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EFFECT OF PROBATE CODE UPON THE CLAIMS OF ALIEN NONRESIDENTS TO SHARE IN CALIFORNIA ESTATES

By GRAHAM KELLY

A lawyer examining the claim of an alien nonresident to share in a California estate will find a variety of laws in federal treaties, the state Constitution and codes and in state and federal decisions which govern such claims. California, contra to the common law, was originally extremely liberal in granting rights to alien claimants. The original rule still exists as Civil Code section 671: "Any person, whether citizen or alien, may take, hold, and dispose of any property, real or personal, within this state." The word "take" was interpreted to include an alien's taking by will or intestate succession.¹

The state Constitution, article 1, section 17, provides: "Resident aliens of the white or African race and who are eligible to citizenship have the same rights to transmit or inherit all property, other than real estate, as native born citizens." This section has been construed to protect the designated rights of the described groups from legislative infringement upon those rights,² but not to restrict the Legislature from granting other or greater rights to these groups or to other groups not included in the description.³ Under this interpretation, Civil Code section 671 did not conflict with this section of the Constitution and validly extended such greater right to all aliens.

History of Probate Code Section 259 et seq.

The newest additions to these general regulations are Probate Code sections 259, 259.1 and 259.2.⁴ These sections introduced the principle of reciprocity as limiting the right of an alien nonresident to take by will or intestacy from a California estate.⁵

¹Billings v. Hauver, 65 Cal. 593, 4 Pac. 639.

²Blythe v. Hinckley, 127 Cal. 431, 59 Pac. 787.

³*Ibid.*, State v. Smith, 70 Cal. 153, 12 Pac. 121.

⁴1941 version: Sec. 259: *Aliens residing abroad: Dependence of rights upon reciprocity.* The rights of aliens not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this state by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are inhabitants and citizens and upon the rights of citizens of the United States to receive by payment to them within the United States or its territories money originating from the estates of persons dying within such foreign countries.

Sec. 259.1: *Same: Burden of establishing that rights are reciprocal.* The burden shall be upon such nonresident aliens to establish the fact of existence of the reciprocal rights set forth in section 259.

Sec. 259.2: *Same: Disposition of property on finding of nonreciprocity.* If such reciprocal rights are not found to exist and if no heirs other than such aliens are found eligible to take such property, the property shall be disposed of as escheated property.

⁵Estate of Bevilacqua, 31 Cal.2d 580; Estate of Knutzen, 31 Cal.2d 574.

Originally effective in December, 1941, these sections denied any right in alien nonresidents to share in either realty or personalty unless American citizens would have the right to take property of the same class from an estate in the country of the alien's residence on a basis of equality with nationals of that country; and furthermore, the proceeds of property so passing to an American citizen by will or succession must, as a matter of right, be payable within the United States or its territories in American money. The burden of proving such reciprocal rights was placed upon the nonresident alien claiming an interest in a California estate.

In September, 1945, amendments became effective which combined all provisions into a single new section 259, deleted the requirement that the proceeds of a foreign estate must be receivable in American money within the United States, and created a disputable presumption that reciprocal rights did exist, thus shifting the burden of proof to one disputing the right of an alien to take because of section 259.

New amendments, effective in September, 1947, substantially reinstated the 1941 sections, returning the burden of proof to the alien claimant, but not requiring that the proceeds of a foreign estate be payable within this country.

From 1941 to the present time the law has stated that if all alien claimants were barred by section 259 et seq., from taking and if there were no persons resident within the United States or its territories who were qualified to take the estate, all undistributed property should escheat to the state.

During the war, the Alien Property Custodian was empowered to vest in himself all the right, title and interest of aliens of many nationalities in property within American territory.⁶ Under his "vesting orders" the United States asserted claims to many California estates.⁷ Resulting litigation produced authoritative interpretations of most of the present statutory wording, if we assume that like phrases in like statutes will be interpreted identically.

Constitutionality of Sections

These sections have held up under repeated attacks upon their constitutionality. They prevailed over assertions that they were in conflict with the

⁶"Trading With the Enemy Act," 40 Stats. 411, chap. 106; 50 U.S.C. App., sec. 1 et seq., as amended.

