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S. A. Bayitch

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CONFLICT LAW IN UNITED STATES TREATIES*

S. A. BAYITCH

XIII

PROPERTY

There are only a few conflict rules imbedded in treaty law concerning property in general. One of them, the rule guaranteeing protection²⁰¹ of property, is quite common; however, standards afforded in this respect vary. One group of treaties states the rule in a general way, by providing that "the most constant protection and security for property" will be given (*e.g.*, treaties with Argentina, 1853, Art. III; Uruguay, 1949, Art. VIII, 2; Ireland, 1950, Art. VIII, 2; Japan, 1953, Art. VI, 1). In other treaties the standard of international law is adopted (*e.g.*, with Poland, 1931, Art. I, 4; Liberia, 1938, Art. I, 3; China, 1946, Art. VI, I; Italy, 1948, Art. V, 1; Ireland, 1951, Art. VIII, 2). The extent and methods of protection are determined by local substantive and procedural law, as indicated expressly in the treaty with Colombia (1849, Art. 13) stating that "both contracting parties promise and engage formally to give their special protection to the . . . property of the citizens of each other . . . leaving open and free to them the tribunals of justice for their judicial recourse." In other treaties the protection is granted on the national basis (*e.g.*, with Liberia, 1938, Art. I, 4), or according to the most-favored-nation clause (*e.g.*, with Yugoslavia, 1881, Art. II, I; Spain, 1902, Art. II; Saudi Arabia, 1933, Art. II; Nepal, 1947, Art. 6), or by a combination of both (Ireland, Art. VIII, 3).

*This is the completion of an article, the first and second portions of which appeared in 8 *MIAMI L.Q.* 501-529 and 9 *MIAMI L.Q.* 9-40.

201. Wilson, *Property Protection Provisions in United States Commercial Treaties*, 45 *AM. J. INT'L* 83 (1951); WILSON, *THE INTERNATIONAL LAW STANDARDS IN TREATIES OF THE UNITED STATES*, 92 (1953); WILSON *Natural Resources Provisions in United States Commercial Treaties*, 48 *AM. J. INT'L* L. 355 (1954).

The treaties of peace (Paris, 1947) with Bulgaria (Art. 25,2), Hungary (Art. 29,2), and Rumania (Art. 27,2) contain a uniform provision as to the law controlling liquidation and disposition of property "within its territory and belonging" to nationals or corporations of these enemy countries; it "shall be carried out in accordance with the law of the Allied and Associated Powers concerned," *i.e. lege loci*. The same law shall determine the extent to which such enemy aliens "shall have . . . rights with respect to such property." Leiss and Dennett, *European Peace Treaties after World War II*, 140 (1954).

In present times, property rights are frequently affected by one or another type of *expropriation*.²⁰² The question as to what standard shall apply in such situations was considered already in the treaty with Switzerland (1850/55) where national treatment was promised "in cases of . . . expropriation for purposes of public utility" (Art. II, 3). Recent treaties center their attention to problems of nationalization. One type of rule limits the possibility of such takings to specifically listed purposes (e.g., "for public benefit," Art. VII, 3, with Greece, 1951; "for public purposes and reasons of social utility as defined by law," Columbia, 1951, Art. VI, 3; "for public purpose," Japan, 1953, Art. VI, 3). In other type treaties the standard of due process and payment of compensation is set up²⁰³ (e.g., treaty with China, 1946, Art. VI, 2; Italy, 1948, Art. V, 2; Denmark, 1951, Art. VI, 3; Israel, 1951, Art. VI, 3). As to the law applicable, only one treaty contains, at least, a hint. The treaty with Uruguay (1949, Art. VIII, 2) prescribes that "any expropriation shall be made in accordance with the applicable law" which may as well mean a promise that expropriations will be, in regard to treaty aliens, executed by constitutionally enacted measures. Moreover, a considerable number of treaties contain the promise to apply to expropriations involving treaty aliens (including corporations) one or another of the general standards, e.g., national treatment (treaty with Uruguay, 1949, VIII, 2), in some treaties combined with the most-favored-nation clause (e.g., with Italy, 1948, Art. V; Greece, 1951, Art. VII, 2; Japan, 1953, Art. VI, 2).

Interests in chattels.—In general, treaty aliens are entitled, according to a rule restated in most of the treaties, to acquire, possess and dispose of all kinds of personal property²⁰⁴ (e.g., treaties with Switzerland, 1850/55, possess and dispose of every kind of movable property on the same terms as the nationals"). There is, nevertheless, one treaty containing a complete conflict rule. Art. XIV, 4, of the treaty with Sweden (1910) provides that the "taking possession" of chattels disposed of "by sale, donation, testament, or otherwise" shall be "in accordance with and acting under the provisions

202. Abel, *Foreign Confiscatory Legislation and Private International Law*, 6 MOD. L. REV. 166 (1943); Beitzke, *Probleme der Enteignung in Internationalprivatrecht*, Festschrift für Raape 109 (1948); Friedman, *Expropriation in International Law* (1953); RE, *Foreign Confiscation in Anglo-American Law* (1950); RE, *Nationalization and the Investment of Capital Abroad*, 42 GEO. L.J. 44 (1953); Miller, *Expropriation and Foreign Investment*, 39 GEO. L.J. 1, 12 (1950); Savatier, *Les Nationalisations en Droit International Privé*, 8/9 TRAVAUX DU COMITE FRANCAIS DE DROIT INTERNATIONAL 47 (1951); Wortley, *Problemes soulevés en Droit International Privé par la Législation sur l'Expropriation*, 67 RECUEIL DES COURS (Hague), 345 (1939) and recently, De Nova *Volkerrechtliche Betrachtungen über Konfiskation und Enteignung*, 52 FRIEDENSWARTE 116 (1954).

Cf. *Ozanic v. United States*, 188 F.2d 228 (2d Cir. 1951).

203. Hyde, *Compensation for Expropriation*, 33 AM. J. INT'L L. 108 (1939); Rubin, *Nationalization and Compensation, a Comparative Approach*, 17 U. OF CHI. L. REV. 458 (1950).

204. GIBSON, *ALIENS AND THE LAW* 45 (1941).

of the laws of the jurisdiction in which the property is found," *i.e.*, *lege rei sitae*.²⁰⁵

Art. V; Bolivia, 1853, Art. XII, Guatemala, 1901, Art. II; Italy, 1948, Art. VII, 3). In some treaties national treatment is set up as the controlling standard, as in the treaty with Thailand (1937, Art. I, 6). In others, the most-favored-nation standard is granted (*e.g.*, with Great Britain, 1899, Art. V; China, 1946, Art. VIII, 5; Uruguay, 1949, Art. VII, 4a). A few treaties add a reference to the law locally applicable, (*e.g.*, the treaty with Thailand, ". . . upon compliance with the provisions of local law, the nationals . . . of each of the high contracting parties, shall . . . have the right to acquire,

Vessels.—According to the Convention establishing uniform rules with respect to assistance and salvage at sea (Brussels, 1910, 37 STAT. 1658) the apportionment of remuneration in such cases is controlled by the "law of the vessel's flag" (Art. 7). A different rule, however, is adopted in the treaty providing for assistance to and salvage of vessels in danger or shipwrecked on the coast or within the territorial waters of either country, concluded with Mexico (1935, 49 STAT. 3359); as to assistance and salvage "private vessels . . . shall be subject to the provisions of the laws in force in the country in whose territorial waters such assistance is rendered" (Art. 3).²⁰⁶

Aircraft.—Important conflict rules regarding interests in aircraft are contained in the Convention on the international recognition of rights in aircraft (Geneva, 1948, TIAS 2847).²⁰⁷ The nucleus of its legal structure is the law of the country where the aircraft "was registered as to nationality," the *quasi-national law* of the aircraft.²⁰⁸ This law controls, according to the Convention, the following matters:

205. In some of the recent treaties, restrictions established in municipal law are upheld regarding, for example, shares in corporations "carrying on particular types of business" (*e.g.*, with China, 1947, Art. VIII, 4; Ireland, 1951, Art. VII, 2; Colombia, 1951, Art. IX, 4), or matters "dangerous from the standpoint of public safety," like "firearms, explosives, poisons and habit-forming drugs" according to Art. VII, 2 of the treaty with Ireland.

206. On the Convention for the unification of certain rules of law concerning maritime liens and mortgages (Brussels, 1926), see Lord and Glenn, *The Foreign Ship Mortgage*, 56 YALE L.J. 923 (1947).

207. The convention is now in force between the United States, Pakistan, Brazil and Norway. Ratifications by Mexico and Chile are not accepted by the United States because of reservations they contain (text in 1951 U.S. Av. Rep. 130, 1952 U.S. & Can. Av. Rep. 433).

Calkins, *Creation and International Recognition of Title and Security Rights in Aircraft*, 15 J. AIR L. & COMM. 156 (1948); Wilberforce, *The International Recognition of Rights in Aircraft*, 2 INT'L L.Q. 421 (1948); Moore, *Some Principal Aspects of the ICAO Mortgage Convention*, 14 J. AIR L. & COMM. 531 (1947); also *Report and Commentary of the Legal Committee of ICAO on the Draft* (Brussels, 1947), 14 J. AIR L. & COMM. 505 (1947).

