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Foreign Legatees and Distributees Under Section 269 of the Surrogate's Court Act

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instances,[49] the courts are reluctant to allow the wife to sue for its loss since the danger that is presented to the relationship is not so great that negligent defendants should have the burden of paying excessive damages for the loss of something which is assumed by a jury. The injustice, however, of summarily dismissing a complaint on the ground that there is no authority to sustain it,[50] is manifested by such a situation as found in *Hipp* v. *Dupont*. The confusion arises from the failure of the courts to uniformly examine the facts of these cases to determine factually what the extent of the loss is and whether damages are recoverable without making a farce of our trial system. Public policy, as expressed in New York, has been to limit recovery by the husband for loss of his wife's consortium [51] and to require him to give proof of the value of his wife's services and the expenses to which he was put.[52] The danger of recovering excessive damages for sentimental elements, the loss of which is assumed, having been reduced to a minimum there is absolutely no reason why the wife should not be given her full, equal rights in the courts.

BERNARD SCHIFF.

FOREIGN LEGATEES AND DISTRIBUTEES UNDER SECTION 269 OF THE SURROGATE'S COURT ACT.

"Where it shall appear that a legatee, distributee or beneficiary of a trust would not have the benefit or use or control of the money or other property due him, or where other special circumstances make it appear desirable that such payment 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 * * *."

This is the 1939 addition to Section 269 of the Surrogate's Court Act.[1] Appended to it was the following bill note: "* * * The purpose of the amendment is to authorize the deposit of monies or property in the Surrogate's Court in cases where transmission or payment to a beneficiary, legatee, or other person resident in a foreign country

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[49] Colwell v. Tinker, 169 N. Y. 531, 536, 62 N. E. 668, 670 (1902), *supra* note 11.

[50] Maloy v. Foster, 169 Misc. 964, 8 N. Y. S. (2d) 608 (1938), *supra* note 44.

[51] N. Y. WORKMEN'S COMPENSATION LAW § 11; Swan v. F. W. Woolworth Co., 129 Misc. 500, 222 N. Y. Supp. 111 (1927) (no recovery by a husband for loss of his wife's services, when she is injured in the course of her employment and has received compensation under Workmen's Compensation Law).

[52] Schaupp v. Turner, 188 App. Div. 338, 177 N. Y. Supp. 132 (3d Dept. 1919), *supra* note 39.

[1] N. Y. Laws 1939, c. 343, in effect April 24, 1939.

might be circumvented by confiscation in whole or in part * * *." This bill note must be considered in any interpretation of the statute.[2]

In other words, where a non-resident alien becomes entitled to money or property from the estate of a decedent, and it is "contingently possible" [3] that such money or property would be subject to confiscation by his government in whole or in part if transmitted to him through the usual channels, the surrogate, in the exercise of his sound discretion, may direct that the money or property be paid into court.

It is obvious that this statute was to a certain extent aimed particularly at certain confiscatory practices of the totalitarian states.[4] Confiscation changes its color and form to meet various situations, all under the guise of legal process. First, outright and allegedly forthright confiscation, used when the recipient belongs to a certain race or holds certain religious or political beliefs contrary to the national philosophy.[5] Secondly, the imposition of excessive taxes.[6] Thirdly, payment to the recipient in debased coinage or paper money.[7]

Thus, Mr. American Resident would die with the belief that all his worldly possessions would go to his friends and relatives in the old country, whereas, in fact, they would receive nothing. This situation demanded a remedy, and the executive committee of the Surrogate's Association of the State of New York proposed the amendment to Section 269 of the Surrogate's Court Act.

At about the same time, companion pieces of legislation were passed. Section 51a of the Civil Practice Act [8] is a short statute of limitations which cuts off adverse claims for money against resident debtors and stakeholders. Sections 287a–287e of the Civil Practice Act [9] govern actions to determine adverse claims to specific personal property. Section 474 of the Civil Practice Act [10] declares that where a person is entitled to a judgment for money or other personal property, and it appears that he would not have the "benefit or use or control" of the money or property, it may be paid into court for his

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[2] Matter of Weidberg, 172 Misc. 525, 15 N. Y. S. (2d) 252 (1939), citing American Historical Soc. v. Glenn, 248 N. Y. 445, 162 N. E. 481 (1928) and People v. Schweinler Press, 214 N. Y. 395, 108 N. E. 639 (1915); Matter of Bold, N. Y. L. J., Feb. 15, 1940, p. 721, col. 2.