⁷Estate of Knutzen, 31 Cal.2d 573; Estate of Bevilacqua, 31 Cal.2d 580; Estate of Blak, 65 Cal.App.2d 232; Estate of Michaud, 53 Cal.App.2d 835; Estate of Carcofingas, 24 Cal.2d 519; Estate of Thramm, 67 Cal.App.2d 659 and 80 Cal.App.2d 756; Estate of Brast, 69 Cal.App.2d 705; Estate of Giordano, 85 Cal.App.2d 588; Crowley v. Allen, 52 F.Supp. 850; Allen v. Markham (9th C.C.A.), 147 F.2d 136; Markham v. Allen, 326 U.S. 490, 90 L.Ed. 256, 66 S.Ct. 296; Allen v. Markham (9th C.C.A.), 156 F.2d 653; Clark v. Allen, 331 U.S. 503, 91 L.Ed. 1633, 67 S.Ct. 1431; see, also, Estate of Nielsen, 118 Mont. 304, 165 P.2d 792; Duke of Richmond v. Milne, 17 La. 312, 36 Am.Dec. 613.

exclusive grant of treaty-making powers to the federal government,⁸ that they were an interference with the control of foreign affairs,⁹ that they invaded federal control over interstate and foreign commerce,¹⁰ that they were an illegal deprivation of an "inherent natural right to take by will or succession,"¹¹ that they conflicted with federal war powers¹² including the right to make "captures upon land" of the property of enemy aliens,¹³ that they denied "due process,"¹⁴ and that they constituted a statute of forfeiture¹⁵ or of retribution and confiscation within the domain of federal power over foreign affairs.¹⁶ In the *Bevilacqua* case¹⁷ the California Supreme Court held that the sections did not constitute a "special law" within the ban of section 25 of article IV of the state Constitution. The subject matter is within legislative control and the statute operates uniformly on all persons within the same class, and it cannot be said that there is an arbitrary classification.¹⁸

While constitutionally sound, the statute is subordinate to any treaty granting conflicting rights to aliens. Rights to succession to property are determined by local law, but those rights may be controlled by an overriding federal policy, as where a treaty makes different or conflicting arrangements, in which case the state policy must give way.

Effect of Treaties

The provisions of (a federal) treaty, until superseded or abrogated, will prevail over any conflicting requirements of California law.¹⁹ Treaties are the supreme law of the land. The effect of a treaty upon a conflicting state law of succession is not to void the state law, but to suspend its operation to the extent that it conflicts with the treaty and only during the life of that treaty.²⁰ This raises the question of when a treaty terminates otherwise than by its own terms or by express renunciation.

In *Clark v. Allen* the treaty at issue was a general treaty with Germany.²¹ It was contended that the complete treaty, including sections governing recip-

⁸Clark v. Allen, 331 U.S. 503; Allen v. Markham, 156 F.2d 653.

⁹Clark v. Allen, 331 U.S. 503.

¹⁰170 A.L.R. 966, Annotations, covering many constitutional challenges to these and similar statutes; see, also, 137 A.L.R. 1328, 147 A.L.R. 1297, 150 A.L.R. 1418, 152 A.L.R. 1450.

¹¹Estate of Knutzen, 31 Cal.2d 573; Estate of Bevilacqua, 31 Cal.2d 580.

¹²Allen v. Markham, 156 F.2d 653.

¹³*Ibid.*

¹⁴Estate of Bevilacqua, 31 Cal.2d 580; Estate of Hill, 179 Cal. 683.

¹⁵Estate of Bevilacqua, 31 Cal.2d 580; Estate of Knutzen, 31 Cal.2d 573; Estate of Giordano, 85 Cal.App.2d 588.

¹⁶Allen v. Markham, 156 F.2d 653.

¹⁷Estate of Bevilacqua, 31 Cal.2d 580.

¹⁸*Ibid.*

¹⁹Clark v. Allen, 331 U.S. 503.

²⁰Byrne I. Drain, 127 Cal. 663; Blythe v. Hinkley, 127 Cal. 433; affirmed, 180 U.S. 333, 45 L.Ed. 557, 21 S.Ct. 390.

²¹1923 Treaty of Friendship, Commerce, and Consular Rights with Germany.

rocal rights to take property, was abrogated either by the outbreak of war with Germany or by the unconditional surrender and collapse of its government in 1945. The United States Supreme Court held that treaty rights to take reciprocally still existed in full force although other treaty provisions had been annulled. The outbreak of war does not necessarily suspend or abrogate treaty provisions, but there may be such an incompatibility between a particular treaty provision and maintenance of a state of war as to make it clear that it should not be enforced, or the President or Congress may have formulated a national policy inconsistent with enforcement of a treaty in whole or in part.²²

The Trading with the Enemy Act and various executive orders were not incompatible with continuance of treaty provisions as to inheritance.²³ Vesting an alien's interest in an agency of the government (Alien Property Custodian) is discretionary and does not deprive the alien of all benefits of inheritance (the assets may be applied to pay his American creditors).²⁴

Generally, treaty provisions permitting subjects of one power "to continue to hold and transmit land in the territory of the other survive the outbreak of war."²⁵

