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TREATIES GOVERNING THE SUCCESSION TO REAL PROPERTY BY ALIENS

Willard L. Boyd, Jr.*

I

The Law Governing Succession in the Absence of Treaty

Under customary international law no nation has the duty to grant to aliens the right to hold real property. Although international law accords to an alien the privilege of participating in the economic life of the state of his residence, this privilege does not encompass the right to hold real property. The right to succeed to and hold real property is a matter solely within the competence of a nation. It is for each nation exclusively to regulate the acquisition and tenure of real property. National authority in this regard can be traced to the concept that the sovereign may have good reasons for placing restrictions on alien ownership of real property.

In the United States, the regulation of the tenure of real property is within the power of the state governments. The disposition of real property is governed by the laws of the state within whose jurisdiction the property is located. This power stems from state sovereignty in all matters in which there has been neither an expressed nor implied delegation of authority to the Federal Government. The titles and methods of disposition of real property have not been placed within the authority of the Federal Government. Nevertheless, the power of the state to control the acquisition and disposition of real property is not without limitation for it is qualified by the Federal Constitution, especially the treaty power and the power of Congress to control public lands.

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1 HYDE, INTERNATIONAL LAW §203 (1951); VATTEL, THE LAW OF NATIONS, book II, c. VIII, §114 (1758).
5 See Allen v. Markham, (9th Cir. 1946) 156 F. (2d) 653 at 659, revd. in part and affd. in part sub nom. 331 U.S. 503, 67 S.Ct. 1431 (1947); Clarke v. Clarke, 178 U. S. 186 at 190-191, 20 S.Ct. 873 (1900); Opel v. Shoup, 100 Iowa 407 at 422-423, 69 N.W. 560 (1896); Wunderle v. Wunderle, 144 Ill. 40 at 53, 33 N.E. 195 (1893).
6 See United States v. Fox, 94 U.S. 315 at 320-321 (1876).
7 5 VERNIER, AMERICAN FAMILY LAWS 346 (1938). See also Clark v. Allen, 331 U.S. 503 at 517, 67 S.Ct. 1431 (1947).
state law, however, which permits an alien to inherit real property does not constitute a violation of article 1, section 10 of the United States Constitution which prohibits state action in foreign affairs.\(^8\)

Restrictions on the ownership of real property by aliens can be traced to the feudal period. There was a parallel development of these restrictions in the civil and common law.

In Europe there came into existence the **droit d'aubaine** by which aliens were prevented from taking by will or intestate succession property held in a state by either aliens or citizens.\(^9\) Grotius pointed out that this law was derived from the Roman period when aliens were regarded almost as enemies.\(^10\) This absolute prohibition on succession to property by aliens existed until the eighteenth century, at which point it was replaced by the **droit de detraction**. The **droit de detraction** was a tax levied on the removal from a country of property acquired by succession. This tax was imposed on foreigners who withdrew property from the state of which the decedent was a citizen.\(^11\) Both the **droit d'aubaine** and the **droit de detraction** have been almost entirely abolished by municipal legislation and international treaties based on reciprocity.\(^12\)

It was the policy of the United States Government during the nineteenth century to provide specifically by treaties with several of the German states for the abolition of these severe restrictions in their application to American citizens.\(^13\) Furthermore, in a number of treaties to which the United States has been a party, there has been a provision prohibiting the imposition of any taxes in the nature of the **droit de detraction**.\(^14\)

During the thirteenth century, the common law restrictions on alien succession developed. Underlying the common law rules was the theory that aliens could not hold land.\(^15\) Insofar as succession to real property at death was concerned two different rules evolved, one dealing with intestate succession and the other with testate succession.


\(^12\) Borchard, Diplomatic Protection of Citizens Abroad 87-88 (1915); Wheaton, Elements of International Law, Boyd 3d ed., §82 (1889).

\(^13\) Treaty with Saxony, 9 Stat. L. 830 (1845) (art. 1); Treaty with Bavaria, 9 Stat. L. 827 (1845) (art. 1).

\(^14\) E.g., Treaty with Colombia (art. 9), 8 Stat. L. 309-310 (1824).

\(^15\) Note, 16 Univ. Chi. L. Rev. 315 at 316 (1949).
With respect to succession by devise, it was established that an alien could take land by act of a person. An alien who took by devise held title good against all except the crown. Until the crown acted by "inquest of office found" to divest the alien of title, the alien had all the rights and incidents pertaining to the ownership of real property. Nevertheless, it was impossible for an alien who took by devise to convey title which was good as against the crown, and on the death of an alien the realty passed to the crown without "office found" even if the alien had devised the land to another.

On the other hand, it was provided that an alien could not succeed to realty by operation of law. This result followed from the theory that an alien had no inheritable blood and to allow an alien to succeed by descent would only nullify the law which prevented alien ownership of realty.

The common law rules applied to alien friends as well as to alien enemies, and they dealt not only with the right of an alien to succeed to real property but also with the right to remove the proceeds of sale from the country. These rules were applied solely to realty and not to personalty because of the slight regard for personal property in the thirteenth century.

Disagreement exists as to the reasons which led to the development of the common law rules relating to succession to real property. It is necessary, however, to examine the various reasons advanced in order to ascertain the value of these restrictions.