[3] In Matter of Weidberg, 172 Misc. 525, 528, 15 N. Y. S. (2d) 252, 257 (1939), the word "might" is defined as "to be contingently possible".

[4] "The provision is obviously directed at the so-called totalitarian nations, and primarily at Germany. It is a re-affirmation of faith in democratic principles." HARRIS, ESTATES PRACTICE GUIDE (1939) § 724.

[5] Matter of Weidberg, 172 Misc. 525, 527, 15 N. Y. S. (2d) 252, 256 (1939); Matter of Bold, N. Y. L. J., Feb. 15, 1940, p. 721, col. 2.

[6] *Ibid.;* Ed., N. Y. L. J., Nov. 17, 18, 1939; Ed., N. Y. L. J., Sept. 21, 1939.

[7] See notes 5 and 6, *supra.*

[8] N. Y. Laws 1939, c. 805, in effect June 8. This section is discussed and analyzed in Legis. (1939) 14 ST. JOHN'S L. REV. 221.

[9] N. Y. Laws 1939, c. 804, in effect June 8.

[10] N. Y. Laws 1939, c. 672, in effect June 2.

benefit. Section 978 of the Civil Practice Act [11] grants a similar remedy in cases where one party has money or personal property in his possession which is due to another party and it appears that such other party will not have the "benefit or use or control" of such money or property. The latter two sections were designed primarily to prevent confiscation by the foreign government.[12] Sections 51a and 287a–287e were designed to remedy the effects of confiscation already consummated by the foreign government.[13] Thus, the foreigner entitled to money or personal property situated in this state is well protected from confiscation.

We have seen the motivating causes of the statute. From these, it is fairly easy to determine its purpose. The primary purpose, of course, is to effectuate the express wishes of the testator or the implied wishes of the intestate.[14] This is the ground which justifies the intervention of the surrogates, and which grants jurisdiction to the state to legislate in the matter.[15] Also underlying the statute was a desire to aid the foreign legatee or distributee.[16] As the statute expressly states, the money is to be held for the benefit of the legatee or distributee until such time as it shall appear that he shall be the sole beneficiary of the money. As an afterthought, a third purpose developed. That was to prevent the use of the money to advance un-American doctrines, or "to undermine our institutions and to sabotage our industries." [17]

A determination of its effect at this time must, necessarily, be incomplete. It is still a very young statute and the proper historical perspective has not yet been attained from which it can be evaluated with any degree of certainty.

Power of Attorney.

In most of the cases that have arisen under the statute,[18] a rep-

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[11] *Ibid.*

[12] It will be noted that the language used in N. Y. CIV. PRAC. ACT §§ 474 and 978 is similar to that used in N. Y. SURROGATE'S COURT ACT § 269, and almost identical bill notes were appended to all three.

[13] Assume that an American holds money or property belonging to a Czechoslovakian business man. When Germany conquered that country it confiscated the claim. In order to protect himself from double liability, the American debtor may interplead both claimants. See Legis. (1939) 14 ST. JOHN'S L. REV. 221.

[14] The distribution of the estate of an intestate has been called a "statutory will". Matter of Weidberg, 172 Misc. 525, 528, 15 N. Y. S. (2d) 252, 256 (1939), citing Matter of Williams, 162 Misc. 507, 295 N. Y. Supp. 56, *aff'd*, 254 App. Div. 741, 4 N. Y. S. (2d) 467 (2d Dept. 1937).

[15] Wills and estates have always been exclusively in the jurisdiction of the state. U. S. CONST. Amend. X.

[16] Ed., N. Y. L. J., Sept. 21, 1939.

