (Surr. Ct. 1962) (Soviet, transmittal ordered); Matter of Mitzkel, 36 Misc. 2d 671, 233 N.Y.S.2d 519 (Surr. Ct. 1962) (Soviet, transmittal denied); Matter of Torsky, 36 Misc. 2d 101, 232 N.Y.S.2d 183 (Surr. Ct. 1962) (Soviet, transmittal denied); Matter of Haab, 31 Misc. 2d 878, 219 N.Y.S.2d 1003 (Surr. Ct. 1961) (Soviet, transmittal ordered); Matter of Bartok, 28 Misc. 2d 324, 215 N.Y.S.2d 818 (Surr. Ct. 1961) (Hungarian, transmittal denied); Matter of Moroz, unreported, Surr. Ct. Massena N.Y., Feb. 10, 1961, Surr. Wells, cited by Berman, *supra* note 4, at 259 n.13 (Soviet, transmittal denied); Matter of Gargyan, 27 Misc. 2d 137, 211 N.Y.S.2d 232 (Surr. Ct. 1960) (Hungarian, transmittal denied); Matter of Sorock, 25 Misc. 2d 450, 207 N.Y.S.2d 190 (Surr. Ct. 1960) (Soviet, transmittal denied); Matter of Kuzmic, 23 Misc. 2d 604, 206 N.Y.S.2d 297 (Surr. Ct. 1960) (Soviet, transmittal denied).

47. Matter of Offinger, 28 Misc. 2d 633, 215 N.Y.S.2d 642 (Surr. Ct. 1961).

48. In favor of withholding payments: Atkins, *supra* note 7. *Contra,* Berman, *supra* note 4; Chaitkin, *supra* note 18; Heyman, *The Nonresident Alien's Right to Succession Under the "Iron Curtain Rule,"* 52 Nw. U. L. Rev. 221 (1957).

them.[49] The non-restrictive view seems better for several reasons. First, a lack of an ascertainable standard for what constitutes benefit or reciprocal rights makes the restrictive rule very difficult to apply. The judge should scrutinize many factors such as currency reforms, fiscal policies, official prices, black market prices, income and purhasing power. This information is often unavailable, or when available it may be conflicting. As Dr. Krzyzanowski points out it may have different meanings for the common law judge and a lawyer from a communist country. There is no guide by which the judge can base his decision in dealing with these numerous and varied economic-political elements. Secondly, as the author asserts, it is also quite true that communist governments do not confiscate funds transmitted in American dollars. Self interest will prevent them from depriving the heir of the benefit, for their governments are in desperate need of foreign currency—especially American money. They would act against their own best interest if they were to confiscate and thereby risk a loss of future dollar exchanges. Further, the purpose of the benefit rule is defeated by withholding payments. The interests of the heir are best served by transmittal of their share. In relation to their standard of living, their earnings and their property, payment will be of great help even though the state imposed rate of exchange will be below the black market figure. Many Americans seem to be aware of their need. This is illustrated by Dr. Krzyzanowski's experience that Americans seldom take funds out of Poland, but rather have them distributed among relatives in the old country. Lastly, there may be dangerous propaganda consequences to American application of the restrictive policy. In the eyes of average beneficiary from behind the Iron Curtain, impounding funds and payment into court is never a conservation measure for his interest. It is rather disguised confiscation, nationalization, or as Dr. Krzyzanowski puts it, discrimination. On the contrary, payment in their minds constitutes proof of American liberalism, that is, respect for private property, and a desire for peaceful coexistence, for sharing great economic power and for a high standard of living.

American Heirs Under the Law of Poland

The law of Poland determining the rights of American citizens to inherit property forms part of a much larger framework of law that is applied to aliens generally. In fact, there are no specific provisions applicable to American heirs[50] as such. However, several decisions of Polish courts involving the rights of American heirs, as well as the acute problem of transmitting estate funds between

49. Berman, *supra* note 4, at 274 (prejudice and politics should not influence decisions); Chaitkin, *supra* note 18, at 317 (innocent persons are disinherited); Heyman, *supra* note 48, at 239 (regression from liberal tradition and sums involved are not large enough to make a contribution to enemy powers); Note, *Distribution of Estates to Beneficiaries Behind the Iron Curtain*, 12 Buffalo L. Rev. 630, 639 (1963) (decisions on the basis of foreign policy rather than intention of the testator).