While it is quite true that it was theoretically impossible for an alien to hold land during the feudal period because of the incidents he must render to the overlord, the explanation of the common law rules does

18 5 Vernier, American Family Laws 346 (1938); note, 16 Univ. Chi. L. Rev. 315 at 318 (1949); note, 56 Yale L.J. 1017 at 1019 (1947).
20 See Hauenstein v. Lynham, 100 U.S. 483 at 484 (1879); Fairfax's Devises v. Hunter's Lessee, 7 Cranch (11 U.S.) 603 at 620 (1813). See also HUBERICH, TRADING WITH THE ENEMY 115 (1918).
21 Gibson, Aliens and the Law 34 (1940).
not lie here. These rules seem to stem not from land law but rather from national considerations of foreign policy and defense. It was not until the English came to be driven out of France that any objection to the holding of lands by aliens was raised. In retaliation the English stripped the French of their holdings in England, and at a later date this treatment was extended to other foreigners. Not until the common law rules had been fully established was an explanation of their basis attempted. Coke supplied the reasons for the restrictions both in peace and war. In time of war he contended that alien ownership of realty would increase the possibility that the secrets of the realm would be discovered, that the revenues of the realm would be taken by strangers, and that the presence of aliens in the country during a war would tend toward the destruction of the realm. In time of peace he feared that alien ownership of realty would decrease the number of English freeholders eligible for jury duty with the consequence that there would be a failure of justice. Coke's rationalization has been justly criticized on the basis that in time of war it was inconsistent to justify a discrimination against landholding by aliens when they were allowed to hold other kinds of property and engage in trade as residents without prejudice. That Coke's fears were not justified is evidenced by the act of Parliament in 1870 which permits aliens to acquire and hold lands in the same manner as natural born British subjects.

The common law rules relating to succession to real property were incorporated into the common law of the several states of the United States. In the absence of state legislation the common law rules are in force so that an alien can take by devise subject to forfeiture but has no right of inheritance. Today every state has modified the common law rules either by statute or constitution. Twenty states now permit

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24 2 BLACKST. COMM. 249 (Wendell 1854); note, 16 UNIV. CHI. L. REV. 315 at 316, 321 (1949).
26 Ibid.
28 33 & 34 Vict., c. 14.
29 E.g., Hauenstein v. Lynham, 100 U.S. 483 at 484 (1879); Orr v. Hodgson, 4 Wheat. (17 U.S.) 453 at 460-461 (1819).
aliens to acquire and hold real property by testate and intestate succession as if they were citizens.32 Other states, however, accord equal treatment only to alien friends,33 aliens eligible to citizenship,34 resident aliens,35 or aliens who have declared their intention to become citizens.36 Aliens who do not come within these special classifications have either no rights or else their rights are limited.37

II

The Effect of Treaties Governing Succession

Whenever the Federal Government has determined to regulate the succession to real property by aliens, it has utilized the treaty making power. It is uncertain whether Congress has the power to enact regulatory legislation or whether even in regard to aliens legislation pertaining to the devolution of real estate is exclusively within the power of the state governments.38 The possibility that the Federal Government will attempt regulation by legislation, rather than by treaty, is slight. By treaty uniform national regulation is achieved.39 Further, through the use of bilateral treaties it is possible to define the rights of aliens of a particular nationality, while federal legislation to be feasible would have


37 See also 5 VERNIER, AMERICAN FAMILY LAWS 304 et seq. (1938).


39 The possible use of executive agreements with congressional consent would eliminate
to be in terms of reciprocity. The difficulties involved in the proof of foreign law are too abundant to recommend this type of statute. Probably the most important factor militating against the use of federal legislation is the fact that, even though constitutional, there would be a bitter reaction to such legislation. Certainly, the power over real property is one of the most fundamental and revered of the state rights. Proposed federal legislation in this area would meet with disapproval of such vehemence as to prevent its enactment.

In 1819 there prevailed in the State Department the opinion that the Federal Government could not by treaty interfere with the authority of the states over the disposition of land. This attitude soon gave way to the contrary view, but in 1850 the earlier opinion received recognition again.40 This was illustrated by the treaties with France (1853),41 Brunswick (1854),42 and Switzerland (1855),43 in which the Federal Government did not claim the right to control the succession to real property in a state.44 An unqualified right of succession was granted to Swiss aliens only in those states in which foreigners were entitled to hold or inherit real estate.45 In the treaty with France the President engaged to recommend to those states which did not permit aliens to hold lands the passage of the laws necessary to confer this right since succession under the treaty was limited to those states where aliens were permitted to possess realty.46

By 1857 there had been a return to the doctrine that the question of succession to realty by aliens is within the purview of the treaty making power. The Supreme Court has stated that the treaty making power extends to all proper subjects of negotiations between two national governments. The protection of alien-owned property and the manner in which that property may be transferred, devised, or inherited are the proper subjects of such negotiations.47 With the increase of commercial intercourse between nations, the removal of alienage as a

the disadvantages attendant upon the treaty approval process. Note, 56 Yale L.J. 1017 at 1033 (1947).


41 10 Stat. L. 996 (art. 7).

42 11 Stat. L. 602 (art. 2).

43 11 Stat. L. 590-591 (art. 5).

44 See Prevost v. Grenaues, 19 How. (60 U.S.) 1 at 7 (1856).

45 Supra note 43.

46 Supra note 41.

47 See Geofroy v. Riggs, 133 U.S. 258 at 266-267, 10 S.Ct. 295 (1890); Wunderle v. Wunderle, 144 Ill. 40 at 54, 33 N.E. 195 (1893). See also Mears, Resident Orientals on the American Pacific Coast 159 (1928).
Succession to Property by Aliens

bar to succession promotes friendly relations between nations. It is today established that the Federal Government can by treaty regulate the succession to real property by aliens and prohibit relevant tax discrimination, conflicting state statutes yielding to the treaties.