[17] Matter of Landau, 172 Misc. 651, 653, 16 N. Y. S. (2d) 3, 6 (1939).

[18] The cases under the statute, to date, are:

German: Matter of Weidberg, 172 Misc. 525, 15 N. Y. S. (2d) 252 (1939) (Kings, Surrogate Wingate); Matter of Ohly, N. Y. L. J., Nov. 18, 1939, p.

resentative of the foreign government has appeared with a power of attorney signed by the foreign legatee or distributee. "An inevitable implied term of this, and every other, power of attorney is that it confers upon the donee only such authority as may be permissible of exercise under the laws of the place in which action thereunder is contemplated." [19] Since Section 269 of the Surrogate's Court Act is law in New York, a power of attorney is subordinate and subject to it. Therefore, if the conditions described in the statute are proven to the satisfaction of the surrogate, he may refuse to deliver the money to the attorney in fact.

In *Matter of Landau* [20] and *Matter of Bold*,[21] the distributees were Russian citizens, and were represented here by an attorney in fact. In the former case, Surrogate Wingate took judicial notice of the fact that private ownership of property has been abolished by the Soviet government and, therefore, the distributive share would be confiscated in its entirety. In the *Bold* case, Surrogate Foley, although refusing to accept the contention that there was a limited form of private ownership of personal property under the new Soviet constitution, preferred to base his decision on the fact that even if the share were remitted to the distributee, he would be paid in Russian rubles, and would receive but a minute fraction of his share.[22] Regardless of the reasoning, there can be no doubt that Section 269 of the Surrogate's Court Act applies to legatees and distributees residing in Soviet Russia.

1695, col. 5 (New York, Surrogate Foley); Matter of Kyriss, N. Y. L. J., Dec. 8, 1939, p. 2034, col. 3 (New York, Surrogate Foley); Matter of Lex, N. Y. L. J., Jan. 29, 1940, p. 462, col. 2 (Kings, Surrogate Wingate); Matter of Mintz, N. Y. L. J., Feb. 10, 1940, p. 665, col. 4 (New York, Surrogate Foley); only in the *Weidberg* and *Mintz* cases did the surrogate impound the money.

Russian: Matter of Landau, 172 Misc. 651, 16 N. Y. S. (2d) 3 (1939) (Kings, Surrogate Wingate); Matter of Bold, N. Y. L. J., Feb. 15, 1940, p. 721, col. 2 (New York, Surrogate Foley); in both cases the money was impounded.

Polish: Matter of Steiner, 172 Misc. 950, 16 N. Y. S. (2d) 613 (1939) (Bronx, Surrogate Henderson); Matter of Kamioner, N. Y. L. J., Feb. 16, 1940, p. 739, col. 4 (New York, Surrogate Foley); Matter of Rosilinsky, N. Y. L. J., Mar. 6, 1940, p. 1046, col. 4 (Kings, Surrogate Wingate); in each case the money was paid into court.

Italian: Matter of Blasi, 172 Misc. 587, 15 N. Y. S. (2d) 682 (1939) (Kings, Surrogate Wingate); Matter of Grosso, N. Y. L. J., Dec. 8, 1939, p. 2043, col. 4 (Kings, Surrogate Wingate); in both cases the money was given to the Italian consul.

[19] Matter of Weidberg, 172 Misc. 524, 531, 15 N. Y. S. (2d) 252, 259 (1939).

[20] 172 Misc. 651, 16 N. Y. S. (2d) 3 (1939).

[21] N. Y. L. J., Feb. 15, 1940, p. 721, col. 2.

[22] According to the testimony of an expert witness on Russian exchange rates, the distributee would receive only $30 out of his distributive share of $1,500. An expert for the attorney in fact testified that he would be paid one fifth in American dollars. But even that would amount to a confiscation of $1,200 out of $1,500.

