JO DUNN DOLAN *

Treaty Provisions Affecting Inheritance Rights in the Western Hemisphere

Who has not heard in fact, read in fiction, or day-dreamed in fancy of an unexpected legacy from a rich and distant relative who has lived and died, all but forgotten, in another country. In these real and imaginary situations, despite the usual plots and counterplots among the various claimants to the fortune, there is usually omitted a legal consideration which may be the deciding factor in either assuring or nullifying the proverbially happy ending: treaty law affecting the right to inherit.

Of course, treaty law is a subject of limited interest, even to lawyers. On the other hand, it is not unusual for an attorney conversant with wills and estates to overlook the role of treaty law in probate practice. Not surprisingly, an attorney emersed from day to day in the statutory and case law of a particular state may find himself unprepared for the client who wishes to write a will naming as legatees his Argentine wife and her daughter by a previous marriage, or the client whose uncle in Colombia has left him a piece of real estate which he would like to know whether he is entitled to receive and to keep.

The purpose of this article is to be neither fanciful nor esoteric, but to provide practical information for the lawyer interested in the current status of treaty law affecting inheritance rights in the Western Hemisphere, through explanation and comparative analysis of actual

* The author, a member of the Florida Bar, received her LL.B. from New York University, and LL.M. from the University of Miami in Coral Gables, Florida. She is a member of the Council and Co-Chairman of Section A of the Civil Law Committee of the Inter-American Bar Association.

treaty provisions. For this reason, examination of treaties no longer in effect will not be made. The writer has used *Treaties in Force,* an annual publication of the U.S. State Department, as the criterion.[1] If a United States treaty applicable to the Western Hemisphere is listed as in force on January 1st, 1967, it is covered here, but not otherwise.[2]

Guide to Treaty Law

Treaty provisions affecting inheritance rights are generally found in the following types of treaties: (a) Treaties of Amity, or Peace and Friendship, or Trade and Commerce, including Navigation; (b) Treaties relating to Tenure and Disposition of Real and Personal Property; (c) Consular Conventions; and (d) Tax Treaties, such as those for the avoidance of double taxation and prevention of fiscal evasion in the case of estate taxes and succession duties.

Most of the United States treaties governing inheritance rights in the Western Hemisphere are bilateral, being made directly between countries of which nationals of one and sometimes both nations may be involved. Nearly all U. S. treaties with Latin American countries are of this kind. It should be remembered, however, that certain European nations have possessions in the Western Hemisphere, and in these situations the governing treaty instrument may be between the United States and the mother country of a Western Hemisphere possession, but the practice in this regard is not uniform. For example, Article 9 of the Treaty of Amity, Commerce and Navigation between the United States and Great Britain signed at London in 1794 [3] applies to inheritance rights in Canada, as does the Convention between the United States and the United Kingdom relating to tenure and disposition of real and personal property.[4] On the other hand, a modern convention with Canada for the avoidance of double taxa-

[1] Cited as TIAS, this publication lists "treaties and other international agreements of the United States on record which had not expired by their terms or which had not been denounced by the parties, replaced or superseded by other agreements, or otherwise definitely terminated."

[2] As a further note of explanation, treaties with "mother countries" of Western Hemisphere possessions are included, but other treaties affecting inheritance rights of Europeans and other nationals in the U.S. are not. The reader seeking later information should check the current status of treaties and other international agreements in the *Department of State Bulletin,* a weekly publication for sale by the Superintendent of Documents, United States Government Printing Office, Washington, D.C. 20402.

[3] 8 Stat. 116. Only relevant articles 9 and 10 appear to remain in force.

[4] 31 Stat. 1939.

tion was signed at Ottawa directly between officials of the United States and Canada.[5]

With respect to the Caribbean area, there is a mixed situation, as follows:

British: A treaty between the United States and Great Britain is *extended* to a Caribbean nation (*e.g.*, Jamaica) if there is notification from a particular Caribbean nation of the desire to participate.[6]

Dutch: United States Consular Convention with the Netherlands [7] specifically covers Dutch territories of the Carribbean.

French: United States Consular Convention with France [8] does not apply to French possessions in the Western Hemisphere. Conventions for avoidance of double taxation apply to French citizens in the United States, but provide for extension to French colonies by written notification.[9]

Limitations of space prevent inclusion here of specific rules as to when treaties are in force, but this subject is covered in other sources.[10] Similarly, examination of the historical background of treaties is not within the scope of this article, but may be found elsewhere.[11]

Analysis of Provisions of U.S. Treaties in Force

For ease of reference, a table of citations to the texts of treaty articles of bilateral treaties of the United States in force as of January

[5] Convention for the avoidance of Double Taxation and the Prevention of Fiscal Evasion in the Case of Estate Taxes and Succession Duties. 59 Stat. 915. For conventions supplementary thereto, see 2 UST 2247 and 13 UST 382, at p. 389.

[6] How notice is required to be given may depend upon the terms of the particular treaty (*e.g.*, Convention with United Kingdom of 1899, 31 Stat. 1939, was supplemented by a convention in 1936, 55 Stat. 1101, re notice requirements). Or it may depend upon the status of a particular Commonwealth nation.

[7] 10 Stat. 1150.

[8] 10 Stat. 992.

[9] See 64 Stat. (3) B3, 64 Stat. (3) B28, and 8 UST 843 respectively.