50. Throughout the article, the author deals with the inheritance process so as to include both testate and intestate succession. Thus, the term heir will refer to devisees as well as heirs or distributees; and the term testator will include a deceased intestate. [Ed.]

Poland and the United States, prompted us to treat this subject separately. We will try to establish that Polish law is fairly liberal in enabling Americans to inherit.

Constitutional Provisions Concerning the Right to Inherit Property in Poland

As in many other countries, the Constitution occupies the most prominent position in the Polish legal system. It determines the main characteristics of all legal institutions; it also specifies the fundamental principles of the law of succession.

Specifically, this subject is dealt with in Article 12 of the Constitution which declares that the Polish State "recognizes and protects, within existing laws, individual property and the right to inherit land, buildings and other means of production." Likewise, Article 13 provides safeguards to Polish citizens for the "full protection of their personal property and the right to inherit it."

These two provisions are of great practical importance in view of the fact that large sectors of the national economy, especially agriculture, are predominantly privately-owned. Moreover, it is generally agreed that these constitutional provisions, although they expressly refer to Polish citizens alone, should not be interpreted restrictively. An authority in this field observed: "Even though Articles 12 and 13 of the Constitution established very important directives to the legislature with respect to the law of succession, they did not limit its freedom in solving the principal issues presented by that law."[51]

Statutory Provisions

The main statutory provisions of the Polish law of succession are contained in Book Four of the new Polish Civil Code of 1964.[52] The provisions of this Code are applicable to all heirs, whether Polish or foreign since they do not distinguish between these two categories of persons.

The term inheritance is defined as "the proprietary rights and obligations of the deceased."[53] The expression "proprietary rights and obligations" embodies a sweeping concept since it includes comprehensively what the civilians call "rights and obligations of a private legal character." The Code provides that the acquisition of an estate consists in "taking" it as a whole by one or more persons (heirs). This is the well-known rule of universal succession, *i.e.*, the acquisition by the heir of all rights and obligations connected with the inherited property. The succession to these rights and obligations may occur pursuant to either statute or testamentary disposition.[54]

The heir acquires the estate by operation of law as of the moment of the "opening" of the estate[55] which is the moment of the testator's death. In light

51. J. Gwiazdomorski, Zarys Prawa Spadkowego, Warszawa 1961. [This quotation and the succeeding Polish sources are the author's translation.]
52. Law Journal of the Polish People's Republic of 1964, No. 16 item 93.
53. Polish Civil Code art. 922 § 1.
54. Polish Civil Code art. 926 § 1. [See editorial footnote 50 *supra*.]
55. Polish Civil Code art. 925.

of these "objective" aspects of the transmission from the dead to the living, Polish courts do not grant rights or titles to the estate.[56] The Code provides that "the court, on the demand of the interested person who has a title to it, *confirms* the acquisition of the estate by an heir."[57] This is merely a declaratory order of the court which does not in any way affect the rights of heirs under the law. This principle applies to all modes of succession, *i.e.*, by statute as well as by a will.

The Civil Code does not contain provisions that would prohibit succession to an estate by aliens generally or Americans in particular. The only condition is the existence of a degree of relationship to the deceased as defined by Part II of Book Four of the Code, a relationship which will enable the heir either to take title to the whole of the estate or to share with others in its distribution. This principle is further strengthened by the provisions of a Decree of the President of the Republic of January 14, 1936, which grants to aliens the same treatment as to Polish nationals.[58] For these reasons a Polish court cannot discriminate among heirs with respect to their nationality or domicile; these circumstances are irrelevant to a judicial determination as to whether the "objective" elements of the succession to an estate, referred to above, are present in a particular case.