The effect of a treaty dealing with succession on a state law which conflicts with the treaty is not to abrogate or repeal the state law but rather to suspend its effect for the duration of the treaty. Upon the expiration of the treaty, the state law comes back into force and controls the devolution of realty to aliens. If a treaty provides that an alien shall be given a specified period of years in which to dispose of the realty and withdraw the proceeds, the effect of the treaty is to suspend the operation of the state law only for the period of time specified.

Where real property rights vest under a treaty, the subsequent expiration or abrogation of the treaty will not divest these rights. This results from the high esteem of the common law for real property rights and the extensive protection which the courts have given to these vested rights. However, a contingent right in property under a treaty which is not perfected before the expiration of the treaty is extinguished.

If a decedent dies before the coming into effect of a treaty, an alien cannot invoke the provision of such a treaty permitting alien succession since the treaty will not be given retroactive effect. Similarly, the...

49 McKeown v. Brown, Treas., 167 Iowa 489, 149 N.W. 593 (1914).
52 Pierson v. Lawler, 100 Neb. 783, 161 N.W. 419 (1917).
56 Buchanan v. Deshon, 1 Harr. and G. (Md.) 280 (1827) (contingent right of dower and the treaty expired before the husband died).
57 Toop v. Ulysses Land Co., 237 U.S. 580, 35 S.Ct. 739 (1915) (a life estate in the realty which terminated after the coming into effect of the treaty did not prevent the fee from vesting in the citizen heirs at the time of the decedent's death since a fee will not be held in suspension); Brown v. Sprague, 5 Den. (N.Y.) 545 (1848). But cf. Vogel v. N.Y. Life Ins., (5th Cir. 1932) 55 F. (2d) 205 at 209 (personalty), cert. den. 287 U.S. 604, 53 S.Ct. 9 (1932).
right of a state to a succession tax vests on the death of the decedent, and a treaty which comes into effect at a later date does not prevent the state from levying a succession tax which discriminates against aliens. 58

In the United States, treaties relating to individual rights are deemed to have effect from the date of the exchange of ratifications. 59 If the decedent dies intestate during the period between the signature of a treaty and the exchange of ratifications, an alien heir cannot invoke the provisions of the treaty in order to inherit realty. 60 The reason for this result lies in the injustice which would arise from the divestment of a title which has vested prior to the exchange of ratifications. Since it is necessary for a treaty to be ratified with the consent of the Senate before it becomes law and since the Senate has the right to modify or amend, it would be improper to hold an individual bound by the provisions of a treaty affecting property rights prior to the exchange of ratifications. 61

The treaties concerning succession to realty by aliens confer rights which are capable of being enforced between private parties in the courts of the United States. These treaties are self-executing because they prescribe a rule by which the rights of individuals can be determined. 62 A provision in the treaty which permits an alien a certain number of years in which to dispose of the realty is self-executing and requires no additional legislative action. 63

It is established that war itself does not abrogate a treaty provision granting the right of succession to realty by aliens. 64 Such a provision is not incompatible with the existence of a state of war, and the right secured by the treaty in no way gives assistance to the enemy. In World War II, The Trading With the Enemy Act and the Executive Orders issued pursuant to the act precluded the removal of money and property from the United States for the use or account of German nationals. This federal action was deemed to have abrogated those parts of Article

58 Succession of Schaffer, 13 La. Ann. 113 (1858).
60 Haver v. Yaker, 9 Wall. (76 U.S.) 32 (1869).
61 Id. at 35.
63 See Pierson v. Lawler, 100 Neb. 783 at 787, 161 N.W. 419 at 421 (1917); Cowles, "International Law in Inland States: A Case Study," 28 Neb. L. Rev. 387 at 394 (1949).
64 State v. Reardon, 120 Kan. 614, 245 P. 158 (1926); Techt v. Hughes, 229 N.Y. 222, 128 N.E. 185 (1920), cert. den. 254 U.S. 643, 41 S.Ct. 14; 15 Ill. L. Rev. 460 (1920). In the case of the creation of a new state by a division of territory and in the absence of repudiation by the new state, a treaty provision relating to alien succession by which it was bound as a part of the whole state remains binding on the new state. Hanafin v. McCarthy, 95 N.H. 36, 57 A. (2d) 148 (1948).
IV of the 1923 Treaty with Germany which deal with the liquidation of realty and the removal of the proceeds from this country, but the right of succession granted by this article was not considered abrogated either by this action or by the war. 65

III

The Treaty Provisions Governing Succession

The United States treaty provisions relating to the succession to realty by aliens and the judicial interpretations of these provisions have produced unwarranted confusion and misunderstanding. This situation has been caused by two factors, the language used in the treaties and the attitude of the state courts toward these treaties.

No field of law compares with land law in the use of words as terms of art. History provides for the drafters and interpreters of land law the meaning to be ascribed to terminology. As Justice Cardozo has said: "Deep into the soil go the roots of the words in which the rights of the owners of the soil find expression in the law." 66 Unfortunately, treaty provisions relating to succession to real estate have often been drawn in equivocal phraseology. 67 In order to achieve the results demanded by policy, it is necessary that there be strict adherence to the terminology employed in land law.