208. It is interesting to note that the Brussels draft (1947, 14 J. AIR L. & COMM. 501, 1947) used the expression "the law of the Contracting State whose nationality the aircraft possesses." According to the Convention on international civil aviation (Chicago, 1944, TIAS 1591) aircraft have "the nationality of the State in which they are registered" (Art. 17); as a consequence, an aircraft cannot "be validly registered in more than one State, but its registration may be changed from one State to another" (Art. 18).

(i) rights in aircraft listed in Art. I, 1,²⁰⁹ which contracting countries have undertaken to recognize, provided such interests "have been constituted in accordance" with this law and are "regularly recorded in a public record of such country" [Art. I, 1 (1) (ii)]. The question arises, however, whether or not the quasi-national law of the aircraft so referred to by the Convention means only the substantive law of the country or its conflict rules as well. The second interpretation seems to prevail.²¹⁰ It would follow, then, that interests in aircraft will be internationally recognized (*i.e.*, in the territories of all contracting countries) whenever such interests have been created validly according to conflict rules contained in the quasi-national law of the aircraft, regardless of the fact that the law so applicable may not be the law of the 'home country' of the aircraft, but the law of some other country, perhaps even of a non-signatory to the Convention.²¹¹ Consequently, interests created outside of the country of national registration (*e.g.*, by transactions entered into abroad, or when the aircraft was, at

209. To facilitate the understanding of treaty law here involved, a list of rights to be recognized under the Convention follows.

Rights to be recognized under the Convention are: (a) property, (b) "rights to acquire aircraft by purchase coupled with possession of the aircraft," meaning the right of a possessor to have the title transferred to him upon performance, on his part, of deferred obligations, *e.g.*, payment of the purchase price (conditional sale); (c) right to possession under leases of six months or more (especially designed to cover situations involving equipment trusts and trust receipts); (d) "mortgages, hypothèques and similar rights" of a contractual origin (therefore not liens or interests created by law, by attachment, etc.) for payment of "an indebtedness," not necessarily connected with the security involved.

As to recordation of ownership, lease, mortgage, etc., see 19 U.S.C. § 523 (1948); as to Florida, FLA. STAT. § 329.01 (1953).

Claims rank as follows: I. priority claims according to the Convention (a) costs (Art. VII, h), (b) compensation for salvage and preservation (Art. IV, 1) since these claims are given, according to the Convention, "priority over *all* other rights in the aircraft," (c) claims for injuries and damages in the sense of Art. VII (5); II. claims to be recognized under the Convention after privileged claims: claims as recorded and ranking under the law of the country of "registration as to nationality"; III. claims recorded and enforceable under the law of other countries (Art. I, 2, Art. II, 2) which claims will be treated according to the conflict law of the forum.

210. Calkins (*supra* note 207, at 164) states that "the discussion of Brussels makes it amply clear that what is intended is the entire law of a Contracting State, including its law on conflict of laws." Wilberforce (*supra* note 207 at 434), on the other hand, appears more cautious when he states that "specific proposals to add the words 'including the rules of conflict of laws' were rejected. On the final reading the Chairman . . . said 'The consequence was that the Brussels text remained as it stood and this was satisfactory. . . . The result seems to be that States may apply their rules on conflict of laws if they think fit.'" This would mean countries are to be free to interpret treaty law as to whether it includes only the substantive law or conflict law as well, according to their own rules of interpretation.

An additional conflict rule in the nature of inter-provincial conflict law is contained in Art. XVII, that "If a separate register of aircraft for purposes of nationality is maintained in any territory for whose foreign relations a Contracting State is responsible, reference in this Convention to the law of the Contracting Country shall be construed as reference to the law of that territory."

211. The question what law controls the relation between primary parties to the creation of interests in aircraft is not decided in the Convention. Nevertheless, taking into consideration Art. I (2), one may conclude that the law applicable according to the conflict law of the home country will control the international recognition of such interests.

the time of creation of the interest involved, in a foreign country), will be tested, as to their international recognition, according to the law declared applicable by the conflict law of the 'home country.' This law may apply, with regard to aircraft and interests in them, a principle similar to the *lex nationalis* which will follow, so to speak, the aircraft wherever it may fly. In this case, the *lex nationalis* of the aircraft will control all interests in aircraft "registered as to nationality" within such country, including transactions abroad or transactions entered into at a time when the aircraft was located abroad. On the contrary, if the conflict rule of the 'home country' follows the territorial contact in the sense of the *lex situs* of the aircraft at the time of the transaction involved, then foreign law so identified will control the creation of interests in the aircraft. In both cases such interests may be said to have been "constituted in accordance with the law of the Contracting State" involved.²¹² This alone will not, however, suffice to secure international recognition of interests so created since, according to the Convention, such interests must also be "regularly recorded" in the 'home country' of the aircraft. The compliance with this additional requirement may run into difficulties in countries where, under their municipal recording statutes, only interests permissible under their substantive municipal law are recordable (Art. II, 3).

(ii) The same law, *i.e.*, the law of quasi-nationality of the aircraft will control also the "regularity of successive recordings in different Contracting States" (Art. II, 1) as well as

(iii) the method of public notice required in case of forced sale of an aircraft (as prescribed by Art. VII, 2, b);

(iv) this law will determine the extent to which recorded interests will affect spare parts (Art. X, 1).

Around the nucleus of the quasi-national law of the aircraft other legal systems are arranged; these laws control, according to the convention, certain specific aspects. The applicable law of any other contracting country will govern:

212. Calkins (*supra* note 207, at 167) suggests that it is possible "to have a transfer of an aircraft, made when the aircraft is outside the jurisdiction of the state of its registry, effected in accordance with the law of the foreign state"; this will be correct only where, under the law of the country of registry, the law of the situs of the aircraft controls, and, in addition, such transaction is recordable under the law of the country of registry. The statement that "if the State in which the aircraft is located at the time of the attempted creation of the interest, does not recognize such interests, then apparently no valid right will have been created under the Convention, even though the home state does recognize such rights in its own municipal law" is consistent with the position taken by the author only where, according to the conflict law of the country of registry, the creation of such interests is governed by the *lex situs*. However, in a case where, according to the conflict law of the country of registry, its substantive law applies regardless of the situs of the aircraft, foreign law (the law of the situs) will be disregarded. In these situations the *lex situs* cannot prevent the creation of interests in an aircraft in spite of the fact that such aircraft is located, at the critical time, within its territory, if, according to the law of the country of registration, the latter country's law applies as a quasi-national law.

(i) the recognition of any right in aircraft except where international recognition is imposed by the convention (Art. I, 2);

(ii) rights of third parties (*i.e.*, not participant in the establishment of interests listed in Art. I, 1), except where the convention contains express provisions superseding the municipal law otherwise applicable, *e.g.*, Art. I (2), IV, VI, VII (5);

(iii) municipal law also controls the right to prohibit "the recording of any right which cannot validly be constituted according to its national law" (Art. II, 3), which rule will be applied, for example, by countries where the only security interest in chattels is pledge. It is to be noted, however, that interests once validly created in compliance with the convention (Art. I, 1) cannot be defeated by the transfer of registration of an aircraft (Art. XI);

(iv) the same law will decide the question whether the filing for recording alone will have the effect of recording (Art. III, 3), provided, of course, such recording was subsequently executed.²¹³

In some instances the convention refers to the *lex fori* as controlling. As already indicated above, the law of the forum where the claim involving salvage or preservation of an aircraft is being litigated will "determine the contingencies upon which the three months period may be interrupted or suspended" (Art. IV, 4, b).

Another *lex fori* appears in the convention, the forum where the forced sale of the aircraft takes place. As already indicated above,

(i) the procedure of such sale is governed by the *lex fori executionis* (Art. VII, 1);

(ii) the same law will determine consequences of failure to comply with requirements of notice of such sale (Art. VII, 3); and

(iii) the question of what costs are chargeable as a preferred claim, to the proceeds (Art. VII, b).

Another special *forum executionis* is the one in whose jurisdiction, in addition to the fact that the "execution sale takes place" there, an injury to person or damage to property on surface was inflicted by an aircraft subject to any rights recognized according to the convention (*lex fori et loci delicti*). The domestic law in force in such jurisdiction granting such claims priority, will prevail, with certain limitations, over priorities established according to the convention (Art. I, 1), provided municipal law stays within standards established by the convention (Art. VII, 5, a and b). In case there is no such municipal law in force, the Convention supplies its own rule (Art. VII, 5).