In *Matter of Weidberg,*[23] the distributees were four Jewish subjects of Germany who had left the country, one now residing in Denmark, one in Belgium, and two in Palestine. The German consul and his two legal attorneys appeared with a power of attorney. Surrogate Wingate took judicial notice of the $400,000,000 fine levied on the Jewish people by the German government, and also of the fact that it had not as yet been paid in full. These were sufficient "special circumstances" to justify the surrogate in retaining the money. Therefore, Section 269 of the Surrogate's Court Act apparently applies to Jewish legatees and distributees residing in Germany, unless there is some other rule of law which prevents the statute from going into operation.

Treaty.

The United States Constitution, the treaties between the United States and other nations, and the laws of Congress are the supreme law of the land.[24] There is little doubt that the statute is constitutional and we have already seen that the New York State Legislature had jurisdiction to enact it.[25] But the statute is still subordinate to any inconsistent provision in a treaty.[26] In the treaty between the United States and Germany [27] is found this clause: "A consular officer of either High Contracting Party may in behalf of his non-resident countrymen receipt for their distributive shares derived from estates in process of probate * * *, provided he remit any funds so received through the appropriate agencies of his Government to the proper distributees, and provided further that he furnish to the authority or agency making distribution through him reasonable evidence of such remission." [28] This same provision is in force between the United States and many other nations, by reason of "most favored nation" clauses.[29] Is this treaty provision inconsistent with the 1939 amendment to Section 269 of the Surrogate's Court Act?

In *Matter of Weidberg,* one of the four German-Jewish distributees was an infant now residing in Palestine, a British protectorate. Surrogate Wingate held that since Germany and Great Britain were at war, and since it was manifestly impossible for the German government to remit the funds to him "through the appropriate agencies of his Government", there was no conflict between the treaty and the statute. He did not, however, consider the treaty in relation to the

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[23] 172 Misc. 524, 15 N. Y. S. (2d) 252 (1939).
[24] U. S. CONST. Art. VI, § 2.
[25] See note 15, *supra.*
[26] "The public policy of one of the states must yield to an international treaty or compact to which the United States is a party." 6 WILLISTON, CONTRACTS (Rev. ed. 1936) § 1792.
[27] Treaty of Dec. 8, 1923, 44 STAT. 2132 (1923).
[28] *Id.* Art. 25, p. 2154.
[29] The "most favored nation" clause is found in Article 17 of the treaty with Italy, May 8, 1878, 20 STAT. 725, 732 (1878).

other distributees who had escaped from Germany, for it appears that the German consul claimed to represent them only through the power of attorney.

If the consul had claimed under the treaty, could the surrogate have withheld the money, or would he have been compelled to pay it to the consul? This question is fraught with difficulty. While the courts have the power to interpret treaties,[30] they have no power to violate them, or to modify or repudiate them. The courts have no power to refuse to enforce a provision of a treaty between the United States and a foreign government on the ground that the foreign government has itself violated the provision.[31] That is a political question solely in the jurisdiction of the executive and legislative branches of the Federal Government.[32] Since neither the President, the State Department nor Congress has as yet spoken on the subject, the treaty provision must be considered as valid and controlling as far as the judiciary is concerned.

Assignment.

Another interesting problem presents itself. Assume that, instead of appearing under a power of attorney or under the treaty, the representative of the German government appeared with an assignment of the share from the distributee, which assignment was completely valid on its face. The average layman, who reads his daily paper and is reasonably conversant with current European events, would immediately say that it could not have been the voluntary act of the Jewish distributee. This, undoubtedly, would be true, and the man would be justified in his conclusion. Unfortunately, or perhaps fortunately, the law is not thus easily satisfied. Rules of evidence would make it very difficult to prove in a court of law that this assignment was procured through duress. Of course, if the signature was forged, it might not be difficult to prove that fact. But dictators do not work that way. So we will assume that the signature was actually that of the distributee. If it were procured through duress, there certainly will have been no third persons conveniently present to witness the transaction. The distributee himself is still living, but "somewhere in Europe", although it might be doubted whether the presumption of continuance of existence in the war-torn Old World carries much weight.[33] However, he is unavailable as a witness. The burden of proving duress is on the party who asserts it.[34]

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[30] The rules of statutory construction apply. Hamilton v. Erie R. R., 219 N. Y. 343, 114 N. E. 399 (1916).