Some of the uncertainty arising from treaty provisions can be traced to the differences in definition of terms found to exist between the civil and common law countries. An example of this was the confusion which resulted from the use of the words "goods and effects" in article 6 of the Treaty of 1783 with Sweden. 68 This was a translation, from the French text of the treaty, of "fonds et biens" which according to French law included within its meaning both personalty and realty. The courts divided on the question of whether the treaty related to real estate as well as to personalty. On the one side, it was held that "goods and effects" clearly included only movables within the common law meaning and that the treaty could in no way be extended to cover realty. 69 On the other, the meaning of the words in the French text was

67 See Dockstader v. Roe, 4 Penne (Del.) 398, 55 A. 341 at 342 (1903).
68 8 Stat. L. 64.
69 Johnson v. Olson, 92 Kan. 819, 142 P. 256 (1914); Meier v. Lee, 106 Iowa 303, 76 N.W. 712 (1898).
taken and aliens allowed to succeed to realty.\textsuperscript{70} One court, in construing article 6 of the 1782 treaty with the Netherlands,\textsuperscript{71} in order to strengthen its interpretation of "effects" seized upon the right of the heirs to receive "such successions, even ab intestato" because civil law succession includes immovables as well as movables.\textsuperscript{72}

The construction placed upon these treaty provisions by state courts has usually been strict. The courts have refused to recognize the rule of liberal interpretation of treaties in this situation. These courts have announced that where a treaty provision violates the right of a state to control the transmission of property and its taxation the language of the treaty will be construed when possible as not overriding the relevant state law.\textsuperscript{73} This canon of construction has sometimes resulted in inconceivable interpretations.

A. Succession by operation of law and act of the party. Generally, until the middle part of the nineteenth century the treaties to which the United States was a party gave to aliens only certain rights of succession to realty where the decedent died intestate. The explanation for this lay in the common law rules regarding succession by aliens to real estate. It was the purpose of these treaties to modify the harsh effect which the common law had in the case of intestate succession, and it was unnecessary to protect a devisee since the procedure of "office found" was seldom used. Not until the widespread adoption of alien land laws prohibiting in some measure alien succession to realty was it necessary to define the rights of alien devisees by treaty.

The provision prevailing during the first half of the nineteenth century was first inserted in the treaty of 1785 with Prussia\textsuperscript{74} and was last utilized in the treaty with the Dominican Republic in 1867.\textsuperscript{75} It provided that "... where, on the decease of any person holding real estate, ... such real estate would, by the law of the land, descend on a citizen or subject of the other, were he not disqualified by alienage, ..."\textsuperscript{76} the alien would have certain rights as to the realty. The use of

\textsuperscript{70} Erickson v. Carlson, 95 Neb. 182, 145 N.W. 352 (1914); Adams v. Akerlund, 168 Ill. 632, 48 N.E. 454 (1897). In the absence of a foreign language text, the common law interpretation has governed. See Succession of Sala, 50 La. Ann. 1009, 24 S. 674 (1897) (treaty with Spain, 1795).

\textsuperscript{71} 8 Stat. L. 36.

\textsuperscript{72} University v. Miller, 14 N.C. (3 Dev.) 188 (1831).


\textsuperscript{74} 8 Stat. L. 88 (art. 10). The treaties with France in 1778, 8 Stat. L. 18-20 (art. 11), and 1800, 8 Stat. L. 182 (art. 7), also limited the alien's right to intestate succession.

\textsuperscript{75} 15 Stat. L. 473 (art. 5).

\textsuperscript{76} Treaty with Prussia, 8 Stat. L. 384 (1828) (art. 14).
the word "descend" clearly made the treaty applicable in cases of intestate succession\(^{77}\) and just as clearly inapplicable in the case of testate succession.\(^{78}\) At the beginning of the present century three treaties were entered into which substituted the words "pass to" for "descend on."\(^{79}\) In view of the language used in the treaty with Germany in 1923,\(^{80}\) it seems apparent that the State Department considered that the passing of real estate by the laws of the land included only intestate succession and not testate succession.

The first rights given to aliens by treaty in the case of testate succession came in the treaties with the Netherlands in 1782\(^{81}\) and Sweden in 1783.\(^{82}\) In these treaties it was provided that "The subjects of the contracting parties may . . . dispose of their effects, by testament, donation, or otherwise; and their heirs . . . shall receive such successions, even ab intestato. . . ."\(^{83}\) Although the term "heirs" in its strict common law sense means persons who succeed in the case of intestacy, in the context of this treaty it was used to include those who succeed by will.\(^{84}\) Since succession includes both testate and intestate and since the construction of the provision readily demonstrates that succession is to be taken in its broadest sense, these treaties protected the alien who took by devise.\(^{85}\)

Between 1824 and 1858 the United States entered into a series of treaties with a number of Latin American states which seem to have given the right to an alien to take real estate by both intestate and

\(^{77}\) Wilcke v. Wilcke, 102 Iowa 173, 71 N.W. 201 (1897); Kull v. Kull, 37 Hun (N.Y.) 476 (1885).


\(^{79}\) Treaty with Spain, 33 Stat. L. 2107, U.S. Treaty Ser., No. 422 (Dept. State 1902) (art. 3); Treaty with Guatemala, 32 Stat. L. 1945, U.S. Treaty Ser., No. 412 (Dept. State 1901) (art. 1); Treaty with Great Britain, 31 Stat. L. 1939, U.S. Treaty Ser., No. 146 (Dept. State 1899) (art. 1). Note the incorrect use of "descend" where the alien was granted certain rights in the case where real " . . . property (would) descend, either by the laws of the country, or by testamentary disposition. . . ." Treaty with Switzerland, 9 Stat. L. 903 (1847) (art. 2); Treaty with Brunswick, 11 Stat. L. 602 (1854) (art. 2). A better provision gave the right where real " . . . property would, by the laws of the land, descend . . . or . . . has been devised by last will and testament. . . ." Treaty with Saxony, 9 Stat. L. 830-831 (1845) (art. 2).