213. See 62 STAT. 494 (1948), 49 U.S.C. § 523 (d), with limitations in § 523 (a) (3).

There is, lastly, the law of the place where the "operations of salvage or preservation were terminated" (Art. IV, 1). A claim based upon such operations will be granted priority as against interests to be recognized under the convention, provided such claim is recognized according to the municipal law of the *lex loci actus*, and, in addition, there is "a charge against the aircraft," in the nature of a lien.²¹⁴

Real property.—The well established rule that interests in land are governed by the law of the situs became a treaty problem where local law prevented treaty aliens from holding land in general²¹⁵ or from taking it upon death (*escheat, droit d'aubaine*).²¹⁶ This type of discrimination blossomed under feudal law and continued in force in many countries changing its motivation from the interests of the feudal lord to reasons of national policy.²¹⁷

214. Till now this country did not adhere to any of the international agreements concerning negotiable instruments, particularly not to the Convention for settlement of certain conflict of laws in connection with bills of exchange and promissory notes (Geneva, 1930), nor to the parallel convention concerning check (Geneva, 1931); Hudson and Teller, *International Unification of Laws Concerning Bills of Exchange*, 44 HARV. L. REV. 333 (1931); Gutteridge, *Unification of the Law of Bills of Exchange*, 12 BRIT. Y.B. INT'L L. 13, 21 (1931); Guerrico, *Unification and Present Status of Negotiability Legislation in America*, 29 MINN. L. REV. 1 (1944). Nevertheless, it must not be overlooked that there is a scintilla of treaty conflict law. The now superseded Agreement concerning money orders (Postal Union of the Americas and Spain, Panama, 1936, 50 STAT. 1708) contained two significant conflict rules: one, that the law of the place of indorsement controls the question of permissibility of such indorsement (Art. VI), and the other, that the law applicable to the issuance and payment of money orders is the law "in force within the country of origin or the country of destination as the case may be" (Art. 13). Later agreements (Rio de Janeiro, 1946, 61 STAT. 3540, and the recent agreement of 1950, 2 UST 1449) formulates the first provision to read that the contracting countries "are authorized to permit in their territory and in accordance with their domestic legislation, the endorsement of money orders originating in any country" (Art. VII), while the second runs that "money orders exchanged between two countries are subject, insofar as their issue and payment are concerned, to the provisions in force in the countries of origin and destination, as the case may be, applicable to domestic money orders" (Art. 14).

215. DAVIES, *THE LAW OF ALIENS* (1931); GIBSON, *ALIENS AND THE LAW* (1940); 1 POWELL, *THE LAW OF REAL PROPERTY* 369 (1949); Wilson, *Natural-Resources Provisions in United States Commercial Treaties*, 48 AM. J. INT'L L. 355, 365 (1954). Comment, *Conflict Between Local and National Interest in Alien Land Holding Restrictions*, 16 U. OF CHIL. L. REV. 315 (1948); KONVITZ, *THE ALIEN AND THE ASIATIC IN AMERICAN LAW* (1946).

216. For a discussion, see *Nielsen v. Johnson*, 279 U.S. 47 (1929); CAILLEMER, *CONFISCATION ET ADMINISTRATION DES SUCCESSIONS PAR LES POUVOIRS PUBLICS DU MOYEN AGE*. . . 147, 171 (1901).

217. For federal law, see 48 U.S.C. §§ 1501-1508 (1952). MacClintock, *Aliens under the Federal Laws of the United States*, 4 ILL. L. REV. 95 (1909).

On state law, 1. POWELL, *op. cit. supra* note 215 at 372 (1949); Orfield, *Alien Rights in Nebraska*, 17 NEB. L. BULL. 3 (1938); Pratt, *Present Alienage Disabilities under New York State Law in Real Property*, 12 BROOKLYN L. REV. 1 (1942); Ward, *The Mississippi Alien Statute*, 11 MISS. L.J. 313 (1939). Comment, *Right of an Alien to Own Land in Texas*, 7 TEX. L. REV. 607 (1929); *Validity of State Restraints on Alien Ownership of Land*, 51 MICH. L. REV. 1053 (1953); *The Alien Land Laws, a Reappraisal*, 56 YALE L.J. 1017 (1947). For a recent case, see *Pavlick v. Meridan Trust and Safe Deposit Co.*, 107 A.2d 262 (Conn. 1954). See also Florida's DECLARATION OF RIGHTS, § 18 (1926).

Impact of treaties, 1 POWELL, *op. cit. supra* note 215, at 399; Cowles, *International Law in Inland States, a Case Study*, 28 NEB. L. REV. 387, 393 (1949); Duwalt, *The*

These developments make it understandable why this particular facet of the rule of the situs prevails in treaty law, reinforced, in many instances, by an express reservation in favor of local law.²¹⁸ "All that relates to the acquisition, possession and disposition of immovable property . . . shall . . . be subject exclusively to the applicable law of the situs of such immovable property," declares the treaty with Thailand (1937, Art. I, 7), adding, in regard to this country, that "The applicable laws of the situs of immovable property . . . shall be understood and construed to mean the laws applicable to immovable property of the state, territory or possession of the United States of America in which such immovable property is situated; and nothing therein shall be construed to change, affect or abrogate the laws applicable to immovable property of any state, territory or possession . . ." The straight rule of the situs is repeated in recent treaties, e.g., with Ireland (1951, Art. VII, 3) stating that the ownership of real property "shall be subject to the applicable laws therein," a formula used also in the treaties with Ethiopia (1951, Art. XI) and Germany (1954, Art. IX, 1). The same rule is adopted, in regard to land in this country, in a line of treaties (with China, 1946, Art. VIII, 1; Italy, 1948, Art. VII, 1, a; Uruguay, 1949, Art. VII, b; Israel, 1951, Art. IX, 1, b; Japan, 1954, Art. 15, 2)²¹⁹ while American

Treaties of the United States and Alien Land Laws of Illinois, 43 CENT. L.J. 211 (1896).

The effect of the United Nations Declaration on Human Rights is discussed in *Fuji v. State of California*, 242 P. 2d 617 (Cal. 1952) followed in *Harruye Masaoka v. People*, 245 P.2d 1062 (Cal. 1952). Wright, *National Constitution and Human Rights — the Fuji Case*, 45 AM. J. INT'L L. 62 (1951); Preuss, *Some Aspects of the Human Rights Provisions of the Charter and Their Execution in the United States*, 46 AM. J. INT'L L. 289 (1952).

218. A mutual reservation of this kind is adopted, for example, in the treaty with Switzerland (1850/5, Art. V, 2) according the right to dispose of and acquire "real estate situated in the States of the American Union, or within the Cantons of the Swiss Confederation, in which foreigners shall be entitled to hold or inherit real estate."

The treaty with France (1853) contains an identical provision that "In all States of the Union, whose existing laws permit it so long and to the same extent as the said laws shall remain in force (this last phrase added as an amendment by the Senate and accepted by Switzerland, 6 MILLER, *op. cit. supra* note 50, at 181) Frenchmen shall enjoy the right of possession . . . real property . . . as citizens of the United States" (Art. VII). It is important to notice that France proposed (note of September 30, 1852, 6 MILLER, *op. cit. supra* note 50 at 188) national treatment for Frenchmen in this country pointing out that under French law (statute of July 14, 1819, repealing Art. 726 and 912 of the Civil Code) there is no discrimination against aliens. After prolonged negotiations the French proposal was rejected (6 MILLER *op. cit. supra* note 50 at 190). Instead, the next paragraph, reaffirming the reservation already contained in the beginning of the article, stated that "As to the States of the Union, by whose existing laws (which seems not to cover completely the above mentioned addition to paragraph one) aliens are not permitted to hold real estate" the President promised to recommend the passage of necessary laws which promise was promptly performed (6 MILLER, *op. cit. supra* note 50 at 193). In view of this background the interpretation in *Geofroy v. Riggs*, 133 U.S. 258 (1890) appears questionable (see notes 43 and 50 *supra*) taking also into account that a reservation in favor of the law of the situs in regard of this country was a constant feature in all previous treaties with France, (1778, Art. IX, and 1800, Art. VII). CASCHON, CODE DIPLOMATIQUE DES AUBAINS, OU LE DROIT CONVENTIONNEL ENTRE LA FRANCE ET LES AUTRES PUISSANCES RELATIVEMENT A LA CAPACITE RECIPROQUE D'AQUERIR OU TRANSMETTRE DES BIENS MEUBLES OR IMMEUBLES . . . (1818); DELAUME, LES CONFLITS DE LOIS A LA VEILLE DU CODE CIVIL 161, 314 (1947).

219. An interesting situation could arise in a state granting aliens national treatment (without requiring reciprocity) if the alien's country denies such treatment to our

nationals are accorded in the respective foreign countries national treatment conditioned upon reciprocity. However, national treatment regarding aliens' interests in land in this country is granted only exceptionally, for example, in the treaty with Argentina (1853), Art. IX providing that "In whatever relates to . . . acquiring and disposing of property of every sort and denomination, either by sale, donation, exchange, testament or any other manner whatsoever . . . the citizens shall reciprocally enjoy the same privileges, liberties and rights, as native citizens."²²⁰ Other treaties grant the most-favored-nation treatment (*e.g.*, with Yugoslavia, 1881, Art. II; Spain, 1902, Art. III, 3; Sweden, 1910, Art. 14, 5). Some treaties are restrictive and guarantee a mere non-discriminatory alien treatment, as the treaty with Austria (1928, Art. I, 3) granting treaty aliens ". . . subject to reciprocity, the treatment generally accorded to foreigners by the law of the place where the property is situated"²²¹ (same in Art. IX, 3 of the treaty with Denmark, 1951).