[31] See DEVLIN, TREATY POWER UNDER THE CONSTITUTION OF THE UNITED STATES (1908) §§ 96, 97.

[32] U. S. CONST. Art. II, § 2, par. 2.

[33] Surrogate Wingate, in Matter of Weidberg, 172 Misc. 524, 530, 15 N. Y. S. (2d) 252, 258 (1939): "In a war-torn Europe, the weight of the inference of continuance of existence becomes negligible."

[34] 5 WILLISTON, CONTRACTS (Rev. ed. 1939) § 1626.

Other Nations.

We have seen the statute as it applies to Nazi Germany and Soviet Russia. Now let us see how it affects other nations. In *Matter of Blasi*,[35] the Italian consul appeared under the treaty between the United States and Italy,[36] claiming to represent a distributee resident in Italy. Surrogate Wingate there said: "No intimation has been made in the present case, and there is nothing of which the court may take judicial notice, to indicate that if the net distributable assets of this estate were paid to the Italian consul, pursuant to his authority of receipt, the sum would not be capable of transmission, and in fact, be remitted to the distributees in Italy." [37] This case indicates and emphasizes that something more than mere *power* to confiscate is necessary to call Section 269 of the Surrogate's Court Act into play. Italy, being a totalitarian state, had the power to confiscate the distributive share. But there must also be shown the *inclination* to exercise that power. That inclination was shown in regard to Germany and Russia, but not in regard to Italy.

In respect to distributees situated in the late country of Poland, there can be little doubt that the surrogate has not only the power but the duty to pay any money into court,[38] at least until the outside world is able to get an accurate picture of what is happening in that country. It would be impossible for the defunct Polish government to transmit the funds,[39] and the German government would have no treaty right to the funds, since the Poles are not their countrymen. Germany's conquest of Poland has not received recognition from the United States government. The same reasoning applies to both Austria and Czechoslovakia, and to such minor sections as Memel and Danzig. However, if, under a power of attorney, the attorney in fact proves that the proper beneficiaries will receive the money, then the surrogate may release the money.

In respect to other totalitarian states, such as Spain and some of the South American nations, the same rule would seem to apply as that applied to Italy. The special circumstances which would deprive the beneficiary of the use of the money or property would have to be proven to the satisfaction of the surrogate. If the legatee or distributee is a gentile, the mere fact that he resides in Germany will not occasion the surrogate to impound the money.[40]

It is improbable that the statute will ever be invoked against a democracy, for the reason that it is improbable that a democracy will attempt to confiscate illegally money due to one of its citizens. How-

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[35] 172 Misc. 587, 15 N. Y. S. (2d) 682 (1939).
[36] See note 29, *supra*.
[37] 172 Misc. 589, 15 N. Y. S. (2d) 684.
[38] See note 18, *supra*.
[39] Matter of Steiner, 172 Misc. 950, 16 N. Y. S. (2d) 613 (1939).
[40] Matter of Ohly, N. Y. L. J., Nov. 18, 1939, p. 1695, col. 5; Matter of Kyriss, N. Y. L. J., Dec. 8, 1939, p. 2034, col. 3; Matter of Lex, N. Y. L. J., Jan. 29, 1940, p. 462, col. 2.

ever, if such an attempt were made, the statute would be just as effective against a democracy as against a dictatorship.

Payment into Court.

The last sentence of Section 269 of the Surrogate's Court Act is as follows: "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." In *Matter of Weidberg,*[41] after the money due to the four German-Jewish refugees had been paid into court, the German consul retired from the case, and the other two attorneys in fact communicated with the distributees in their new countries. The attorneys received cables and letters from each in return requesting the attorneys to collect and remit the money to them by check. These the attorneys filed in the Surrogate's Court along with affidavits swearing that the distributees would actually receive the money. Relying on these, Surrogate Wingate released the money to the attorneys in fact.[42]

This is one illustration of what might happen to the money after it has been paid into court. If such proof had not been filed, however, the money might have stayed in the city treasury bearing interest indefinitely. It would remain there so long as it appeared that the distributee or his heirs would not receive the money, so long as the threat of confiscation existed. By the time that threat disappeared, it might be impossible to trace the distributee or his heirs. The money would then revert to the heirs of the decedent. But his kin may have disappeared by this time. In such a case, the money would escheat to the state.