\(^{80}\) Infra note 90.

\(^{81}\) 8 Stat. L. 36 (art. 6).

\(^{82}\) 8 Stat. L. 36 (art. 6).

\(^{83}\) Supra note 81.

\(^{84}\) Cf. Watson v. Lynch, 28 Barb. (N.Y.) 653 (1859) [construction of art. 9, Treaty with Great Britain, 8 Stat. L. 122 (1794)].

testate succession.\textsuperscript{86} They stipulated that "The citizens of each of the contracting parties shall have power to dispose of their personal goods . . . and their representatives, being citizens of the other party, shall succeed to their said personal goods, whether by testament or \textit{ab intestato}, . . . And if in the case of real estate, the said heirs would be prevented from entering into the possession of the inheritance on account of their character of aliens, . . ." certain rights of succession would be granted to them.\textsuperscript{87} Here the inclusion of testate succession depends on the scope of "inheritance." Certainly, "inheritance" and "heirs" are terms used in the common law to describe intestate succession, but they can and do in this context include testate succession.\textsuperscript{88}

That doubt existed concerning this construction is evidenced by a subsequent series of treaties entered into with some of these nations which gave the unqualified right to these representatives to "succeed to personal goods or real estate, whether by testament or \textit{ab intestato}."\textsuperscript{89} The treaty with Germany of 1923\textsuperscript{90} has set the pattern which is now being followed in United States treaties dealing with succession.\textsuperscript{91} In this treaty a right pertaining to real estate is clearly given in both the case of testate and intestate succession.\textsuperscript{92} Article 4 of that treaty states:

"Where, on the death of any person holding real or other immovable property or interests therein within the territories of one High Contracting Party, such property or interests therein would, by the laws of the country or by a testamentary disposition, descend or pass to a national of the other High Contracting Party, whether resident or nonresident, were he not disqualified by the laws of the

\textsuperscript{86} E.g., Treaty with Colombia, 8 Stat. L. 309-310 (1924) (art. 9); Treaty with Bolivia, 12 Stat. L. 1010, U.S. Treaty Ser., No. 32 (Dept. State 1858) (art. 12). The same provision also appeared in the treaty with the Hanseatic Republics. 8 Stat. L. 370 (1827) (art. 7).

\textsuperscript{87} Treaty with Venezuela, 8 Stat. L. 470 (1836) (art. 12).

\textsuperscript{88} See In re Stixrud’s Estate, 58 Wash. 339 at 354, 109 P. 343 (1910) (construction of art. 6, treaty of 1783 with Sweden, 8 Stat. L. 64).


\textsuperscript{90} 44 Stat. L. 2135, U.S. Treaty Ser., No. 725 (Dept. State 1923).

\textsuperscript{91} E.g., Treaty with Liberia, 54 Stat. L. 1741, U.S. Treaty Ser., No. 956 (Dept. State 1938) (art. 4); Treaty with Finland, 49 Stat. L. 2662, U.S. Treaty Ser., No. 868 (Dept. State 1934) (art. 4). But see the treaty of 1951 with Israel: "Nationals and companies of either Party shall be permitted freely to dispose of property within the territories of the other Party with respect to the acquisition of which through testate or intestate succession their alienage has prevented them from receiving national treatment, and they shall be permitted a term of at least five years in which to effect the disposition." Treaty with Israel, Sen. Exec. R., 82d Cong., 1st sess. 8 (1951) (art. 9-4). See also treaty of 1951 with Denmark, Sen. Exec. I., 82d Cong., 2d sess. 7 (1952) (art. 9).

\textsuperscript{92} Clark v. Allen, 331 U.S. 503, 67 S.Ct. 1431 (1947).
country where such property or interests therein is or are situated, such national shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and withdraw the proceeds thereof, without restraint or interference, and exempt from any succession, probate or administrative duties or charges other than those which may be imposed in like cases upon the nationals of the country from which such proceeds may be drawn."

B. **Nationality of the decedent or successor and the location of the realty.** The treaty of 1783 with Sweden provided that "The subjects of the contracting parties in the respective states, may freely dispose of their goods and effects, either by testament, donation, or otherwise, in favour of such persons as they think proper; and their heirs in whatever place they shall reside, shall receive the succession..." The better construction of these words gave to the Swedish or American decedent the right to transmit his real estate at death, not only that located in the other nation but also that located within the country of his citizenship. Certainly, the language of the treaty was so broad that it appears that the right of succession accrued to any successor regardless of nationality so that it was possible to argue that the American heir of an American decedent was covered when the property was situated in the United States. Such a result is contrary to the policy of the Federal Government not to regulate the devolution of realty as between Americans, and further it is probable that the treaty was designed only to protect heirs who were nationals of the contracting country other than that in which the property was located.