However, the strict rule upholding the law of the situs discriminating against holding of land by treaty aliens proved to be harmful to favorable international relations. A trend toward relaxing such discrimination grew stronger during the first half of our century when aliens were permitted to hold land for specific purposes connected with the enjoyment of privileges granted them under the treaties, *e.g.*, for "residential, scientific, religious, philanthropic, manufacturing, commercial and mortuary purposes upon the same terms as nationals" (*e.g.*, treaties with El Salvador, 1926, Art. I; Finland, 1934, Art. I, 2; Greece, 1951, Art. IX, 1) all this irrespective of local law. Some of the recent treaties even dispense with enumerating these purposes and substitute instead a general clause granting treaty aliens the right to hold land where such holding is "incidental to or necessary for the enjoyment of rights secured by the provisions of the present treaty" (*e.g.*, with Ireland, 1950, Art. VII, 3; Denmark, 1951, Art. IX, 3). Similar functional privileges are extended for consular premises (convention with Liberia, 1928, Art. II, 3). Article 7 of the consular convention with Great Britain (1951) grants the right to acquire land for consular premises "under such form of tenure as may exist

nationals. According to the language of this type of treaty, the applicability of the *lex situs* in this country seems unconditional, and, consequently, the advantage of the *lex situs* cannot be withheld from treaty aliens. Apparently, this treaty provision was drafted under the assumption that the only restrictions to consider are those in force in this country while it was assumed that foreign countries have no parallel restrictions. However, recent developments indicate that the liberalizing trend is gaining momentum in this country while abroad, under the impact of nationalistic and collectivistic ideas, the opposite appears to be true.

220. This provision was successfully invoked by a British subject residing in Canada, under the most-favored-nation clause (1899) in the unreported case *Texas v. Fasken* (app. dism. 274 U.S. 724, 1926), 1 POWELL, *op. cit. supra* note 215 at 402, note 22.

221. This version was taken from the not ratified treaty of Lausanne (1927) as against the Austrian proposal to adopt the most-favored-nation treatment which appeared undesirable in view of Art. IX of the treaty with Argentina, 1853; 1 U.S. FOREIGN REL.: 1928 at 926.

under the laws of the territory" (also Ireland, 1951, Art. VII)²²² In some treaties specific reservations in favor of local building and zoning laws are added (e.g., treaties with the Philippines, 1947, Art. III; Costa Rica, 1948, Art. V; Great Britain, 1951, Art. VII, 2).

Similarly, there are treaties relaxing the strict law of the situs rule in regard of other types of interest in land as, for example, leases.²²³ Pursuant to these treaties (e.g., with Italy, 1948, Art. I, 2, b; Uruguay, 1949, Art. VII, 1, a; Colombia, 1950, Art. IX, 1, a; Israel, 1951, Art. IX, 1, a; Japan, 1953, Art. IX, 1)²²⁴ leases may be acquired by treaty aliens for specific purposes enumerated in the treaty under the national treatment. A general clause referring to the "conduct of activities pursuant to the present treaty" is used in the treaty with Ethiopia (1951, Art. IX, 1, a).

On the contrary, disposition of land held by treaty aliens is generally favored²²⁵ and national treatment (e.g., Uruguay, 1949, Art. VII, 4, b; Colombia, 1951, Art. IX, 5; Israel, 1951, Art. IX, 1; Greece, 1951, Art. IX, 3), or most-favored-nation treatment (Great Britain, 1899, Art. V) or both combined (Japan, 1953, Art. IX, 4) are granted.²²⁶

Copyright.—It may well be put forward that under the Copyright Law²²⁷ aliens are accorded national treatment, provided such author is domiciled in this country at the time of the first publication, or, his country "grants either by treaty, convention, agreement, or law" American nationals substantially the same protection which requirement must be established by Presidential Proclamation, or, finally, according to the Universal Copyright Convention (1952) in regard to nationals of signatory

222. Special privileges are secured in relation to Germany that both governments may "acquire, own, lease for any period of time or otherwise hold and occupy, such lands, buildings, and appurtenances as may be necessary for governmental, other than military, purposes"; in case local permission is required it "shall be given on request" (Art. 19 of the 1923 treaty with Germany as amended in 1953, 28 DEP'T STATE BULL. 877, 1953, remaining in force according Art. 28 of the 1954 treaty).

223. By an exchange of notes (1933, 48 STAT. 1769) Art. VII of the 1853 consular convention with France was clarified with regard to leases of American nationals in France reaffirming national treatment; DELAUME *op. cit. supra* note 43 at 30, citing cases. Note also *Lambert v. Jourdan* (1948), AM. J. INT'L L. 206 (1950) discussing Art. II of the law of May 28, 1943; NIBOYET, COURS DE DROIT INTERNATIONAL PRIVE FRANCAIS 311 (1949).

Note *Palermo v. Stockton Theatres*, 195 P.2d 1 (Cal. 1948) where expired treaty provisions on leases survived in consequence of its incorporation into local law.

224. Nebraska law establishing restrictions upon disposition over homestead land was held consistent with Art. VI of the treaty with Sweden (1827) in *Todok v. Union State Bank*, 281 U.S. 449 (1930).

225. Wilson, *Natural-Resources Provisions in United States Commercial Treaties*, 48 AM. J. INT'L L. 355, 367 (1954).

226. For treaty law governing vested interests in land, see Art. VIII of the Guadelupe-Hidalgo treaty with Mexico (1848), *Amaya v. Stanolind Oil & Gas Co.*, 158 F.2d 554 (1947); also Art. IV of the treaty with China regarding the relinquishment of extraterritorial rights in China, 57 STAT. 767 (1943).

227. As reenacted in 1947, 61 STAT. 652 and amended in 1954, Ch. 1161, Publ. Law 743.

countries or of countries where the work was first published.²²⁸ With this understood by way of preface, numerous bilateral agreements may be noticed according national treatment under conditions as "prescribed by the laws of the country where the protection is claimed," i.e., *lege fori* (Art. 2 of the treaty with Hungary, 1912); the same law controls the "term of copyright protection" (Art. 3). According to the treaty with China (1946, Art. IX), registration and other formalities are controlled by the "applicable law and regulations," i.e., by the law applicable according to the local conflict law; in addition, the treaty guarantees "effective protection . . . by civil action" (Protocol 5, b).

Brief mention should be made of collective international agreements in matters of copyright. The interamerican convention on literary and artistic copyrights (Mexico, 1902, 35 STAT. 1934) contains a reservation in favor of the *lex loci delicti* by providing that publications infringing copyright may be confiscated "but without prejudice to the indemnities or punishments to which the falsifiers may be liable according to the laws of the country in which the fraud has been committed" (Art. 13). A substantially identical provision was repeated in Art. 14 of the 1910 convention (Buenos Aires, 38 STAT. 1785).²²⁹

The recently ratified Universal Copyright Convention (Geneva, 1952)²³⁰ grants, in principle, national treatment to nationals of all contracting countries as well as in regard of works first published in the same country, with a possibility to assimilate, by domestic legislation, "to its own nationals any person domiciled in that State" (Art. II). The duration of the copyright protection is governed by the *lex fori* ("by the law of the Contracting State in which protection is claimed") with a uniform minimum period added by the convention (Art. IV, 2). The period, however, may

228. TREATIES IN FORCE, A LIST OF TREATIES . . . 167, 170 (1944); Peterson, *Protection Afforded Alien Authors by American Copyright Law*, 18 NEB. L. BULL. 257 (1930).

229. Ladas, *Interamerican Copyrights*, 7 U. OF PITT. L. REV. 283 (1941); UNION PANAMERICANA, PROTECCION DEL DERECHO DE AUTOR EN AMERICA DE ACCUERDO CON LAS LEGISLACIONES NACIONALES Y TRATADOS INTERAMERICANOS (1950).

The Washington convention, 1946, is not yet in force. Comment, *The Interamerican Copyright Convention, Its Place in United States Copyright Law*, 60 HARV. L. REV. 1329 (1947). Cf. Hoffman, *The Position of the United States in Relation to International Copyright Protection of Literary Works*, 22 U. OF CIN. L. REV. 415 (1953); Schulman, *International Copyright in the United States, a Critical Analysis*, 19 LAW & CONTEMP. PROB. 141 (1954).

230. Ratified, but not yet in force (31 DEP'T STATE BULL. 970, 1954); 83d Congr., 1st Sess., Senate, Exec. M.; 83d Congr. 2d Sess., Senate, Exec. Rep. No. 5; Universal Copyright Convention and Implementing Legislation (*Hearings before . . . Committee on Foreign Relations . . .*, April 7 and 8, 1954).

Dubin, *The International Copyright Convention*, 42 CAL. L. REV. 89 (1954); Honig, *International Copyright Protection and the Draft International Copyright Convention of the UNESCO*, 2 INT'L & COMP. L.Q. 88 (1953); Schulman, *Another View of Article III of the Universal Copyright Convention*, 1953 WIS. L. REV. 297; Warner, *The UNESCO Universal Copyright Convention*, 1952 WISC. LAW REV. 493. Comment, *International Copyright Convention and the United States: the Impact of the UNESCO Universal Copyright Convention on Existing Law*, 62 YALE L.J. 1065 (1953).

be shorter in cases of published works if the duration is, according to the law of the country where the work was first published, shorter than the applicable *lex fori*, or, in cases of unpublished works, the period may be shortened by the law of the country of which the author is a national (Art. IV, 4); and, it may be added, the law of the country of publication or of nationality apply according to the same *lex fori*—all rules reminiscent of our borrowing statutes. Another provision of the convention presents the application of the *lex fori* rule to judicial proceedings in copyright matters. According to the convention (Art. III, 3), plaintiff must, "in bringing the action, comply with procedural requirements, such as that the complainant must appear through domestic counsel or that the complainant must deposit with the court or administrative officer, or both, a copy of the work involved in the litigation." This requirement, however, does not affect the validity of the copyright nor can it be imposed only against treaty aliens.