These principles which grant to a foreign heir the same treatment as if he were a Polish national, have, however, a considerable tendency toward creating, in fact, a privileged position for the foreign heir. This tendency becomes most clearly noticeable where the estate consists of real property, for the following reasons. Due to the special conditions prevailing in Polish agriculture which is characterized by the small size of farm land owned by the average farm family, it had become necessary, many years ago, to prevent the process of further parcelling of the land due, among other things, to succession. Special provisions of the Code applicable to the succession to farm land prohibit its parcelling by providing that only *one* heir, namely the one most closely connected with the land, is entitled to take the entire realty.[59] The Code provides a number of situations in which the other heirs, if any, may or may not be entitled to receive compensation in money. We shall not elaborate further on this issue since the rules of the Title X concern mostly heirs who are Polish nationals, while foreign heirs, are exempted from these restrictive provisions provided that reciprocity is granted.[60] Therefore, once reciprocity has been shown to exist, a foreign heir is entitled to receive the pecuniary equivalent of his share in the estate, although a Polish national comparably placed might not.[61]

Another problem in the field of inheritance is the capacity of a heir to take

56. Polish Civil Code art. 924.
57. Polish Civil Code art. 1025 § 1 [emphasis added].
58. Law Journal of the Republic of Poland of 1936, No. 3 item 22. (Decree on the Protection of the Interests of Polish State and of its Citizens in International Relations.)
59. Polish Civil Code, Title X, art. 1058-88.
60. Law on Entry into Force of the Civil Code art. 23; Law Journal of the People's Republic of Poland of 1964, No. 16 item 94.
61. Law on Entry into Force of the Civil Code art. 23 § 1.

a bequest. In Polish law this problem, commonly dealt with by the law of conflicts, is governed by statute.[62] It provides that capacity to take a bequest is governed by two laws of nationality (*lex nationalis*), namely, the heir's and the testator's at the time of his death.[63] Under this cumulative requirement, a disqualification under either law will incapacitate the heir. Thus, the foreign heir would be prejudiced, if at all, only by his own law.

Procedural Requirements

The procedural requirements are defined in the 1964 Polish Code of Civil Procedure.[64] Under the provisions of this Code persons entitled to inherit in Poland make appearance in the probate proceedings either personally or through their representatives (attorneys at law). In the case of a foreign heir his Consul may make an appearance in these proceedings as well.[65] A special procedure is provided for estates left in Poland by foreign nationals.[66] Some characteristic provisions exemplify the liberal policies of the Polish inheritance law.[67] Thus, the Polish state notarial offices and courts[68] are under an obligation to take charge of estates left by a foreign national when there is a danger that his property may be damaged, removed or destroyed in some other manner. The pertinent order of the notarial office or of the court involves the performance of yet another duty on its part, namely the obligation to inform the Consular officer of the deceased alien's country concerning the entry of such an order and concerning the date when the estate was "opened" and public notice of it was given. Independently from these requirements, other provisions of the Code require the notarial offices or the courts to notify all heirs of the "opening" of the estate, regardless of their domicile or nationality. Furthermore, the Code permits movables to be delivered to the foreign Consul in the event that no one appears to claim the inheritance.[69] The existence of reciprocity is required, however, if such a delivery is to be made.[70]

May we stress again that all these provisions are enforced in accordance with the Decree of the President of the Republic of 1936 noted above,[71] which does not establish any restriction on or discrimination with respect to the property rights, including succession rights, of aliens, unless a foreign state

62. Law Applicable to Private International Relations art. 28 § 2; Law Journal of the Republic of Poland of 1926, No. 101 item 580.
63. See generally Ludwiczak Witalis, Miedzynarodowe Prawo Prywatne (Warszawa, 1961).
64. Polish Code of Civil Procedure arts. 627-91; Law Journal of the Polish People's Republic of Poland of 1964, No. 43 item 296.
65. Polish Code of Civil Procedure art. 1139 § 1.
66. See Wierzbowski, *Spadki po cudzoziemcach zmarlych w Polsce* 11 Nowe Prawo (1963).
67. See Polish Code of Civil Procedure arts. 1139, 1142.
68. Notarial offices are the Polish equivalent of the American surrogate or probate courts.
69. Polish Code of Civil Procedure art. 1141 § 1.
70. Polish Code of Civil Procedure art. 1141 § 4.
71. *Supra* note 58.

first destroys reciprocity by discriminatory action against the rights of Polish nationals. There is a presumption that Polish nationals enjoy equal treatment in foreign countries in accordance with the so-called principle of "formal reciprocity."