That the possible interpretation of the Swedish treaty did not represent the intent of the United States Government is suggested by the language of a number of treaty provisions beginning in 1824 and last used in 1870. The general purport of these treaties was that "The citizens of either of the high contracting parties shall have the full power and liberty to dispose of their . . . real estate . . . , within the jurisdiction of the other, by sale, donation, testament, or otherwise; and

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98 8 Stat. L. 64 (art. 6).
96 See article 6 of treaty with the Netherlands, 1782, where it was necessary that the heir be a subject of the two contracting parties. 8 Stat. L. 36.
97 Treaty with Colombia, 8 Stat. L. 309-310 (1824) (art. 9).
98 Treaty with Peru, 18 Stat. L. (3) 703 (1870) (art. 12).
their heirs or representatives, being citizens of the other party, shall succeed to the said ... real estate. ... It seems unquestionable that under this article a citizen of one contracting party was allowed a right of succession only in the case where a decedent who was a citizen of the same state died leaving realty in the territory of the other contracting party. Nevertheless, it has been held that a similar provision gave to an alien the right to succeed to the lands in the United States of a citizen of this country.

A qualified right of succession has been granted in a group of treaties beginning in 1785 to aliens "... where, on the death of any person holding real estate, within the territories of the one party, such real estate would, by the laws of the land, descend on a citizen or subject of the other, were he not disqualified by alienage. ..." Here the determinate criterion is the location of the property and not the citizenship of the decedent, and as long as the successor is a citizen of the other nation he is entitled to the benefit of this provision. Thus an alien can succeed to real estate where the decedent is a citizen of the country in which the land is located as well as where the decedent is alien to the country in which the property is located. Nor does it make any difference that the successors and the decedent are of the same nationality. This type of provision is found in the 1923 treaty with Germany where it is also expressly stated that the alien can succeed regardless of whether he is a resident or nonresident national of the other party. It is clear that in order to avail himself of these treaty provisions the alien must be a national of one of the contracting parties.

C. Conditions required for lifting the alienage disability. In those treaties which have granted to an eligible alien unqualified rights in realty, this grant has not been conditioned on the existence of certain state laws. The only deviation from this practice occurred at the time

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99 Ibid.
102 Treaty with Prussia, 8 Stat. L. 88 (1785) (art. 10).
103 Supra notes 75-76.
105 Doehrel v. Hillmer, 102 Iowa 169, 71 N.W. 204 (1897).
106 Supra note 90.
107 Wunderle v. Wunderle, 144 Ill. 40, 33 N.E. 195 (1893).
108 E.g., Treaty with Sweden, 8 Stat. L. 64 (1783) (art. 6); Treaty with El Salvador, 18 Stat. L. (3) 730 (1870) (art. 12).
when doubt was expressed as to the power of the Federal Government to control the devolution of realty to aliens. Accordingly the treaty with Switzerland in 1855 grants unlimited rights in real property in those states in which "foreigners shall be entitled to hold or inherit real estate." The treaty further stipulates that in the states in which an alien is not permitted to hold real estate there shall be accorded to the alien successor such term as the state will permit to sell the property. This language has been provocative of differing interpretations. One view does not read "hold or inherit" as meaning "hold and inherit" which would grant the right only where the alien can hold by inheritance. Consequently, where the law of the jurisdiction allows an alien to hold by conveyance or by will although not by intestate succession, it has been said that the treaty applies. This construction has been disputed by the assertion that where it is unlawful to hold by one means, the lawfulness of holding by other means does not permit the application of the treaty in order to validate the unlawful holding. Nor will the establishment by state law of a term in which the alien is permitted to sell such property constitute a holding of property so as to grant to the alien unlimited rights in the realty.

The treaty with France provides that "In all the States of the Union, whose existing laws permit it, so long and to the same extent as the said laws shall remain in force, Frenchmen shall enjoy the right of possessing personal and real property by the same title and in the same manner as the citizens of the United States." It has been said that for this treaty to be applicable the state law must permit the holding of real estate by aliens. If an alien is prevented by state law from taking by descent but is allowed to hold realty, he can take by intestate succession under the treaty. Where state legislation permits a resident alien to acquire and hold property by inheritance but prohibits this in the case of a nonresident alien, the nonresident alien is covered by the treaty since the state law does not prevent all aliens from acquiring and possessing realty.

In those treaties which provide for a qualified right in realty, this right is subject to the requirement that the successor must be prevented

115 Ibid.
from succeeding to the realty solely because of alienage. 117 Where a state law permits an alien to succeed to the realty without regard to alienage, the treaty is inapplicable. 118 Nor does the general language in contemporary treaties119 requiring that the alien be disqualified in succession rights by the laws of the country where the property is situated have reference to any other than an alienage disqualification. 120

D. Rights in realty. There are two types of property rights which have been granted to aliens by treaties of the United States. 121 The first one completely removes the disability of alienage in succession and allows the alien to take real estate with all the rights pertaining to it as if he were a citizen of the state in which the property is situated. 122 This unqualified grant of property rights first appeared in a treaty with France in 1778,123 but has not appeared in a treaty since 1870.124

The predominant treaty right granted to aliens is a qualified one. The alien is allowed a specified period of time in which to liquidate the realty and remove the proceeds without restraint or interference from the country in which it is situated. 125 By this method the states are left to determine their own policies concerning the holding of realty by aliens and at the same time the alien is allowed the market value of the property and forfeiture is avoided. 126 Usually the time specified in which an alien can sell the realty is three years and may be reasonably


118 Maynard v. Maynard, 36 Hun (N.Y.) 227 (1885).


120 See Treaty with Israel, supra note 91, where the disqualification of alienage alone is mentioned.

121 See IA CALIF. L. REV. 56 at 58, note 15 (1921).

122 E.g., Treaty with the Netherlands, 8 Stat. L. 36 (1782) (art. 6); Treaty with Mexico, 8 Stat. L. 414-415 (1831) (art. 13); Treaty with Argentina, 10 Stat. L. 1009, U.S. Treaty Ser., No. 4 (Dept. State 1853) (art. 9).