[10] *E.g.*, Crandall, Samuel B., *Treaties, Their Making and Enforcement*, 2nd ed., (1916).

[11] The reader who seeks such background material is referred to *Foreign Relations of the United States*, an annual publication of the United States Government Printing Office, Washington, D.C., which may prove a helpful starting point for research along this line.

1st, 1967, which affect inheritance rights is included as an addendum to this article. There follows an analysis of pertinent provisions of the four types of treaties already referred to:

(a) *Treaties of Peace and Friendship*

Most United States treaties presently in force affecting inheritance rights in the Western Hemisphere are treaties of peace and friendship, or trade and commerce, or some variant of the same. They are to be distinguished from peace treaties usually made at the conclusion of a war, such as the bilateral Treaty of Peace made between the United States and Great Britain after the War of 1812. Most modern peace-after-war treaties are multilateral, whereas all U.S. peace-and-friendship treaties with Latin American countries affecting inheritance rights are bilateral. The age of treaties is material to an understanding of them.[12] Nearly all of the peace-and-friendship treaties were entered into during the 19th century, and their texts tend to follow certain patterns.

Specifically, the following provision in the United States Treaty with Chile:

> The citizens of each of the contracting parties shall have power to dispose of their personal goods within the jurisdiction of the other, by sale, donation, testament, or otherwise, and their representatives, being citizens of the other party, shall succeed to their said personal goods, whether by testament or *ab intestato,* 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 the said goods are, shall be subject to pay in like cases: 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, and exempt from any other charges than those which may be imposed by the laws of the country.

This treaty, entered into force in 1834,[13] is similar to that of the United States with Brazil (1829),[14] Ecuador (1842),[15] Guatemala

[12] See Devlin, Treaty Power (treatise); also Wilson, 45 *Am. J. Int. L.* at 104.

[13] 8 Stat. 434.

[14] 8 Stat. 390. Re problems of knowing which provisions have been terminated, see TIAS, 1967 ed., footnote p. 18; also Crandall, note 10 *supra.*

[15] 8 Stat. 534.

(1852),[16] and Venezuela (1836).[17] Bolivia's treaty (1862) [18] is stamped from the same cloth, with one variation: it allows "the longest period under law" for the disposal of real estate acquired through inheritance, rather than the three-year period granted by the others.

The text of the United States treaty with Costa Rica (1852) [19] is similar to that with Paraguay (1860),[20] although Costa Rica's calls for reciprocity of treatment in the country of the other contracting party, and Paraguay's does not. The text of the treaty with Honduras (1928) [21] is not conformable with any of the other treaties which remain in force in the Western Hemisphere, although neither its history nor its content is unique.[22]

The only really modern treaty of friendship, commerce, and navigation presently in force in the Western Hemisphere is that with Nicaragua,[23] which was signed January 21st, 1956, and entered into force May 24th, 1958. The United States Senate Committee on Foreign Relations has expressed disappointment in the fact that since 1945, when the State Department undertook a program of modernizing treaties of friendship, commerce, and navigation, 17 such new treaties have come into force, but only one, Nicaragua's, is with a Latin American country.[24]

Examination of peace-and-friendship treaties on the basis of types of property reveals the following:

Personal Property: Applicable provisions of treaties with Bolivia, Brazil, Chile, Colombia, Ecuador, Guatemala, and Venezuela provide that citizens [25] of each of the contracting parties have the right to dispose of their personal property within the territory of the other

[16] 10 Stat. 875.

[17] 8 Stat. 466.

[18] 12 Stat. 1003.

[19] 10 Stat. 916.

[20] 12 Stat. 1091; re construction see In re Baglieri's Estate, 137 N.Y.S. 175 (1912). See also in re Estate of D'Adamo, 212 N.Y. 214 (1914).

[21] 45 Stat. 2618.

[22] Its text is similar to that in the treaty of 1870 with El Salvador, which latter treaty is not shown as in force in TIAS. Re background of Treaty with Honduras, see Vol. III, Foreign Relations of the United States, pp. 92-117, (1927 ed.).

[23] 9 UST 449.

[24] Report on S. 2996, Foreign Assistance Act of 1962, 87th Congress, 2nd Session, Report No. 1535, p. 26.

[25] Choice of the word "citizens" is important. Some treaties refer to "nationals," others to "inhabitants."

contracting party, by testament or otherwise, and that their heirs or representatives may take possession of the same. In the case of Honduras, the text states that "nationals" (rather than citizens) have power to dispose, and their "heirs, legatees and donees, of whatsoever nationality, whether resident or non-resident, shall succeed to such personal property, and may take possession thereof, either by themselves or by others acting for them, and retain or dispose of the same at their pleasure." [26]

With respect to *succession* to personalty, the treaties with Argentina,[27] Costa Rica, and Paraguay call for reciprocal national treatment, whereas only Argentina and Costa Rica require reciprocity in the *disposal* of personalty,[28] and Paraguay's treaty, as regards disposal, provides for national treatment pure and simple, without regard to reciprocity.

The modern treaty with Nicaragua is not so categorized. It states that 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 that they shall have at least five years in which to effect such disposition.