Patents.—Bilateral treaties stipulate, as a rule, national treatment²³¹ (e.g., Uruguay, 1949, Art. V, 1, b; Ireland, 1951, Art. VI, 1, b); other treaties prefer a combination of the national with the most-favored-nation treatment (Colombia, 1951, Art. X; Israel, 1951, Art. X; Denmark, 1951, Art. X; Japan, 1953, Art. X; Germany, 1954, Art. X). Among the collective treaties, the interamerican convention for the protection of patents, inventions, designs and industrial models (Buenos Aires, 1910, 38 STAT. 1811) deserves brief mention. It provides that the transfer of a patent shall be controlled by the "law of the country" (Art. VIII), apparently meaning the *lex loci actus*.

Trade-marks.—Bilateral treaties grant national treatment upon complying with the applicable local law (e.g., treaties with France, 1869, Art. I; Uruguay, 1949, Art. V, 1, b; Ireland, 1951, Art. VI, 1, b) while others assure national combined with the most-favored-nation treatment (e.g., Italy, 1948, Art. VIII; Colombia, 1951, Art. X; Greece, 1951, Art. X; Japan, 1953, Art. X; Germany, 1954, Art. X).²³² Among collective treaties, some conflict rules contained in the interamerican convention (Buenos Aires, 1910) have already been discussed. Here, it may be added that according to Art. II of the 1929 convention (Washington, 46 STAT. 2907) the transfer of a trade-mark is governed by the "internal law of the state in which such transfer took place."²³³

231. TREATIES IN FORCE, A LIST OF TREATIES . . . 190 (1944). LADAS, THE INTERNATIONAL PROTECTION OF INDUSTRIAL PROPERTY (1930); LADAS, *The Self-Executing Character of International Conventions on Industrial Property*; 31 TRADE-MARK REP. 5 (1941).

232. Federico, *Treaties Between the United States and Other Countries Relating to Trade-Marks*, 39 TRADE-MARK REP. SUPP. (1949).

233. LADAS, THE INTERNATIONAL PROTECTION OF TRADE-MARKS BY THE AMERICAN REPUBLICS (1932); Holliday, *Interamerican Conventions for the Protection of Trade-Marks*, 28 CAN. B. REV. 609 (1950).

XIV

FAMILY LAW

Questions of family law are considered mainly in treaties with countries where such questions are classified as constituting the personal status of treaty aliens. Illustrative of such remnants of Capitulations are a few treaties with Middle East countries, for example, the agreement between Great Britain and Iraq (1922) applicable also to American nationals; they read that "In matters relating to the personal status of foreigners . . . in which it is customary by international usage to apply the law of another country, such law shall be applied in a manner prescribed by law" (Art. 4). The respective national law will, consequently, control questions of "marriage, divorce, maintenance, dowry, guardianship of infants" with the proviso that this must be "without prejudice to the provisions of any law relating to the jurisdiction of religious courts." Substantially similar though more elaborate provisions are included in the agreement with Iran (1928) where questions of personal status are enumerated as relating to "marriage and conjugal rights, divorce, judicial separation, dowry, paternity, affiliation, adoption, capacity of persons, majority, guardianship, trusteeship, and interdiction . . ." These matters "and in general, family law of non-Moslem nationals of the United States of America in Persia shall be subject to their national law" while Iranian nationals in this country shall "enjoy most-favored-nation treatment in the matter of personal status."²³⁴ The notion of personal status was also used in the Montreux convention (1937) to limit consular jurisdiction to "matters of personal status in all cases in which the law applicable is the national law" of the country exercising consular jurisdiction in Egypt (Art. 10); personal status comprising "the status and capacity of persons, legal relations between members of a family, or more particularly, betrothal, marriage, the reciprocal rights and duties of husband and wife, dowry, and their rights of property during marriage, divorce, repudiation, separation, legitimacy, recognition and repudiation of paternity, the relation between ascendants and descendants, the duty of support as between relatives by blood or marriage, legitimation, adoption, guardianship, curatorship, emancipation . . ." Corresponding conflict rules are set out in full (Art. X, 3) in Art. 20 of the Règlement annexed to the convention.

While the time-honored 'commercium' still remains one of the main features of treaty law, the twin privilege of 'connubium' has disappeared. It is therefore interesting to find that such a provision was inserted in the treaty with Nicaragua (1867, 15 STAT. 554, terminated in 1902); Art. IX of this treaty provided that "the citizens of the United States residing in Nicaragua, or the citizens of Nicaragua residing in the United States, may

234. Greenfield and Aghakoff, *Droits des Personnes, de Famille, des Successions et Donations des Etrangers dans la Législation Iramienne*, 15 ANNUARIO DI DIRITTO COMPARATO . . . 243 (1941).

intermarry with the natives of the country; hold and possess . . . by marriage . . . any estate, real or personal . . ." ²³⁵ The conflict rule of *lex loci celebrationis* was included in the treaty with El Salvador (1870, 18 STAT. 725, terminated in 1893) providing that in case nationals of one country marry in the other "according to the laws, such marriage shall be considered legal in the other country" (Art. 29, 2). ²³⁶

XV

DECEDENTS' ESTATES

Generally, treaties guarantee the right to dispose by will of real as well as personal property. ²³⁷ Such freedom of testamentary disposition, a corollary to the general guarantee of disposition of property, may be granted outright (e.g., Art. 12 of the treaty with Colombia, 1846), ²³⁸ or under any of the international standards of treatment, i.e., under the national treatment (Argentina, 1853, Art. IX, qualified with reciprocity), ²³⁹ under the most-favored-nation clause (Yugoslavia, 1881, Art. II, ²⁴⁰ Great

²³⁵. According to news dispatches, a reappearance of the problem is imminent in Spain.

²³⁶. Some of the recent treaties (with Great Britain, 1951, Art. 17, 2; Ireland, 1951, Art. 17, 2) provide that the fact a marriage "celebrated under the law of the territory" was registered by the consul, in no way dispenses from the duty of registration as imposed "by the law of the territory." The same applies with regard to births and deaths.

²³⁷. For an exhaustive list of treaties, see UNITED STATES TREATY DEVELOPMENTS, App. III, C.

GIBSON, ALIENS AND THE LAW (1940); Boyd, *Treaties Governing the Succession to Real Property by Aliens*, 51 MICH. L. REV. 1001 (1953); LAWRENCE, CONFLICT OF FOREIGN TREATIES WITH STATE LAWS RELATIVE TO THE TRANSMISSION OF REAL ESTATE TO ALIENS (1871); Lenoir, *The Effect of War on Bilateral Treaties with Special Reference to Reciprocal Inheritance Treaty Provisions*, 34 GEO. L.J. 129 (1946). Comment, *Right of Nonresident Aliens to Take Real and Personal Property* . . . , 25 SO. CALIF. L. REV. 329 (1952). Note, *Right of an Alien to Take Land by Descent*, 5 MINN. L. REV. 373 (1921). Cf. Chaitkin, *The Rights of Residents of Russia and Its Satelites to Share in Estates of American Descendants*, 25 SO. CALIF. L. REV. 297 (1952) and EMMERICH, ESTATE PRACTICE IN THE UNITED STATES AND IN EUROPE (1950).

²³⁸. "The citizens of each of the Contracting Parties shall have the power to dispose of their personal goods or real estate within the jurisdiction of the other, by . . . testament or otherwise, and their representatives being citizens of the other party, shall succeed to their said personal goods or real estate, whether by testament or *ad intestato* . . ."

The term "goods and effects" used in other treaties includes real property as well; *Todok v. Union State Bank*, 281 U. S. 449 (1930).

²³⁹. See note 220 *supra*.

²⁴⁰. *In re Arbulich's Estate*, 41 Cal. 2d 86, 257 P. 2d 433 (1953); *cert. denied*, 346 U.S. 897 (1953); *rehearing denied*, 347 U.S. 908 (1953); the question of reciprocity imposed under state law was discussed while the most-favored-nation clause went almost unnoticed, except that the appellate court [*In re Arbulich's Estate*, 248 P.2d 179, 437 (1952)] wrote: "Even if we assume its applicability in that respect, however, the rights granted are only those given by each of the contracting nations 'to the subjects of the most-favored-nations' and do not purport to equal the rights given or guaranteed by each of the contracting nations to its own citizens. Consequently, the treaty provisions do not establish the reciprocal rights required by the Probate Code." It may be added that according to BARTOS-NIKOLAJEVIC, PRAVNI POLOZAJ STRANACA 191 (1951) the "Yugoslav system is based upon protective provisions limiting foreign owned property" which system proved to be, in its international repercussions, "more damaging than useful"; accord-

Britain, 1899, Art. V; Sweden, 1910, Art. XIV, 5; Ethiopia, Art. IX) or by a combination of both (Germany, 1954, Art. IX, 4). However, conflict rules as such are few. A rule governing the form of *wills* appears in the Convention relating to the treatment of prisoners of war (Geneva, 1929, 47 STAT. 2021). According to Art. 76 (1) of the convention, wills "shall be received and drawn up in the same way as for the soldiers of the national army," meaning that the prisoners' national law,²⁴¹ *i.e.*, the law of the army to which they belong, and not the *lex loci actus*, normally the national law of the detaining power, will control. The provision was redrafted in the recent convention (Geneva, 1949)²⁴² to read that such wills shall be drafted as to "satisfy the conditions of validity required by the legislation of their country of origin" (Art. 120); 'origin' apparently meaning not their national origin or their domicile, but the law of their military 'origin,' *i.e.*, the law of the country of which they are soldiers.