123 Treaty with France, 8 Stat. L. 18-20 (art. 11).

124 Treaty with El Salvador, 18 Stat. L. 730 (art. 12). This treaty provides that aliens "... may take possession (of the real estate) ..., and dispose of the same at their will. ..." It has been argued, however, that these words only gave an alien the right for a period of time to dispose of the realty and not an indefinite right to hold. GIBSON, ALIENS AND THE LAW 36 (1940).


126 BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD 88 (1915).
prolonged if circumstances render it necessary. A few treaties have allowed the disposal to be made within a reasonable time and have not set any specific time limit.

Although the right secured by these treaties is denominated a right of sale, it is in substance a right of ownership. If in the absence of an alienage bar an estate in fee simple would pass to an alien by succession, an estate in the nature of a determinable fee passes to the alien. The alien is allowed to enter into possession of the property and is able to exercise all the rights of ownership. He is entitled to the rents and income of the property and is permitted to bring an action in partition. The estate, however, is terminated by the failure to exercise the right of sale within the period specified by the treaty. Upon the expiration of the period allowed by the treaty, the state law comes into force and controls the disposition of the property.

As to when the period allowed for sale begins to run, there is a conflict in the judicial interpretations. One interpretation treats the sale period as commencing at the time of the decedent's death; while according to the other it does not begin to run until the probate proceedings are closed. The determination of a reasonable time or the rea-

127 A period of five years without express provision for prolongation is permitted in the 1951 Treaties with Israel and Denmark, supra note 91.

128 E.g., Treaty with Hanover, 8 Stat. L. 556-558 (1840) (art. 7).

129 See Techt v. Hughes, 229 N.Y. 222 at 240, 128 N.E. 185 (1920), cert. den. 254 U.S. 643, 41 S.Ct. 14; Ahrens v. Ahrens, 144 Iowa 486 at 489, 123 N.W. 164 (1909); see also note, "Right of an Alien Enemy to Take Land by Descent," 5 Minn. L. Rev. 373 at 379-380 (1921).

130 See Miller v. Clausen, (8th Cir. 1924) 299 F. 723 at 726-727. Interests in land other than estates in fee simple are protected by these treaties, but the rights granted by the treaties will be limited by the nature of the estate. See Treaty with Germany, supra note 90.


132 Schultze v. Schultze, 144 Ill. 290, 33 N.E. 201 (1893) (partition); Kull v. Kull, 37 Hun (N.Y.) 476 (1885) (rents and income). In Doehrel v. Hillmer, 102 Iowa 169, 71 N.W. 204 (1897), the treaty was interpreted to allow a determinable fee created by it to descend according to its provisions. In this regard see Ky. Rev. Stat. (1948) §381.340.

133 Ahrens v. Ahrens, 144 Iowa 486, 123 N.W. 164 (1909); see Kull v. Kull, 37 Hun (N.Y.) 476 at 480 (1885).

134 Miller v. Clausen, (8th Cir. 1924) 299 F. 723; see Schultze v. Schultze, 144 Ill. 290, 33 N.E. 201 at 203 (1893). But in Dutton v. Donahue, 44 Wyo. 52, 8 P. (2d) 90 (1932), the court held that a conveyance of the realty by the alien to a third person after the expiration of the treaty period but prior to escheat proceedings passed good title even as against the state.


136 See Doble v. State, 95 Wash. 62 at 70, 163 P. 37 (1917).
sonable prolongation of a term is made by the courts.\textsuperscript{137} In the case of the prolongation of the term, the extension of the time may well be granted after the expiration of the specific time set for the sale by the treaty.\textsuperscript{138} The only generalization that can be derived from the judicial determinations of reasonableness is that the longer the failure to sell the more extenuating must be the factors causing the failure.\textsuperscript{139}

In several treaties\textsuperscript{140} it is stipulated that in those states where an alien is not permitted to succeed to real property, the alien shall be permitted such term as the laws of the state will permit to sell such property. In the absence of such state law, the time in which the alien must sell is unlimited since it was clearly the intention of the treaty to give a right of sale.\textsuperscript{141}

E. Restrictions on taxation relating to the rights of succession.

The problem of taxation of the rights granted by treaties governing succession to real property by aliens has at times been the subject of considerable confusion.\textsuperscript{142} The two principal types of provisions, however, have been clear in their effect.

\textsuperscript{137}See In re Beck, 11 N.Y.S. 199 (1890); see Bamforth v. Ihmsen, 28 Wyo. 282 at 311-312, 204 P. 345 (1922). It has been suggested that if the legislature enacts legislation fixing the time for the sale of realty judicial discretion is eliminated in the determination of a "reasonable time" where the time set by the legislature is not so brief as to violate the spirit of the treaty. See Ahrens v. Ahrens, 144 Iowa 486 at 490, 123 N.W. 164 (1909).

\textsuperscript{138}See Dutton v. Donahue, 44 Wyo. 52 at 59-60, 8 P. (2d) 90 (1932).

\textsuperscript{139}See Pierson v. Lawler, 100 Neb. 783, 161 N.W. 419 (1917); Ahrens v. Ahrens, 144 Iowa 486, 123 N.W. 164 (1909). In the determination of reasonableness infant successors stand in no better position than adult successors. See Wieland v. Renner, 65 How. Pr. (N.Y.) 245 (1883).