Real Property: The only treaty of peace and friendship providing for free disposition and succession with respect to real estate is that with Colombia,[29] and it would be interesting to see how this provision would be interpreted in a jurisdiction in the United States which prohibits aliens from inheriting.[30] The treaty with Argentina calls for reciprocal national treatment in whatever relates to "the acquiring and disposing of property of every sort" either by testament or in any other manner whatsoever. The requirement of reciprocity would bring about different results in various jurisdictions of the United States. In Florida it would be no bar, since F.S. 731.28 provides in part:

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[26] Lest this provision seem disarmingly clear to the uninitiated, it had best be read in conjunction with the interpretation, in the leading case of Clark v. Allen, 331 U.S. 503 (1947), of a similarly worded treaty with Germany.

[27] Citations are included in the addendum to this article.

[28] To see how the requirement of reciprocity would work under Florida law, see F.S. 731.28.

[29] 9 Stat. 881.

[30] The writer could not find any cases listed in Volume 14 of the United States Supreme Court Digest Annotated which would apply.

> An alien may devise, bequeath, inherit and transmit inheritance in real and personal property as if he were a citizen of the United States; and in taking title by descent it shall be no bar to a party that the intestate or any ancestor through whom he derives his descent from the intestate is or has been an alien.[31]

Most of the treaties currently in force with Latin American countries are silent as to the right to dispose by testament or through intestacy, but do give the right to dispose of realty within a specified period of time if local law prevents acquisition by aliens. The following are treaties in this category: Bolivia (grants "longest period allowed by law"); Brazil (3 years); Nicaragua (at least 5 years); and Venezuela (3 years).

The treaties with Costa Rica and Paraguay are silent both as to any right to dispose of real property by will or intestacy, and to acquire it through succession; impliedly there is no right under the treaty to do either, and it would appear that local law would be determinative.[32]

(b) *Treaties re Tenure and Disposition of Real and Personal Property*

Treaties of this type presently in force in the Western Hemisphere are those with Guatemala (signed in 1901, entered into force in 1902),[33] and with the United Kingdom (signed in 1899, entered into force in 1900).[34] The latter, which has been supplemented several times,[35] was extended to Canada in 1922,[36] to Jamaica in 1901,[37] and to Trinidad and Tobago in 1901.[38] It is also applicable in the

[31] There is no constitutional or statutory prohibition against a person living in a so-called unfriendly country from inheriting from a Florida resident, with the possible exception of an alien enemy. 1962 Op. Atty. Gen., 062-105, Aug. 8, 1962. Re reciprocity for property presumed abandoned or escheated under the laws of another state, see F.S. 717.11. Re U.S. Government protest to Argentina (1879) because of an Argentine local law providing for escheat of an estate not claimed within one year, see Moore, Vol. IV, p. 6 (*Digest of International Law*).

[32] Although silence, in treaty law, is not generally to be construed as indicative. The writer refers here to the principle that jurisdiction over realty is in the sovereign of the territory where the real estate is located.

[33] 10 Stat. 875.

[34] 31 Stat. 1939.

[35] See 32 Stat. 1914 and 55 Stat. 1101.

[36] Supplementary convention providing for the accession of the Dominion of Canada to the real and personal property convention of March 2, 1899. Signed at Washington Oct. 21, 1921; entered into force June 17, 1922. 42 Stat. 2147.

[37] Applicable to Jamaica Feb. 9, 1901. Supplements also applicable to Jamaica.

[38] Also applicable to Trinidad and Tobago Feb. 9, 1901. Supplementary convention extending the time within which notification may be given of the

Western Hemisphere to Puerto Rico, the Bahamas, Bermuda, British Honduras, the Leeward Islands, St. Lucia, and St. Vincent. The reader interested in other areas would be wise to check the current status of accession.[39]

The texts of the treaties with Guatemala and the United Kingdom are almost identical, the former granting the right to dispose and succeed to personal property to "citizens" of contracting parties, and the latter referring in this connection to "citizens or subjects." Where real property would, by the laws of the land, pass to a citizen (or subject: Britain) were he not disqualified by the laws of the country where such real property is situated, the term of three years is given to sell the property and withdraw the proceeds. Consular administration is also provided for in both treaties. It is noted that Guatemala's property treaty (1902) differs in certain particulars from its treaty of peace and amity (1852).[40]

(c) *Consular Administration*

Treaty provisions relating to consular administration of estates in the Western Hemisphere are not uniform. Usually those which are contained in treaties of peace and friendship (*e.g.*, Argentina, Paraguay) [41] are less detailed than those which appear in separate bilateral Consular Conventions (*e.g.*, Cuba, Mexico).[42]

The latest Consular Convention is that with Costa Rica, which was signed in San Jose on January 12th, 1948, and entered into force March 19th, 1950,[43] of which it has been said:

> 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

accession of British colonies or foreign possession to the Convention of March 2, 1899, signed at Washington January 13, 1902, applicable to Trinidad and Tobago April 2, 1902 (32 Stat. 1914); supplementary convention signed at Washington May 27, 1936; applicable to Trinidad and Tobago March 10, 1941 (55 Stat. 1101).

[39] *Re* weekly publication, *Department of State Bulletin*, see note 2, *supra*.

[40] 32 Stat. 1944 and 10 Stat. 875 respectively.

[41] 10 Stat. 1005 and 12 Stat. 1091 respectively.

[42] 44 Stat. 2471 and 57 Stat. 800 respectively.