Regarding the taking of *realty*, the common law rule is to be born in mind that aliens have no "inheritable blood" and may take only under statute or by purchase (including devise), or in pursuance of a treaty.²⁴³ So it is not surprising to find that this principle was adopted in the treaty with another common law country, Great Britain (1899, Art. I, in force also regarding other members of the British Commonwealth of Nations, *e.g.*, Canada, Australia;²⁴⁴ an identical provision is inserted in the treaty with Guatemala, 1901, Art. 1). The provision reads as follows:

Where, on the death of any person holding real property (or property not personal), within the territories of the one of the High Contracting Parties, such real property would, by the laws of the land, pass to a citizen or subject of the other, were he not disqualified by the laws of the country where such real property is situated, such citizen . . . shall be allowed a term of three years in which to sell the same

ing to the authors, succession to land, except by law and *in natura*, is impaired by the prélèvement and hampered by exchange restrictions.

On reciprocity, see also Lenhoff, *Reciprocity, the Legal Aspect of a Perennial Idea*, 49 N.W. L. Rev. 619 (1954).

Additional recent cases involving state imposed reciprocity, see, *In re Schluttig's Estate*, 218 P.2d 819, *rev'd* 224 P.2d 695 (Cal. 1950); *In re Reih's Estate*, 227 P.2d (Cal. 1951); *In re Meyer's Estate*, 238 P.2d 597 (Cal. 1951); *In re Peter's Estate*, 244 P.2d 88 (1952); *In re Caraba's Estate*, 250 P.2d 593 (Cal. 1952); *In re Krachler's Estate*, 263 P.2d 769 (Cal. 1953); *In the Matter of the Estate of Leefers*, 274 P.2d 239 (Cal. 1954).

In re Turner's Estate, 196 Pac. 807 (Cal. 1921), the most-favored-nation clause was invoked under the treaty with Italy (1871) but no particular treaty was pointed out; the court relied on *Bluthe v. Knikley*, 59 Pac. 787 (Cal. 1900) where it was only decided that a non-discriminatory California statute was not an encroachment on the national treaty-making power. An explanation may be seen in *Succession of Rixner*, 48 La. Ann. 552, 19 So. 597, 600 (1896) where the most-favored-nation clause was interpreted simply as national treatment "to relieve our minds of any complexity in the matter."

241. Potter, *Soldiers' Wills*, 12 MOD. L. REV. 183 (1949).

242. Text in 47 AM. J. INT'L L. SUPPL. 119 (1953).

243. *Orr v. Hogson*, 4 Wheat. 453 (U.S. 1819); *Larkin v. Washington Loan & Trust Co.*, 31 F.2d 635 (D.C. Cir. 1929) *cert. denied*, 279 U.S. 867 (1928); *Ripley v. Sutherland*, 40 F.2d 785 (D.C. Cir. 1930) *cert. denied*, 282 U.S. 865 (1930).

244. See, UNITED STATES TREATY DEVELOPMENTS.

It is apparent that this provision applies in situations where (1) intestate succession involves land in one of the contracting countries, regardless of the nationality of the deceased who may even be a national of a third country; (2) such land would fall, according to the controlling law of the situs, to a treaty alien; and (3) the alien is prevented by the same law from taking the land. In such a situation, the treaty upholds, in principle, the discriminatory law of the situs, mitigating it, however, to the extent that a treaty alien is entitled to take title for a period of years²⁴⁵ during which he has the right to dispose of it (even if he holds only an estate for years)²⁴⁶ and to take the proceeds out of the country safe, in this respect, from local discriminatory treatment.²⁴⁷

Other treaties²⁴⁸ show variations in two points. One variation regards the application of the rule to both types of succession, testate as well as

245. The period ranges from three to five years; some treaties refer simply to the local law, others grant a reasonable period. One treaty (with Switzerland) mentions no period at all.

246. Disqualifying state law is held to be superseded for that period; if the alien fails to sell, the title will vest in those who would have inherited in absence of a treaty, *Pierson v. Lawler*, 100 Neb. 783, 161 N.W. 419 (1917); *cf. Manuel v. Wulff*, 152 U.S. 505 (1894).

247. It is to be observed that at the time when the convention with Great Britain was concluded only state law in this country contained discriminatory provisions against aliens, *British Parliamentary Papers, Report on the Purchase and Holding of Land by Aliens*, Cm. 1697, (1901) while similar British law was abrogated in 1870, *Hanrick v. Patrick*, 119 U.S. 156 (1886).

The great majority of cases interpret the provision to be a reservation in favor of the *lex situs*, *Doble v. State*, 95 Wash. 62, 163 Pac. 37 (1917); *State v. O'Connell*, 121 Wash. 542, 209 Pac. 865 (1922); *State v. Toop*, 107 Neb. 391, 186 N.W. 371 (1922); *Kennedy's Estate v. Richardson*, 41 S. W. 2d 95 (Tex. 1931); *Dutton v. Donahue*, 44 Wyo. 52, 8 P.2d 90 (1932). In some cases, the opposite result was reached, *Die ex dem. Deckstader v. Roe*, 4 Pa. 398, 55 Atl. 341 (1903); *Hanafin v. McCarty*, 95 NH 36, 57 A2d 148 (1948). In *Sullivan v. Kidd*, 254 U.S. 433 (1920), the lack of Canada's notice of adhesion was held decisive. The treaty with Great Britain was invoked under the most-favored-nation clause of the treaty with Sweden (1910) in *Colson v. Carlson*, 116 Kan. 593, 227 Pac. 360 (1924), the court holding that the former treaty "virtually removes the bar of alienage to inheritance of real property, the only qualification being that the alien heir shall sell the property. . . ."

248. The treaty with Switzerland (1850/5) was involved in *Hauenstein v. Lynham*, 100 U.S. 483 (1879) (action for proceeds of escheat sale). In *Lehman v. State ex rel. Miller*, 45 Ind. App. 330, 88 N.E. 365 (1909), the court upheld the discriminatory state law on the ground that "by the laws of our state aliens are not permitted to hold real estate, and, consistent with the last clause of said treaty, have limited time in which they may transfer the same." In *State ex rel. Tanner v. Staeheli*, 112 Wash. 344, 192 Pac. 991 994 (1920) the court was "satisfied . . . that (the treaty) does not and was not intended to modify or avoid any law of the states or of the United States, especially with reference to real estate."

The treaty with France with its reservation in favor of the local law in this country (1853, Art. VII) was interpreted in *Geofroy v. Riggs*, 133 U.S. 258 (1889) in the sense that local law was superseded by the treaty and national treatment granted. A similar attitude prevailed in *Bahuaud v. Bize*, 105 Fed. 485 (D. Neb. 1901) finding the local statute against nonresident aliens holding land to be ineffective; similarly, *In re Romari's Estate*, 191 Cal. 740, 218 Pac. 421 (1923) the local statute excluding nonresident aliens from succession unless they claim within five years was held violative of Art. VII of the French treaty. See note 218 *supra*.

However, local law prevailed in cases where treaties with German states were involved, *e.g.*, with Bavaria (1845) in *Opel v. Shoup*, 100 Iowa 407, 69 N.W. 560 (1896); Bremen (1827) in *Schultze v. Schultze*, 144 Ill. 290, 33 N.E. 201. (1893); Hanover (1840) in *Ahrens v. Ahrens*, 144 Iowa 486, 123 N.W. 164 (1909); Prussia (1828) in

intestate (" . . . by the law of the country or by testamentary disposition, descend or pass . . ." e.g., treaties with Germany, 1923, Art. IV; 1;²⁴⁹ Bolivia, 1858, Art. 12; Brazil, 1828, Art. II; Austria, 1928, Art. IV; El Salvador, 1926, Art. IV; Honduras, 1927, Art. IV; Norway, 1928, Art. IV; Finland, 1934, Art. IV).²⁵⁰ The other variation makes it clear that the recipient being a treaty alien may or may not be a resident of the country where the land is situated.

These rules have been followed in treaties entered into after 1945 in spite of the fact that their importance, at least in regard to this country, has greatly diminished.²⁵¹ Only the language has changed somewhat as may be shown by the treaty with Uruguay (1949, Art. VII, 2), the emphasis shifting toward the right to freely dispose of property "with respect to the acquisition of which through testate or intestate succession the alienage has prevented them (treaty aliens) from receiving national treatment" (also Art. IX, 2 of the treaty with Greece, 1951). In the treaty with Ireland (1951, Art. VII, 1) the phrasing has changed again, this time to read that ". . . with respect to acquiring all kinds of property by testate or intestate succession . . . should they (treaty aliens) because of their alienage be ineligible to continue to own any such property, they shall be allowed a reasonable period to dispose of it . . ." (same in treaties with Colombia, 1951, Art. IX, 3; Israel, 1951, Art. IX, 4; Japan, 1953, Art. IX, 3; Germany, 1954, Art. IX, 3).