\textsuperscript{141}Hauenstein v. Lynham, 100 U.S. 483 (1879). Where a treaty unequivocally grants a power of sale to an alien without a time limitation this power exists during the entire lifetime of the alien. Chirac v. Chirac, 2 Wheat. (15 U.S.) 259 (1817) [construing art. 7, treaty with France, 8 Stat. L. 182 (1800)].

\textsuperscript{142}Note the language of the following treaties:

1. Treaty with Brazil, 8 Stat. L. 390 at 392 (1828) (art. 11): ". . . and if, in the case of real estate, the said heirs would be prevented from entering into the possession of the inheritance, on account of their character of aliens, there shall be granted to them the term of three years, to dispose of the same, as they may think proper, and to withdraw the proceeds without molestation, nor any other charges than those which are imposed by the laws of the country."

2. Treaty with Portugal, 8 Stat. L. 560 (1840) (art. 12): ". . . he then shall be allowed a reasonable time to sell, or otherwise dispose of, such real estate, and to withdraw and export the proceeds without molestation, and without paying to the profit of the respective Governments any other dues than those to which the inhabitants of the country, wherein said real estate is situated, shall be subject to pay in like cases."

3. Treaty with Colombia, 9 Stat. L. 886, U.S. Treaty Ser., No. 54 (Dept. State 1846) (art. 12): ". . . and they may take possession thereof, either by themselves or others acting for them, and dispose of the same at their will, paying such dues only as the inhabitants of the country wherein (said real estate is situated) shall be subject to pay in like cases."
From 1778\textsuperscript{143} until 1849,\textsuperscript{144} a series of treaties guaranteed to an alien exemption from duties of detraction. This exemption did not prevent the imposition of discriminatory taxes on the succession by aliens to real property.\textsuperscript{145} A duty of detraction is a tax levied on the removal of property; while a succession tax is levied on the right of disposition or on the right to receive property by will or descent. In order to prevent discrimination in succession taxation, the treaties since the beginning of this century have made the succession “exempt from any succession, probate or administrative duties or charges other than those which may be imposed in like cases upon the citizens or subjects of the country from which such proceeds may be drawn.”\textsuperscript{146} These recent provisions do not continue the former practice of prohibiting detraction duties for the probable reason that such taxes have been generally abolished.

IV

Conclusion

A contemporary evaluation of the purposes and effects of a policy which prevents an alien successor from receiving the same treatment as a national successor can lead only to the conclusion that such a policy is no longer well founded. Present day considerations demand that an alien successor be treated as if he were a national of the country in which the real property is situated. The treatment of foreign nationals is a problem fraught with international consequences. In many instances the disability of alienage is grounded in a desire to discriminate because of ill-conceived factors of race, economics, and politics. This type of discrimination often results in serious international disagreements. Moreover, the increase in commercial intercourse between nations requires the removal of conditions which impede its continued development. Significant also is the fundamental principle of American law that the intent of the testator should be carried out as far as possible.

\textsuperscript{143} Treaty with France, 8 Stat. L. 18 (1778) (art. 11).
\textsuperscript{144} Treaty with Hawaii, 9 Stat. L. 979 (1849) (art. 8).
\textsuperscript{146} E.g., Treaty with Great Britain, 31 Stat. L. 1939, U.S. Treaty Ser., No. 146 (Dept. State 1899) (art. 1); Treaty with Germany, 44 Stat. L. 2135, U.S. Treaty Ser., No. 725 (Dept. State 1923) (art. 4). A few earlier treaties provided for national treatment in succession taxation. E.g., Treaty with Mexico, 8 Stat. L. 414 (1831) (art. 13). It has been held that an inheritance tax is a “succession duty” so that alien discrimination in inheritance taxation is forbidden by the treaty. McKeown v. Brown, Treas., 167 Iowa 489, 149 N.W. 593 (1914).
The existing restrictive attitude toward alien succession completely ignores these considerations.\textsuperscript{147}

Unfortunately, vital considerations of national welfare exist which militate against equal treatment for the alien successor. Cognizance of these factors was taken by the International Conference on Treatment of Foreigners in 1929.\textsuperscript{148} The proposal was there advanced that aliens should be accorded national treatment in acquiring and disposing of land, reserving to the nation the right to prohibit acquisition only for reasons of security and national defense, or if acquisition would be likely to result in obtaining undue control of the vital economic resources of the country. As long as world economic and political conditions remain unchanged such considerations will influence the treatment of aliens. Nevertheless, it is essential that governments seek to secure national treatment of alien successors in so far as it is consistent with their economic and political security.\textsuperscript{149}

In the United States existing state legislation, while far from being satisfactory, is generally more liberal in the treatment of the alien successor than is treaty regulation.\textsuperscript{150} It is, therefore, incumbent upon the Federal Government to reexamine the legal and political implications of its treaty policy and to strive for national treatment of alien successors. Federal action in this matter is necessitated by the need for uniform treatment of aliens throughout the nation.\textsuperscript{151} Not only is the treatment of aliens usually dealt with by international agreement, but also it is so vitally a part of the nation's foreign policy that the national interest is paramount to any local interest that may exist.\textsuperscript{152}


\textsuperscript{150} GIBSON, ALIENS AND THE LAW 37, 61 (1940).


\textsuperscript{152} Ward, "The Mississippi Alien Statute," 11 MISS. L.J. 313 at 317 (1939); note, 16 UNIV. CHI. L. REV. 315 at 316 (1949).