Conclusion.

The 1939 amendment to Section 269 of the Surrogate's Court Act was designed to prevent confiscation by a foreign government. This purpose has been accomplished satisfactorily in the cases which have applied the statute. In regard to Russia, Poland, Austria, and Czechoslovakia, there seems to be little doubt that the statute is applicable. In respect to Italy and other totalitarian states, outsides of Germany, it must be definitely proven that the money will be wrongfully confiscated by the government before the surrogate will apply the statute.

It is only where Germany is concerned that the problem becomes difficult. Where the representative of the German government claims the distributive share of a Jewish subject under a power of attorney, the money will be withheld. If the German consul claims such a

[41] 172 Misc. 524, 15 N. Y. S. (2d) 252 (1939).

[42] He withheld the infant's share, however, since the power of attorney was not valid as to him. Foley v. Mutual Life Ins. Co., 138 N. Y. 333, 34 N. E. 211 (1893).

share under the treaty, it is doubtful whether the surrogate has the right to impound the money. If the German representative appears with an assignment, valid on its face, it is doubtful whether the surrogate would be legally justified in retaining the money.

The statute, of course, is not restricted to dictatorship. It may also apply to democracies or to any other form of government, as long as the conditions prescribed by the statute appear.

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DUAL JOB HOLDING IN THE PUBLIC SCHOOL SYSTEM.

Although statutory and common law interdictions against the holding of multiple public positions have long been an accepted part of our jurisprudence, it was only recently that such limitations were extended to incumbents in the public school system.

For some time the Board of Education has sought to limit teachers to one position, but it has, to a large extent, been frustrated by the tenure statutes.[1] These laws provide that a person, who has secured tenure thereunder, may not be removed except for cause, after hearing, and by the vote of a majority of the Board.[2] What constitutes good and sufficient cause has been the subject of much controversy.[3]

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[1] In Hughes v. Board of Education of City of New York, 249 App. Div. 158, 291 N. Y. Supp. 462 (1st Dept. 1936), the board of education sought to remove the principal of an evening school after he had secured tenure, during his good behavior and competent service and while night school was being maintained, simply because he held the position of principal of a night school. In reversing the removal the court said that the board had power to grant the permanent tenure, and having done so it could not remove the petitioner except for cause, after hearing and by the vote of a majority of the board. A similar result was reached in Matter of Cohen v. Board of Education, 163 Misc. 638, 296 N. Y. Supp. 522, *aff'd*, 277 N. Y. 519, 13 N. E. 454 (1938).

[2] N. Y. ED. LAW § 872, subd. 3: "* * * Such person and all others employed in the teaching, examining or supervising service of the school of a city, who have served the full probationary period, or have rendered satisfactorily an equivalent period of service prior to the time this act goes into effect shall hold their respective positions during good behavior and efficient and competent service, and shall not be removed except for cause after hearing, by the affirmative vote of a majority of the board."

[3] See Cooke v. Dodge, 164 Misc. 78, 82, 299 N. Y. Supp. 257, 262 (1937), where the court laid down the following rule: "The cause assigned must be substantial and not shadowy, and that the explanation must be received and acted upon in good faith and not arbitrarily. To be substantial the cause assigned must be some dereliction on the part of the subordinate, or neglect of duty, or something affecting his character or fitness for the position." The difficulties in applying this rule are obvious.

In Matter of Thomas, 33 N. Y. St. Dept. Rep. 12 (1925), it was held that the removal of a teacher pursuant to a rule that a teacher's place should become vacant on her marriage was improper. *Cf.* Matter of Weeks, 4 N. Y. St. Dept. Rep. 605 (1915), where it was held that the absence of a married teacher