It is natural that treaty law concerning disposition and taking of *personal property*²⁵² differs considerably from that controlling realty. It will be observed, first, that treaty law controls only testate succession;

People v. Gerke & Clark, 5 Cal. 381 (1855); Doehrel v. Hillmer, 102 Iowa 169, 71 N.W. 204 (1897); Goos v. Brocks, 117 Neb. 750, 233 N.W. 13 (1929); Ripley v. Sutherland, 40 F.2d 785 (D.C. Cir. 1930); Saxony (1846) in Ehrlich v. Weber, 114 Tenn. 711, 88 S.W. 188 (1905); Wurtemberg (1844) in Scharpf v. Schmidt, 172 Ill. 255, 50 N.E. 182 (1898); Germany (1871) in Wunderle v. Wunderle, 144 Ill. 40, 33 N.E. 195 (1893).

249. *In re Knutzen's Estate*, 161 P.2d 598 (Cal. 1945) the court held that Art. IV of the treaty with Germany (1923) did not override local Probate Code requiring reciprocity.

Ehrenweig, *Oesterreichische Erben Amerikanischer Verlassenschaften*, 73 JUR. BLATTER 126 (1951) and Wengler, *Erbrecht von Deutschen Staatsangehörigen in den Vereinigten Staaten von Amerika*, JUR. RUNDSCHAU (1951).

250. Art. IV. (2) of the treaty with Finland (1934) as amended in 1952 (TIAS 2861) applies to all kinds of property and both methods of inheritance, allowing "a reasonable period to dispose" of such property, except in case of ships and shares therein; here, a limited period may be established by local law.

251. See BOYD, *op. cit. supra* note 237, at 1005, note 32; FLA. STAT. § 731.28 (1953).

252. For an exhaustive discussion, Meekinson, *Treaty Provisions for the Inheritance of Personal Property*, 55 AM. J. INT'L L. 313 (1950). Cf. Opton, *Recognition of Foreign Heirship and Succession Rights to Personal Property in America*, 19 GEO. WASH. L. REV. 156 (1950).

The expired treaty with Brunswick and Luneburg (1954) contained an elaborate conflict rule providing that citizens may dispose of their personal property "subject to the laws of the State or country, where the domicile is, or the property is found, either by testament . . . or in any other manner . . ." (Art I).

second, it covers only situations where the deceased was of the same nationality or residence as the recipient; and lastly, treaty law "does not cover personalty located in this country and which an American citizen undertakes to leave" to a treaty alien (e.g., treaty with Germany, 1923, Art. IV, 2, and treaties modeled after it).²⁵³ However, the recent convention with Germany (1954, Art. IX, 2) seems to inaugurate a new trend; it grants treaty aliens national and most-favored-nation treatment "with respect to acquiring . . . personal property . . .," thus eliminating the stumbling block of the nationality of the deceased.

In a separate category belong treaties drafted for countries where, at that time, some traces of the system of Capitulations still lingered on. There, questions of inheritance to movable property are considered part of the personal status of the deceased and, consequently, governed by his national law. According to the treaty with Iraq (1922) national law is applicable to "successions of movable property" (Art. 4). The same rule obtains in the agreement with Iran (1928), namely that the personal law of the deceased will determine "in regard of movable property, the right of succession by will or *ab intestato*, distribution and settlement." The Montreux convention (1937) provided (Art. IX) that "inheritance and wills shall be governed by the national law of the deceased or of the testator" (Art. 28 of the Reglement), except where immovable property is involved.

A peculiar conflict rule has survived in the treaty with Switzerland (1850/5) where, in addition to a conflict rule concerning judicial jurisdiction over succession, Article VI contains the rule that such controversies "shall be decided according to the laws . . . of the country in which the property is situated," i.e., are governed by the substantive law of the situs of the estate involved. In a recent case, however, this provision was interpreted to allow *renvoi*, that is, to refer to the conflict law of the situs.^{254, 255}

Finally, it is to be noted that consular conventions²⁵⁶ usually confer upon consular officers, among other privileges, the right to "take charge of the property left by the decedent, for the preservation and protection of the same." However, in most instances, they may act in this capacity of provisional curators only "so far as the laws of the country permit" (e.g., Spain, 1902, Art. 27, 2; Liberia, 1938, Art. VIII, 2; Philippines, 1947,

253. *Clark v. Allen*, 331 U.S. 503 (1947); cf. *Vogel v. New York Life Ins. Co.*, 55 F.2d 205 (5th Cir. 1932), *cert. denied* 287 U.S. 604 (1932).

254. See note 81 *supra*.

255. Note Agreement relating to the resolution of conflicting claims to German enemy assets (Brussels, 1947, 2 UST 731) especially Part. 2, Art. 7-10, dealing with decedents' estates.

256. *Coudert, Right of Consular Officers to Letters of Administration under Treaties with Foreign Nations*, 13 COL. L. REV. 181 (1913); *Puente, Consular Protection of Estates of Deceased Nationals*, 23 ILL. L. REV. 635 (1929).

Art. IX, 2) a complete reservation in favor of local law.²⁵⁷ The right to claim *administration* of the estate is, in most treaties, also conditioned upon the law of the situs and, in addition, the appointment left within the discretion of the court (" . . . in the discretion of the court competent to take cognizance of the case, provided the laws of the place where the estate is administered permit such action by the consular officer and appointment by the court," Art. 13, 3 of the convention with Cuba, 1926).²⁵⁸ The same principle is followed²⁵⁹ in treaties with Germany, 1923, Art. 24, 2; Austria, 1928, Art. 19, 2; El Salvador, 1926, Art. 22, 2; Finland, 1934, Art. 26; Honduras, 1927, Art. 22; Hungary, 1925, Art. 20; Mexico, 1942, Art. VIII, 2; Norway, 1928, Art. 23, 2; Philippines, 1947, Art. IX, Sweden, 1910, Art. 14, 2; Thailand, 1937, Art. 15, 2, etc.²⁶⁰

A new trend is noticeable in the recent convention with Costa Rica (1948, TIAS 2045). According to Article IX (2) (d) consular officers are put, in regard to their right to claim administration of estates of their nationals, in the same position as persons they represent under the convention, *i.e.*, non-resident nationals not legally represented in the receiving country and holding or claiming a legal or equitable interest in the estate (Art. IX, 2, a). As a consequence, consular officers are granted the right to "apply for and receive a grant to the same extent as the person he represents would have had." Compared with the standard treaty law, it is to be observed that courts retain no discretion in appointing consular officers as administrators wherever persons they represent under the authority of the convention could claim such administration according to local law. The previous general reservation in favor of local law appears to have been changed: while under previous treaties consular officers could be excluded by anyone entitled to such administration according to local

257. Note Art. IX of the treaty with Argentina (1853) granting consular officers the right "to intervene in the possession, administration and judicial liquidation of estates of the deceased, conformably with the laws of the country . . ." analyzed in *Rocca v. Thompson*, 223 U.S. 317 (1912). Cf. San Martin, *La Regulacion Convencional de las Relaciones Consulares, Acuerdos Suscritos por la Republica Argentina*, 3-4 REVISTA DE DERECHO INTERNACIONAL Y CIENCIAS DIPLOMATICAS, 327 (1953).

258. See 54 STAT. 758 (1940), 22 U.S. §§ 1175 — 1177 (1952); on acceptance of administration, 32 STAT. 546 (1902), 22 U.S.C. §§ 1178, 1179 and 22 CODE FED. REGS. § 120.28 (Supp. 1953).

259. The problem was discussed in relation to the treaty with Germany (1923) in *In re Weidberg's Estate*, 172 Misc. 524, 15 N.Y.S. 2d 252 (Surr. Ct. 1929); *Schneider v. Hawkins*, 179 Md. 21, 16 A.2d 861 (1940); *Wyers v. Arnold*, 347 Mo. 413, 147 S.W.2d 644 (1941); *Seaboard Fruit Co. v. Topkin*, 130 N.J. Eq. 46, 20 A.2d 709 (Ch. 1941). The corresponding provision of the now denounced treaty with Poland (1934) was litigated, *eg.*, *In re Swistak's Estate*, 129 N.J. Eq. 138, 18 A.2d 561 (Prerog. Ct. 1941); *State ex rel. Ripa v. Lake Superior Court*, 43 N.E. 2d 871 (Ind. 1942); *In re Skewy's Estate*, 181 Misc. 479, 46 N.Y.S. 2d 942 (Surr. Ct. 1944); *Lachowitz v. Lachowitz*, 30 A.2d 793 (Md. 1943); *In re Zalewski*, 292 N.Y. 332, 55 N.E. 184 (1944); *Petition of Mazurowski*, 116 N.E. 2d 854 (1953).

260. Here, the provision is carefully drafted to read "provided the regulations of his own Government permit such appointment and provided such appointment is not in conflict with local laws and the tribunal having jurisdiction has no special reasons for appointing someone else."

law, they now rank equally with persons they represent under the convention.²⁶¹

This advantage is available, of course, to all countries enjoying in this respect, the most-favored-nation treatment (*e.g.*, France, 1853, Art. 12; Spain, 1902, Art. 28; Greece, 1902, Art. 11).²⁶²

XVI

GENERAL PROBLEMS

Characterization.—The question as to what law shall determine the meaning of words used in treaties is generally answered by pointing out that treaties express the consent of the contracting countries which consent, by necessity, includes treaty semantics as well. A method to secure uniformity in fact is, of course, to agree upon definitions, a practice largely followed in treaties. There are, however, methods where the assumption of the inherent uniformity of treaty semantics is abandoned. One method, frequently used, expressly abandons the dogmatic uniformity by saying that "any term . . . shall have . . . the meaning which it has under the laws of that Contracting State," *i.e.*, of the country applying the treaty provision involved (*e.g.*, convention on double taxation with France, 1946, Art. 2, 2, TIAS 1982). The other method introduces an express conflict rule pointing out the contact to be followed and, through it, the law to be used in characterizing the particular treaty term.