[43] 1 UST 247. Compare consular administration provisions with that in the Treaty of friendship, commerce, and navigation signed at Washington July 10, 1851, entered into force May 26, 1852, and shown as currently in force in TIAS. (10 Stat. 916).

> nationals not legally represented in the receiving country [44] and holding or claiming a legal or equitable interest in the estate (Art. IX, 2, a). As a consequence, the consular officer is granted the right to 'apply for and receive' a grant to the same extent as the person he represents would have had.[45]

A breakdown of treaty provisions relating to consular administration in the Western Hemisphere follows:

**Treaties of Peace and Friendship:*

Argentina:	Consular officers have the right to intervene in administration conformably with laws of the country (in intestacy).
Bolivia:	No provision.
Brazil:	No provision (but party to multilateral consular convention)**
Chile:	No provision (but contains most-favored-nation clauses)***
Colombia:	No provision (but party to bilateral and multilateral consular conventions)**
Costa Rica:	Consular officers have the right to nominate curators, conformably with the laws of the country.
Ecuador:	No provision (but contains most-favored-nation clause)*** (also multilateral consular convention)**
Guatemala:	No provision (but contains most-favored-nation clause)*** (also multilateral consular convention)**
Honduras:	Provides for notice to consul of death (in intestacy), plus right to take charge of property pending appointment of administrator, and be appointed administrator within discretion of court conformably with local law. May receipt for distributive shares of estates and remit funds to distributees.
Jamaica:	See separate United Kingdom Consular Convention, which applies.
Paraguay	Consular officer may take charge of property until appointment of administrator, who may be named by consul conformably with laws.

[44] The receiving country or state is where the decedent's estate or property is located; the sending country or state is the nation which appointed the consul.

[45] Bayitch, *Conflict Law in United States Treaties*, p. 87.

United Kingdom:	Provides for notice of death (in Property Convention of 1899) to consular officer, who may appear until other representation provided. (See also separate consular convention).
Venezuela:	No provision.

**Separate Bilateral Consular Conventions:*

Costa Rica:	Notice to consul re death, whether testate or intestate, if no representative appointed, and right to full administration unless subsequent other appointment. May receive and transmit funds to distributees, in discretion of court.
Cuba:	Notice to consul re death, if no known heirs or executors. In intestacy, consul may take charge pending appointment of administrator, and be appointed administrator within discretion of court, conformably with local law. May receipt for distributive shares and remit same to distributees provided he evidences remission. (Also contains most-favored-nation clause.)***
Jamaica:	See United Kingdom.
Mexico:	Very similar to Cuba's. (Also contains most-favored nation clause.)***
Netherlands:	Notice to consul re death, where no known heirs or testamentary executors. (Also contains most-favored-nation clause.)***
Trinidad:	See United Kingdom.
United Kingdom:	May receive money or property for transmission to national of sending state and furnish evidence of remission, conforming to laws and regulations of receiving state. (Text distinctive.)

* For citations, see addendum to this article.

** The following countries are parties to a multilateral consular convention (1928) relating to duties, rights, prerogatives, and immunities of consular agents, w/o mentioning administration of estates: Brazil, Colombia, Cuba, Dominican Republic, Ecuador, El Salvador, Haiti, Mexico, Nicaragua, Panama, Peru, U.S., Uruguay. 47 Stat. 1976.

*** Most-favored-nation clauses, a weighty topic in themselves, are referred to here only by way of a reminder.

(d) *Tax Treaties*

The only Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion in the Case of Estate Taxes and Succession Duties between two countries of the Western Hemisphere at the present time is that between the United States and Canada. Signed originally at Ottawa in 1944,[46] it has been supplemented and modified twice: the first time by a convention signed at Ottawa on June 12th, 1950, entered into force April 9th, 1962, and operative January 1st, 1959, and a second time by one signed at Washington February 17th, 1961, entered into force April 9th, 1962, and operative January 1st, 1959, necessitated by changes in Canadian law adopting an estate tax to replace its succession tax.[47]

To date, United States conventions of this type have been made mostly with leading European powers; [48] there have been none with Latin American nations.[49] Canada has a similar convention with the United States covering income taxes,[50] and for awhile the Netherland Antilles was particularly attractive to those who took advantage of a loophole in a similar convention between the United States and the Netherlands with respect to income taxes. (A recent Protocol with The Netherlands entered into force September 29th, 1964, changing the U.S. tax rate on dividends, interest, and royalties received from U.S. sources by Netherlands Antilles investment companies owned by persons *not* residents of the Netherlands or Antilles.[51]) Great Britain's convention and protocol and supplementary protocols [52] for the avoidance of double taxation and prevention of fiscal evasion with respect to taxes on *income* has been extended to Ja-

[46] 59 Stat. 915.

[47] Re supplementary conventions see 13 UST 382.

[48] See addendum to this article for citations to conventions with France for avoidance of double taxation re estates, which provide for extension to French colonies by written notification.

[49] But a U.S. Treaty with Brazil re income taxes is in preparation.

[50] 56 Stat. 1399.

[51] Re Convention with the Netherlands with respect to taxes on income and certain other taxes, see 62 Stat. 1757 (1948); re Protocol supplementing the convention (1955) see 6 UST 3696; re Agreement relating to the application of the income tax convention of 1948 as modified and supplemented by the 1955 protocol, to the Netherlands Antilles, see 6 UST 3703; re Protocol which entered into force Sept. 29, 1964, see Commerce Clearing House Sec. 5832 B, also Sec. 9845.