Since the end of the last war, no retaliatory order has been issued by Polish authorities in this context. However, in some states of the United States, Polish citizens have, on certain occasions, been denied the right to inherit.[72] If Polish orders embodying retaliatory measures were to be issued against these states which discriminate against the Polish heirs a very difficult situation would indeed be created. Apparently, such orders cannot be issued for the simple reason that, so far as the Polish authorities are concerned, there are no American citizens of California, Oregon, etc., as distinguished from American citizens at large. Had such an order been issued it would have been directed against all American heirs regardless of their domicile within the United States, because it is only the Federal Government which, under international law, is in a position to deal with Poland on these matters. Needless to say, such an order would have a discriminatory effect upon many American heirs of Polish estates who live in the Eastern part of the United States whose statutes or recent court decisions[73] guarantee to Polish heirs equal treatment with other aliens. Therefore, such an order would have an impact far exceeding its legal objective since it, in turn, could lead to retaliatory counter-measures. This, we submit, explains why the Polish authorities have refrained from issuing such an order.

Foreign Exchange Control Laws in Poland

It is evident that a necessary corrolary of the right of an alien to take by succession is the right, so much praised by American courts, to receive the benefits of the inheritance itself. As the former was established by the law of succession, the latter is mainly governed by fiscal law.

To explain the present situation of an American heir under Polish law in this respect, one must remember that existing foreign exchange control laws are the product of the very difficult economic and financial situation in which Poland found itself as a result of the devastation caused by World War II.

The pertinent provisions are contained in the Foreign Currency Law of March 28, 1952.[74] Until the 1956 amendments[75] were introduced, the provisions of this Law had been rather restrictive both for aliens and Polish nationals. However, these amendments alleviated the situation by affording to aliens a privileged position.

The procedures established by this law and the regulations issued pursuant

72. See cases cited in notes 19, 33-35, *supra;* Note, *Distribution of Estates to Beneficiaries behind the Iron Curtain*, 12 Buffalo L. Rev. 630 (1963).
73. See Matter of Tybus, 28 Misc. 2d 278, 217 N.Y.S.2d 913 (Surr. Ct. 1961).
74. Law Journal of People's Republic of Poland of 1952, No. 21 item 133.
75. Law Journal of the People's Republic of Poland of 1956, No. 56 item 233; also Monitor Polski of 1958, No. 51 item 298.

to it governing the transfer of Polish estates to foreign beneficiaries, who are residents of foreign countries, may be briefly summarized. First, the share due to an heir is remitted to the beneficiary after deducting costs and the fees of the Polish attorneys, as well as other costs connected with the probate proceedings. Secondly, a check for the balance is forwarded to the Polish National Bank. Finally, the American recipient of the remittance may utilize it at his option, in one of the following ways: (1) collect the sum in Polish currency, (2) deposit it in the Bank in the form of a zloty account opened in his name, or (3) apply to the Polish National Bank for a license to transfer the funds abroad.[76]

The fact that an American recipient would need a license from the Polish National Bank to have the proceeds due him transferred abroad does not mean that the granting of this transfer is wholly a matter of administrative discretion. It will be recalled that under the provisions of the Decree of the President of the Republic concerning the protection of the interests of the Polish state and of its citizens in international relations,[77] equality of treatment by foreign states of Polish citizens is presumed. Thus, the affirmative exercise of the discretion vested in the Polish fiscal authorities in issuing licenses of this kind should be anticipated with a minimum of apprehension by an heir whose own state grants reciprocal treatment to a Polish heir.

In this sense, the right of an American beneficiary to take the proceeds out of Poland seems to be an ascertainable right. It is also an *enforceable* right although the procedure to be followed in case the license to transfer is denied, is a special one. This peculiarity, however, is characteristic for all systems of foreign exchange control now in force in many countries of the world.[78] We shall deal with them in some detail below.

It is worth mentioning again in this context that on many occasions difficulties have arisen in the western states of the United States. Attorneys in these states have argued against the distribution of estate funds to Polish beneficiaries on the assertion that under the Polish system of law reciprocal rights do not exist and in particular that in Poland the right of an American heir to have his funds transferred abroad is not "an enforceable right" within the meaning of the common law.