Domicile. Treaty law in regard to the characterization of domicile is to be found mainly in conventions on double taxation.²⁶³ Though the underlying problem of jurisdiction to tax is, for obvious reasons, omitted from the present discussion, still it is interesting to look into the characterization, within this area, of some of the fundamental notions used in conflict law.

261. The consular convention with Great Britain (1949, 81st Cong., 2d Sess., Exec. A) contained in Art. 18 elaborate provisions concerning administration of estates by consular officers. However, this article having been questioned, the Senate Committee on Foreign Relations brought this "informally to the attention of the department of State" (82d Cong., 2d Sess., Exec. 8); subsequently, a new convention was submitted (82d Cong., 1st Sess., Exec. 0) without Art. 18, which convention was ratified (TIAS 2494). Consular administration is now permitted (Art. 27) only if it involves no "conflict with the law of the territory" and such activity is "in accordance with international law or practice . . . recognized in that territory or are acts to which no objection is taken by the receiving state."

The convention with Ireland (1950, 81st Cong., 2d Sess., Exec. P) was adopted with a supplementary protocol added (1952) deleting Art. 18 and qualifying the most-favored-nation clause contained in Art. 5 (3) as not to apply to "functions and activities of consular officers in relation to administration of estates." (Art. 2 of the Protocol; Cf. 98 Cong. Rec., 7222).

262. *Santovincenzo v. Egan*, 284 U.S. 20 (1931); *Rocca v. Thompson*, 223 U.S. 317 (1912). Cf. *Hamilton v. Eric Ry.*, 219 N.Y. 343, 114 N.E. 300; and *Evans v. Cano de Castillo*, 247 S.W.2d 947 (Ark. 1952).

263. WENGLER, *BEITRAGE ZUM PROBLEM DER INTERNATIONALEN DOPPELBESTEUE- RUNG, DIE BEGRIFFSBILDUNG IM INTERNATIONALEN STEUERRECHT* (1935).

It appears that three different rules of characterization of domicile are adopted. One applies the *lex loci* and characterizes domicile according to the law of the place of the alleged domicile.²⁶⁴ This doctrine is followed in the convention with Great Britain (1945, 60 STAT. 1391). There it is formulated to read that "the question whether a decedent was domiciled in any part of the territories of the . . . Parties . . . shall be determined in accordance with the law in force in that territory" (Art. III, 2; also Greece, 1950, Art. IV, 1, TIAS 2091, and Australia, 1953, Art. II, 3, TIAS 2879). The other rule, namely that domicile shall be characterized according to the *lex fori* (in the sense of the officiating administrative agency) is followed, for example, in the convention with Canada (1950, 2 UST 2247); there, the provision reads that "domicile shall be determined in accordance with the laws of the contracting state imposing the tax on the basis of domicile" (same, Switzerland, 1951, Art. II, 3, TIAS 2533). In an amendment to the convention with France (1946) the same doctrine prevailed (1947, TIAS 1983) over the original convention adhering to the *lege loci* characterization. Moreover, there is a third rule as adopted in the Agreement relating to the solution of conflicting claims to German enemy assets (Brussels, 1947, 2 UST 742). The agreement (Art. VII, D) characterizes domicile according to the *lex rei sitae* by providing that the domicile of the deceased "shall be determined according to the law of the Party within whose jurisdiction the property is located."

Immovables.—It is a well established principle that the characterization of immovable property follows the law of the situs. This rule is adopted, for example, in the convention with France (1939, Art. III, 2, a, TIAS 1982) providing that "the question whether any other property or right in property constitutes real property shall be determined in accordance with the law of the place where the land involved is located"²⁶⁵ (same, Norway, 1949, Art. II, 1, a, 2 UST 2354). However, there is a group of treaties adhering to the opposite doctrine of characterization according to the law of the forum, e.g., the convention with Canada (1949, Art. II, 3, 59 STAT. 915); there the rule reads that "The question whether rights relating to or secured by real property are to be considered as real property . . . shall be determined in accordance with the laws of the contracting State imposing tax" (same, Greece, Art. III, 3, TIAS 2901).²⁶⁶

264. But see Joseph, *Domicile and Residence of Individuals for American Tax Purposes*, 29 TAXES 916, 921 (1951).

265. There is an important discrepancy between the English and the French text of the convention in the portion concerning the situs of interests in real property; ". . . les droits immobiliers (seront réputés situés) sur le territoire ou se trouvent les immeubles auxquelles ils s'appliquent" is omitted in the English text which omission is continued in the portion given in the text concluding with ". . . ou le bien sur lequel porte le droit envisagé."

266. In *Laird v. United States*, 115 F. Supp. 931 (1953) the court quoted the controlling treaty provision, yet decided the issue after checking all three competing laws, i.e., the law of Canada, of Wisconsin and of the United States, following fortunately the same doctrine.

Force majeure.—Factors beyond control are characterized, according to various conventions concerning parcel post, in accord with the *lex loci damni*. A typical provision is contained in the Universal Postal Convention (Buenos Aires, 1939, 54 Stat. 2049) to the effect that *force majeure* is to be determined “in accordance with the internal legislation (of the country) in the service of which the loss or damage occurs.” The same rule appears in other conventions, e.g., with Switzerland (1932, 47 Stat. 1997), *force majeure* to be defined “by the legal decisions or rulings in force in the country in whose territory the case has arisen” (Art. 15, 2).

Dol.—A rule how to characterize ‘dol’ (*dolus*, i.e., bad intent) is contained in the Warsaw convention (1929). According to Article 25, a carrier is denied the right to invoke provisions of the convention limiting his liability where “the damage is caused by his ‘dol’ or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to ‘dol.’ It is apparent that the convention has adopted the civil law notion of ‘dol’ and added, for common law countries, an auxiliary rule of characterization instructing the courts to substitute, in case the notion of ‘dol’ is not a part of the *lex fori*, its own notion considered, according to the *lex fori*, “equivalent to dol.”

It is to be pointed out that the convention, at least as in force in this country,²⁶⁷ has not eliminated the notion of ‘dol’ and substituted that of wilful misconduct. The only authentic text of the convention, the French, contains as the basic criterion for liability the notion of ‘dol’ which term was, after an apparently unsuccessful attempt to find a more satisfactory English terms,²⁶⁸ translated as wilful misconduct. Therefore, the notion of ‘dol’ remains the controlling standard, to be characterized in countries where ‘dol’ is not a current legal notion, in accord with the notion which is, according to the *lex fori*, the nearest equivalent to ‘dol.’ From this it appears erroneous to assume that wilful misconduct has to replace ‘dol,’ especially since ‘dol’ is based primarily upon intent and does not include, in principle, elements which, according to civil law, would fall under the opposite category of ‘culpa,’ whether ‘culpa lata’ (gross negligence) or ‘culpa levis’ (ordinary negligence).²⁶⁹

Renvoi.—The only treaty provision on *renvoi* is contained in the Règlement (Art. 31) annexed to the now expired Montreux convention

267. In Great Britain the English translation of the convention is enacted as statute; consequently, the notion of ‘dol’ is eliminated and replaced with ‘wilful misconduct’, a notion developed there in railway cases. SHAWCROSS & BEAUMONT, AIR LAW 362 (2d. ed. 1951). Cf. *Horabin v. B.O.A.C.*, [1952] 2 All. E. R. 1016.

268. *Goedhus, op. cit.* 272.

269. The inclusion of ‘culpa lata’ into ‘dol’ according to the adage ‘culpa lata dolo equiparatur’ is questionable even for French law, MAZEAUD, TRAITÉ THÉORIQUE ET PRATIQUE DE LA RESPONSABILITÉ CIVILE . . . 406 (1947); even so, the notion of ‘dol’

(1937). There, *renvoi* is rejected in situations where the reference to the law applicable is made by means of the contact of nationality; such reference "shall be understood to mean the municipal law of the country in question to the exclusion of the provisions of private international law" (Art. 31).

as used in the convention does not necessarily follow the meaning it has in French law, *cf.* LAWSON, NEGLIGENCE IN THE CIVIL LAW 36 (1950).

Cases in this country indicate a tendency toward restrictive interpretation of wilful misconduct, *e.g.*, *Ullen v. Am. Airlines*, 1948 U.S. Av. Rep. 161, *aff'd*, 186 F.2d 529 (D.C. Cir. 1949); *Pekelis v. Transcontinental & Western Air, Inc.*, 1951 U.S. Av. Rep. 296, *rev'd on other grounds*, 187 F.2d 122 (2d Cir. 1951) *cert. denied*, 341 U.S. 915 (1951); *Goepp v. Am. Overseas Airlines*, 1951 U.S. Av. Rep. 527; 1952 U.S. & Can., Av. Rep. 486; *Froman v. Am. Airways*, 1953 U.S. & Can. Av. Rep 1.

For a recent French case, see *Hennesy v. Compagnie Air France*, Ct. of Appeal, Paris (1954) 49 AM. J. INT. L. 95 (1955).

See DRION, LIMITATION OF LIABILITIES IN INTERNATIONAL AIR LAW 197 (1954).