[52] 60 Stat. 1377; supplementary protocol (1954) 6 UST 37; supplementary protocol (1957) 9 UST 1329.

maica,[53] but there is no convention applicable at present with respect to taxes on *estates*.[54] The interested reader should watch developments closely.

An indication of future tax laws may be seen in the Mexican and London drafts of Bilateral Conventions for the Prevention of the Double Taxation of Successions, which presage fewer and smaller loopholes in the future.[55]

Application of Treaty Law

The right of disposition and succession to property of a decendent is ordinarily a matter of local or municipal law.[56] In the United States, the right of either a citizen or an alien to dispose of his property by will, and to succeed to the property of a decendent, has always been considered a privilege granted by the State, and within legislative control.[57]

Since this article is concerned with the overriding effect of treaty law, we are here dealing essentially with aliens: an alien of the sending or receiving state.[58] Although this fact may not be readily ascertainable from a bare reading of the treaty provisions themselves,

[53] Application of convention, as supplemented, extended to Jamaica Jan. 1, 1959, for both U.S. and Jamaican tax as provided in the agreement effected by exchange of notes Aug. 19, 1959 and Dec. 3, 1958 between U.S. and U.K. relating to the application of the convention to specified British territories. 9 UST 1459. Application of convention, as supplemented, was also extended to Trinidad and Tobago but more recently terminated.

[54] See CCH Tax Treaties, Outline of Death Duty and Gift Tax Treaties, New Developments Sec. 9978, pp. 9957 to 9960, including list and scope of treaties.

[55] See *Legislative History of United States Tax Conventions*, Prepared by the Staff of the Joint Committee on Internal Revenue Taxation, (in Four Volumes). For Mexico Draft, see Vol. 4, p. 85; for London draft, see Vol. 4, p. 86. For commentary on Model Bilateral Convention, see p. 34 *et seq.* of Vol. 4. For list of countries with which U.S. has death tax conventions, see Vol. 3, p. 2965.

[56] In civil law countries, inheritance law is usually set forth in detail in the Civil Code of the particular country. (In Mexico, with its federal and state system, patterned on the United States, it is the Civil Code for the Federal District and Territories which contains inheritance law. Article 1328 of the Code states: "For lack of international reciprocity, aliens who under the laws of their own country cannot make wills or leave their property through intestacy in favor of Mexicans, are incompetent to inherit by will or intestacy from inhabitants of the Federal District and Territories." Re construction of consular treaty between U.S. and Mexico, see Evans v. Cano de Castillo, 245 S.W. 2d 947 (1952).

[57] U.S. v. Fox, 94 U.S. 315 (1876), also U.S. v. Perkins, 163 U.S. 625 (1896).

[58] Sullivan v. Kidd, 254 U.S. 433.

the Supreme Court of the United States has on various occasions [59] pointed out that where a state of the United States is dealing with its own citizen, treaty law is not applicable, and it is local law (that is, state law) which governs.

"Every state and sovereignty possesses the power of regulating the manner and terms upon which property, *real or personal,* within its dominion, may be transmitted by inheritance or last will and testament, and of prescribing who shall and who shall not be capable of transmitting or taking it." [60] (The rule prevailing within the United States, that personalty has as its situs the domicile of the testator does not obtain in the international realm.) [61] It is, of course, an established principle of law, universally recognized, that immovable property is subject to the exclusive jurisdiction of the state or government within whose borders the property is situated.[62] At common law an alien could take real estate by deed or purchase, but could neither take nor transmit title by descent, because he lacked "Inheritable blood." [63] State statutes, in most states of the United States, have modified the common law, but these are by no means uniform. State reciprocity statutes make it difficult for many non-residents to qualify as beneficiaries of an estate in their jurisdictions.[64] A state can exercise power which has legal effect abroad. The extent to which it may do so is defined in the Restatement:[65]

> Within its boundaries a state can exercise its powers so as to have legal effect abroad, except in so far as such exercise of power is contrary to the principles of the common law that govern jurisdiction, or to a constitutional provision limiting the power of the state, *or to some treaty or other formal act to which the state is a party.*

[59] Clark v. Allen, 331 U.S. 503 (1947); see also Sullivan v. Kidd, note 58 *supra.*

[60] Plummer v. Coler, 178 U.S. 115; see also Mager v. Grima, 8 How. 490.

[61] "At present," says Dr. Bayitch in *Conflict Law in United States Treaties,* p. 7, "each country establishes for itself its own conflict law. Consequently, rules in force in different countries may lead, under the same circumstances, to different results." Many civil law countries adhere to the contact of nationality. Reference to the law of a specific country may turn up problems of terminology, *i.e.,* what constitutes a "citizen" or "resident" under the local law of one jurisdiction, may be different from the definition used in another.

[62] McCormick v. Sullivan, 10 Wheat. 202.

[63] Blackstone's *Commentaries,* Book I, p. 372.

[64] For list of states with such statutes, see Meekinson, "Treaty Provisions for the Inheritance of Personal Property," 44 *Am. J. Int. L.* 331.