Whether a state is in a position to perform its treaty obligations is essentially a political, not a judicial question.²⁶ Where there is "no evidence that the political departments have considered collapse and unconditional surrender of (a country) as putting an end to such provisions of a treaty as survived the outbreak of war or obligations of either party with respect to them," this court will not hold that a provision in the treaty relating to testamentary disposition of realty had failed to survive the war because, as a result of defeat and occupation, the other party had allegedly ceased to exist as an independent or international community.²⁷

Congress may enact a rule inconsistent with continued observance of a treaty and Congress's action would control the action of the courts.²⁸ "While war is still flagrant and the will of the political departments unrevealed," . . . "as one provision or another (of a treaty) is involved in some actual controversy," the courts must "determine whether, alone, or by force of connection with an inseparable scheme, the provision is inconsistent with the policy or safety of the nation in the emergency of war, and hence, presumably

²²Clark v. Allen, 331 U.S. 503, 508-509.

²³*Ibid.*, 510.

²⁴*Ibid.*, 511.

²⁵*Ibid.*, 512.

²⁶*Ibid.*, 514.

²⁷*Ibid.*, 514.

²⁸*Ibid.*, 509.

intended to be limited to times of peace. The mere fact that other portions of the treaty are suspended, or even abrogated is not conclusive."²⁹

By clear implication, treaties with governments which have gone into exile have full force and validity so long as the federal government recognizes such governments even though a government's native land is completely occupied by enemy military forces or governed de facto by a different group.

Purpose and Effect of Reciprocity Requirement

"The obvious purpose of the statute was to permit a nonresident alien to inherit when the laws of his country would permit an American citizen to inherit under the same circumstances."³⁰

The reciprocal rights need not be immediately enforceable in the country of the alien's residence to satisfy section 259. The Legislature was concerned only with the existence of rights accorded to United States citizens by and under the legally-constituted and recognized laws and government of the country of which the alien claimant was a citizen and resident . . . knowing that such rights persist . . . in spite of the immediate fluctuations of war, and that, at most, the remedies for the enforcement of the right may be temporarily suspended.³¹

The statute states a condition precedent to the existence of any right in an alien to share in any way in a California estate.³² The state has power to regulate the right of inheritance and succession and testamentary disposition of property within the state.³³ In *Estate of Knutzen*³⁴ an intestate decedent left as his next of kin a brother in California and two sisters and a brother as resident nationals in Germany. The Alien Property Custodian vested the interest of the German relatives in himself and asserted that they had taken a defeasible interest at death, that section 259 was not self-executing but merely provided for defeasance or forfeiture and that their interest having passed to one not barred from taking or holding prior to any action to defeat or forfeit the aliens' interest, section 259 could not be invoked to defeat him. Early California cases³⁵ supported the assertion that an alien would take a

²⁹*Ibid.*, 509-510.

³⁰*Estate of Blak*, 65 Cal.App.2d 232.

³¹*Estate of Knutzen*, 31 Cal.2d 573.

³²*Estate of Michaud*, 53 Cal.App.2d 835.

³³*Allen v. Markham*, 156 F.2d 653, citing 314 U.S. 556.

³⁴*Estate of Knutzen*, 31 Cal.2d 573.

³⁵5 Cal. 373, 2 Cal. 588, 26 Cal. 455, 32 Cal. 376. These California cases represent an extension to cover intestate succession of the common-law rule that "an alien could take title by gift, grant, bequest or devise which would be good against all the world except the sovereign, and that such alien could convey to a non-alien an indefeasible title at any time prior to "Inquest of Office" or other proceeding, or legislative act equivalent thereto (to effect a defeasance or forfeiture). The rule did not apply to succession by descent. The rule was applied to land in *Fairfax v. Hunter* (1813), 7 Cranch (U.S.) 603, 3 L.Ed. 453, and to personalty in *Marshall v. Conrad* (1805), 5 Call (Va.) 364, which paraphrased Lord Coke in *Croft's Case*.

defeasible title by succession. The California Supreme Court held that none of these cases involved a statute like 259.

"Its clear purpose is to regulate succession. The right to succession is not an inherent or natural right, but one which exists only by statutory authority, and it is only by virtue of the state that the heir is entitled to receive any of his ancestor's estate."³⁶ "The proper construction is that sections 259 et seq. are laws of succession, that they constitute limitations on the power of aliens to inherit, and that nonresident aliens . . . acquire no rights in the estate in the absence of reciprocal rights. . . ."³⁷

If reciprocal rights or treaty rights are proven to exist as to realty or personalty but not both, an alien may take property of the class as to which such rights exist, but may be barred from taking the other class.³⁸ A further problem (unlitigated) arises where reciprocity exists as to "realty or other immovable property or interests therein,"³⁹ since "immovables" as defined in private international law does not follow Anglo-Saxon divisions between real and personal property. Section 259 is now phrased to reflect this subdivision of reciprocal rights as to realty and personalty, treating them separately.