It may be conceded that Polish law does not contemplate such a right as understood by American courts. Nevertheless, the procedure available under Polish law does not support the further assertion that reciprocal right to inherit does not exist under Polish law. This assertion, if accepted by American courts, results in denying distribution of American funds to Polish heirs residing in Poland. First of all, it should be noted that, in fact, no country with exchange restrictions ascribes the same meaning to the notion of an "enforceable right" as

76. Art. 23 of the Foreign Currency Law. See generally Bidzinski, Ustawodawstwo Dewizowe p. 160 (Warsaw 1962) [Polish text].

77. See *supra* note 58.

78. See generally any *Annual Report on Exchange Restrictions* published by International Monetary Fund.

does the common law. Even in the United States this notion is a relative one so far as the right of a non-resident alien to inherit is concerned.[79] At the same time, it should be pointed out that while the procedure contemplated by Polish law may delay the transmission of funds to American beneficiaries it does not deny their title to the funds. In this sense, it seems to be a standard regulation common to all exchange control systems.

As a matter of fact, the American heir has the following remedies available to him if the Polish National Bank should deny his application for transmission of estate funds abroad: (a) an administrative remedy, *i.e.*, an appeal to the Ministry of Finance, and (b) as a last resort, in accordance with international law, intervention on the diplomatic level. These procedures might be time-consuming but are neither expensive nor unduly burdensome for American heirs. It may be argued, it is true, that the remedies enumerated above are of an extra-judicial nature. Nevertheless, neither their administrative nor eventual diplomatic character means that the right of an American beneficiary is without practical means of enforcement.

The scarcity of foreign exchange required the adoption of this procedure so as to eliminate the possibility of abuses in the transmission of estate funds left in Poland to beneficiaries abroad. It would appear that Polish fiscal law in fact chose this method in order to prevent possible abuses and to limit the transmittal of funds to bona fide situations.

It is important to stress in this context that the alien heir is, in fact, in a privileged position as compared with a Polish national who resides in Poland. For the latter cannot claim the same rights under the foreign exchange control law. This shows that the Polish law concerning succession by aliens tends toward abandoning the recognized rule of merely formal reciprocity and toward embracing the rule of material reciprocity, when Polish fiscal authorities deal with the application of an ailen heir.

Judicial Decisions

In accordance with the preceding considerations, the rights of American heirs to take real and personal property by succession were on many occasions fully recognized by Polish courts. This writer has personally examined a number of orders of the district courts of Nowy Targ[80] and Jaslo[81] confirming the rights to estates in Poland of persons residing in the United States. As far as the right of an American heir to take the proceeds of estates abroad is concerned, the practice is equally favorable for those American heirs who requested the transmission of

79. Berman, *Soviet Heirs in American Law*, 62 Colum. L. Rev. 257, 272 (1962).

80. Estate of Barbara Szyszko-Maciszczak, No. II 466/57 (Feb. 28, 1958); Estate of Franciszek Czyz, No. II 10/55 (May 23, 1956); Estate of Maria Radecka, No. II 209/54 (Dec. 30, 1955); Estate of Jan Mrowiec, No. II 215/54 (Nov. 1, 1954); Estate of Jan Krupa, No. II 13/51 (Dec. 17, 1951).

81. Estate of Maria Pieta, No. I 2-77/58 (Mar. 10, 1958); Estate of Franciszek Dzik, No. I 2-72/57 (Mar. 5, 1957); Estate of Stefania Zawilinskia, No. I 506/56 (Sept. 11, 1956).

these funds to the United States. It should be pointed out that in practice the transmission procedure is seldom invoked by American heirs. As a practical solution, they prefer to collect the funds due to them in Poland and to distribute them among relatives in the old country. However, there are also cases in which funds were remitted to the United States. Such was the case with the funds due to Mrs. Helen Zgieb of Lawrenceville, Pennsylvania, to whom the equivalent of 3,348 zloties were remitted in American currency.[82] Recently, rather substantial sums were transmitted to many American heirs of Polish estates. For instance, Mr. Peter Yehu Jacobi of New York City received the equivalent of 18,445 zloties, the Gmyr family (Stefan, Feliks and Wladyslawa Gmyr) of Syracuse, New York collected 30,000 zloties and Mrs. Waleria Tyszkiewicz of Detroit—42,955.98 zloties.

82. 2-Polonia Reporter No. 10 (Oct. 1957) Hazlet, New York.