[65] Restatement of the Law of Conflict of Laws, as adopted by the American Law Institute at Washington, D.C. May 11, 1934, Sec. 44.

Treaty law is superior law, displacing local law which conflicts with it. Treaties made under the authority of the United States are a part of the supreme law of the land.[66] Treaty law, however, does not operate in a sphere all its own. It must be considered within the framework of other applicable law. For example, it is domestic law which determines "whether a treaty becomes automatically a part of municipal law binding on the courts, or whether action by a national legislative body is necessary to give local effect to the treaty as a rule of law." [67] A treaty is regarded as self-executing if it may be enforced by the courts without further legislation. Canadian and British Commonwealth practice differs from that of the United States, in that with respect to the former, legislation is generally considered necessary.[68] However, a number of Latin American countries follow the United States system.[69]

Where a treaty contains a requirement of reciprocity, the local law of both the receiving and sending states must be considered.[70] Because of the traditionally strong states-rights doctrine in the United States pertaining to real property, the United States government has generally refrained from making treaties which would contravene state statutes denying an alien the right to acquire realty through inheritance.[71]

Case Law Interpretation

In so far as treaties with Latin American nations affecting inheritance rights are concerned, the Treaty with Argentina appears to have been most often considered and construed by courts of the United States. And it is the provision in that treaty with respect to the right of consular administration which has attracted the lion's share of judicial attention.

Rocca v. Thompson [72] involved an Italian who died intestate in California in 1908, leaving a personal estate there and a widow

[66] Constitution of the United States, Article 6.

[67] Bishop, *International Law,* Second Edition, at p. 140.

[68] *Id.;* see also Hynning, "Treaty Law for the Private Practitioner," 23 *U. of Chi. L. Rev.* 36 (1955).

[69] For example, Argentina, Mexico, Paraguay. See Bishop, *International Law,* 2d Ed. at p. 141.

[70] In Rocca v. Thompson, 223 U.S. 317 (1912) it was pointed out that the treaty under consideration must be examined in the light of the civil law as well as of the common law.

[71] William Marion Gibson, *Aliens and the Law,* University of North Carolina Press, 1940, pp. 35-36.

[72] 223 U.S. 317.

and minor children in Italy. Rocca, Consul General of Italy in California, applied for letters of administration in that state, while Thompson, the public administrator there, sought to be granted administration himself. The Superior Court of California held for Thompson, and the Supreme Court of California affirmed. The Consul General based his claim to administer upon a most-favored-nation clause in the Treaty of 1878 with Italy, read in conjunction with article IX of the treaty signed July 27th, 1853, between the United States and Argentina, which provides:

> If any citizen of either of the two contracting parties shall die without will or testament, in any of the territories of the other, the Consul-General or Consul of the nation to which the deceased belonged. . . . shall have the right to intervene in the possession, administration and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs.

On writ of error to the Supreme Court of the United States, Justice Day, speaking for the Court said:

> . . . it is apparent that the question at the foundation of the determination of the rights of the parties is found in the proper interpretation of the clause of the Argentine treaty . . . The question is: Does that treaty give to consuls of the Argentine Republic the right to administer the estate of citizens of that Republic dying in the United States, and a like privilege to consuls of the United States as to citizens of this country dying in the Argentine Republic? . . . A consular officer is by the law of nations and by statute the provisional conservator of the property within his district belonging to his countrymen deceased therein. He has no right, as a consular officer, apart from the provisions of treaty, local law, or usage, to administer on the estate, or in that character to aid any other person in so administering it, without judicial authorization. . . . It is, however, generally conceded that a consular officer may intervene by way of observing the proceedings, and that he may be present on the making of the inventory. Our conclusion then is that, if it should be conceded for this purpose that the most-favored-nation clause in the Italian treaty carries the provisions of the Argentine treaty to the consuls of the Italian Government in the respect contended for (a question unnecessary to decide in this case), yet there was no purpose in the Argentine treaty to take away from the States the right of local administration provided by their laws, upon the estates of deceased citizens of a foreign country, and to commit the same to the consuls of such foreign nation, to the exclusion of those entitled to administer as provided by the

> local laws of the State within which such foreigner resides and leaves property at the time of his decease.

So saying, the Court affirmed. This provision in the Argentine treaty has been construed by different Surrogate Courts of New York,[73] as well as by the Supreme Court of Alabama,[74] and the Supreme Judicial Court of Massachusetts [75] as giving the foreign consul the right to original administration in preference to one entitled under the local state statutes. Compare *In re Logiorato's Estate,*[76] a case in the New York County Surrogate's court.

The provision relating to consular administration in the Argentine treaty was again considered in the U.S. Supreme Court case of *Santovincenzo v. Egan* [77] (which, like *Rocca v. Thompson,* was also concerned with the most-favored-nation clause of the Consular Convention of 1878 with Italy, as well as a treaty with Persia). Decedent was an Italian subject domiciled in New York. The Court said, in part:

> The provision of Article VI of the Treaty with Persia does not contain the qualifying words *conformably with the laws of the country* (where the death occurred) *as in the case of the Treaty between the United States and the Argentine Confederation of 1853.* . . . The omission from Article VI of the Treaty with Persia of a clause of this sort, so frequently found in treaties of this class, must be regarded as deliberate.

In *Brown v. Daly's Estate,*[78] an Iowa Court held that Article IX, which was considered with regard to the most-favored-nation clause in the 1899 treaty with Great Britain, protected an Argentine heir from discriminatory inheritance taxes. In this case the Court also expressed the view that "the right of a donee to receive is something that concerns the right of disposing."

The provision frequently included in treaties of peace and friendship that there shall be no higher imposts or duties than those which are paid by citizens or inhabitants sounds deceptively simple; hence it should be considered in the light of interpretations such as that of the U.S. Supreme Court in *Peterson v. Iowa,* 245 U.S. 170.

Mexico's Consular Convention was examined by the Supreme

[73] In re Fattosini's Estate, 67 N.Y.S. 1119; In re Silvetti's Estate, 122 N.Y.S. 400.

[74] Carpigiani v. Hall, 172 Ala. 287.

[75] McEvoy v. Wyman, 191 Mass. 276 (1906).

[76] 69 N.Y.S. 507.

[77] 284 U.S. 30 at p. 36-7.

[78] 154 N.W. 602 (1915). See also Meekinson, *loc. cit.,* p. 326.

Court of Arkansas in a 1952 case involving a Mexican national who died intestate in Arkansas.[79] The question at issue was the right of the Mexican Consul to be appointed as administrator, the objection being raised that the Consul was a resident of Tennessee and not of Arkansas. The Consul argued that in accordance with Article VIII, Section 2 of the United States Treaty with Mexico, a consular officer shall have such right "provided the laws of the place where the estate is administered so permit"; further, that in the Mexican Treaty, the United States had agreed to accord to Mexico the same treatment the United States accorded to the most-favored nation, and that under the treaty proclaimed March 20, 1911, between the U.S. and Sweden, the U.S. had agreed that a Swedish Consul could be appointed administrator in a case similar to the one at bar. The decision upheld the appointment of the Mexican Consul, the Supreme Court of Arkansas interpreting same as the appointment of a Special Administrator.

In *Clark v. Allen,* [80] the United States Supreme Court interpreted treaty provisions [81] relating to real and personal property, the text of which is identical with that in the United States Treaty with Honduras. With respect to realty, the Court upheld the treaty provisions, saying that if they "have not been superseded or abrogated, they prevail over any requirements of California law which conflict with them." With regard to the personalty, however, the court held that the provisions of Article IV of the Treaty of 1923 with Germany, which assures to German nationals the power to dispose of their personal property in the United States, does not cover personalty located in this country which an American citizen undertakes to leave to German nationals, but does cover personalty in this country which a German national undertakes to dispose of by will. An oft-quoted and controversial case,[82] *Clark v. Allen* contains thought-provoking language. In citing *Frederickson v. Louisiana,*[83] for example, the Court said:

> That decisions was made in 1860 . . . the consistent judicial construction of the language since 1860 has given it a character which the treaty making agencies have not seen fit to alter, and that construction is entirely consistent with the plain language of the treaty. We therefore do not deem it appropriate to change that construction at this late date, even though as an original matter the other view might have much to recommend it.

[79] Evans *et al.* v. Cano de Castillo, 247 S.W. 2d 947.
[80] 331 U.S. 503.
[81] In the Treaty with Germany of 1923.
[82] For a critical evaluation, see Meekinson, *loc. cit.,* p. 313.
[83] 23 Howard 445.

For a broad list of cases construing the various treaties with Great Britain, see Volume 14 of the United States Supreme Court Digest Annotated, at page 398, under "Treaties and Agreements with Foreign Nations." A further list of cases referring to treaties is in the same volume, by country, commencing on page 5. Shepard's United States Citations—Statutes—contains citations to cases which refer to United States Treaties and other International Agreements. Additional helpful information may be obtained from Hynning's article, "Treaty Law for the Private Practitioner." [84]

Conclusion

Treaty law, even as limited to inheritance rights within the Western Hemisphere, is an exhaustive and exhausting subject. As Hynning says, "the sources of treaty law in the United States are not easy to find or use . . . Nor is there any ready and reliable means of finding court decisions involving treaties and agreements." One could easily spend years at the task, to do a thoroughly comprehensive job. It is hoped that this article may provide a helpful starting point for other lawyers in their search for specific answers to their own particular problems.

[84] See note 68 *supra*.

TABLE OF CITATIONS TO TEXT OF TREATY ARTICLES OF BILATERIAL TREATIES OF THE U.S. IN FORCE AS OF JANUARY 1, 1967 AFFECTING INHERITANCE RIGHTS IN THE WESTERN HEMISPHERE

Country	*Type of Treaty*	*Signed*	*Entered into Force*	*Citations to Text of Treaty*	*Treaty Article*
Argentina	Friendship, Commerce and Navigation	1853	December 20, 1954	10 Stat. 1005; TS 4; 1 Malloy 20	Article IX
Bolivia	Peace, Friendship, Commerce & Nav.	1858	November 9, 1862	12 Stat. 1003; TS 32; 1 Malloy 113	Article XII
Brazil	Peace, Friendship, Commerce & Nav.*	1828	March 18, 1829; operative 12/12/28	8 Stat. 390; TS 34; 1 Malloy 133	Article XI
Canada	Treaties with Great Britain.	See United Kingdom (1) and (2), this table.			
"	Convention for avoidance of double taxation re estates	1944	February 6, 1945	59 Stat. 915; TS 989; 124 UNTS 297	read in entirety
"	Convention for avoidance of double taxation re estates supplementing 1944 convention	1950	November 21, 1951	2 UST 2247; TIAS 2348; 127 UNTS 57	read in entirety
"	Convention for avoidance of double taxation re estates supplementing 1944 and 1950 conventions	1961	April 9, 1962	13 UST 382; TIAS 4995; 445 UNTS 143	read in entirety
Chile	Peace, Amity, Commerce & Nav.	1832	April 29, 1834	8 Stat. 434; TS 40; 1 Malloy 171	Article IX
Colombia	Peace, Amity, Navigation & Commerce	1846	June 10, 1848	9 Stat. 881; TS 54; 1 Malloy 302	Article XII
"	Consular Convention **	1850	October 30, 1851	10 Stat. 900; TS 55; 1 Malloy 314	Article III, Paragraph 3 & 10
Costa Rica	Friendship, Commerce and Navigation	1851	May 26, 1852	10 Stat. 916; TS 62; 1 Malloy 341	Article VIII
" "	Consular Convention	1948	March 19, 1950	1 UST 247; TIAS 2045; 70 UNTS 27	Article IX

Country	*Type of Treaty*	*Signed*	*Entered into Force*	*Citations to Text of Treaty*	*Treaty Article*
Cuba	Consular Convention	1926	December 1, 1926	44 Stat. 2471; TS 750; IV Trenwith 4048; 60 LNTS 371	Article XIII and Article XIV
Ecuador	Peace, Friendship, Nav. & Commerce	1839	April 9, 1842	8 Stat. 534; TS 76; 1 Malloy 421	Article XII
France	Consular Convention ***	1853	August 11, 1853	10 Stat. 992; TS 92; 1 Malloy 528	Article VII
"	Convention for avoidance of double taxation re estates ****	1946	October 17, 1949	64 Stat. (3) B3; TIAS 1982; 140 UNTS 23	Articles 4 & 5
"	Protocol modifying 1946 convention for avoidance of double taxation re estate ****	1948	October 17, 1949	64 Stat. (3) B28; TIAS 1982; 140 UNTS 50	read in entirety
"	Convention supplementing above conventions ****	1956	June 13, 1957	8 UST 843; TIAS 3844; 291 UNTS 101	read in entirety
Guatemala	Peace, Amity, Commerce & Navigation	1849	May 13, 1852	10 Stat. 875; TS 149; 1 Malloy 861	Article XI
"	Convention re Real & Personal Prop.	1901	September 26, 1902	32 Stat. 1944; TS 412; 1 Malloy 876	Art. I, II, III
Honduras	Friendship, Commerce & Consular Rights	1927	July 19, 1928	45 Stat. 2618; TS 764; IV Trenwith 4306; 87 LNTS 421	Art. IV (see also XXIII & XXIV)
Jamaica	Treaties with Great Britain.	See United Kingdom (2) and (3) this table.			
Mexico	Consular Convention	1942	July 1, 1943	57 Stat. 800; TS 985; 125 UNTS 301	Art. VIII & IX
Netherlands	Convention re Consuls in Colonies	1855	May 25, 1855	10 Stat. 1150; TS 253; 11 Malloy 1251	Art. XI & XIV
Nicaragua	Friendship, Commerce & Navigation & Prop.	1956	May 24, 1958	9 UST 449; TIAS 4024; 367 UNTS 3	Art. IX, XI and XII
Paraguay	Friendship, Commerce & Navigation	1859	March 7, 1860	12 Stat. 1091; TS 272; 11 Malloy 1364	Article X
United Kingdom	(1) Treaty with Great Britain	1794	October 28, 1795	8 Stat. 116; TS 105; 1 Malloy 590	Article IX

"	"	(2) Convention re real & Personal prop.*****	1899	August 7, 1900	31 Stat. 1939; TS 146; 1 Malloy 774	Art. I, II, III
"	"	(3) Consular Convention	1951	September 7, 1952	3 UST 3426; TIAS 2494; 165 UNTS 121	Part VII, Art. 18 and 19
"	"	(4) Convention for avoidance of double taxation re estates	1945	July 25, 1946	60 Stat. 1391; TIAS 1547; 6 UNTS 359	Article X
Venezuela		Peace, Friendship, Nav. & Commerce	1836	May 31, 1836	8 Stat. 466; TS 366; 11 Malloy 1831	Article 12

* All articles terminated Dec. 12, 1841, except those relating to peace and friendship.
** Colombia is also a party to a multilateral convention re consular agents: 47 Stat. 1976.
*** Applies only to French citizens in the United States, not to French colonies in Western Hemisphere.
**** Applies to French citizens in the United States, and provides for extension to colonies by written notification.
***** Applicable to Puerto Rico, Jamaica, Trinidad and Tobago, Canada, also to Bahamas, Barbados, Bermuda, Falkland Islands, British Guiana, British Honduras, Leeward Is., St. Helena, St. Lucia, St. Vincent. Entered into force in territories of Western Hemisphere on various dates.
Supplementary convention re accession of colonies or foreign possessions; 32 Stat. 1914;
Supplementary convention providing for accession of Canada: 42 Stat. 2147;
Supplementary convention re application and termination of convention of 1899 to colonies & possessions: 55 Stat. 1101.