When Applicable

The statute is applicable whenever it is shown that one or more of those who would otherwise have an interest in the estate is an alien nonresident. While the statute is normally invoked by a party claiming adversely to such alien, it may be raised by the court of its own motion.⁴⁰

The statute bars only those claimants who are both aliens and nonresidents of the United States or its territories. In *Estate of Brast* testatrix devised realty to her niece . . . "of County Mayo, Ireland." The niece sued to set aside a deed to the realty made by testatrix in a period of great mental and physical weakness shortly prior to death. Defendant asserted that the niece was unable to maintain the suit because barred of any interest by section 259. The court held that in the absence of proof of the niece's alienage the section could not be invoked.⁴¹

Applicable to Whom

If one otherwise barred by section 259 seeks to avoid its bar by asserting overriding treaty rights he may of course base his claim upon such treaty in the state court and appeal if necessary to the United States Supreme Court. Alternatively he may go into the federal courts while probate is pending.

³⁶*Estate of Knutzen*, 31 Cal.2d 573, citing 314 U.S. 556, 21 Cal.2d 561, 191 Cal. 591, 117 Cal. 281.

³⁷*Ibid.*, accord, *Estate of Bevilacqua*, *Estate of Giordano*.

³⁸*Clark v. Allen*, 331 U.S. 503.

³⁹1923 Treaty of Friendship, Commerce, and Consular Rights with Germany.

⁴⁰*Estate of Knutzen*, 31 Cal.2d 573.

⁴¹*Estate of Brast*, 69 Cal.App.2d 705.

Federal courts may entertain suits in favor of creditors, legatees, and heirs and other claimants under federal law against a decedent's estate to establish their claims as a "civil suit in the nature of equity" so long as federal courts do not interfere with probate proceedings or assume general jurisdiction of the probate or control of the property in custody of state courts. The state court is bound by the judgment to recognize a right adjudicated by a federal court.⁴²

Section 259.1 places the burden of proof of reciprocity upon the alien nonresident who claims an interest in the estate.⁴³ The burden remains upon any successor to that interest or any person claiming rights dependent upon the alien claimant's interest. The Alien Property Custodian, upon vesting the supposed interest of an alien in himself, was held bound to satisfy section 259 (if raised) before he could show any interest.⁴⁴ When a relative of decedent sought letters of administration as sole heir and testified without contradiction that all nearer relatives, all those named in decedent's will, were nonresident aliens, he was entitled to rely upon the statute and the public administrator had no priority of right to administer the estate unless he first satisfied section 259.⁴⁵ The public administrator's sole claim to the right to administer depends upon a showing that the claimant is not "the next of kin entitled to share in the estate" (Prob. Code, 422). Incapacity of the heirs first entitled to succeed to property will not effect an escheat, but the property will pass to the persons next entitled to take as though the first heirs had never existed.⁴⁶ The resident claimant need not be of equally close degree of kinship as the nonresident alien claimants⁴⁷ nor need he claim through ancestors who would not have been ineligible because of alienage.⁴⁸ Section 259 when construed with the common law rule of escheat stated above entitled the resident heir to take. The public administrator has not shown that the local claimant is not the "next of kin entitled to share in the estate" since the right of all nearer relatives depends upon section 259 and 259.1 which require that the alien establish the existence of reciprocal rights as a condition precedent to any right to share in the estate of a California decedent. When the nonresidence and alienage of all nearer relatives has been established, any person purporting to act in right of such aliens must establish that such reciprocal right exists.⁴⁹

⁴²Markham v. Allen, 326 U.S. 490.

⁴³Estate of Knutzen, 31 Cal.2d 573; Estate of Bevilacqua, 31 Cal.2d 580.

⁴⁴Estate of Giordano, 85 Cal.App.2d 588.

⁴⁵Estate of Bevilacqua, 31 Cal.2d 580.

⁴⁶*Ibid.*, Estate of Michaud, quoting the common law and citing Orr v. Hodgson, 4 Wheat. (U.S.) 453.

⁴⁷Estate of Bevilacqua, 31 Cal.2d 580.

⁴⁸*Ibid.*

⁴⁹Estate of Michaud, 53 Cal.App.2d 835; Estate of Bevilacqua, 31 Cal.2d 580; Estate of Knutzen, 31 Cal.2d 573.

Applicability—When Raised

The issue of whether an alien nonresident has a legal claim to an interest in an estate may be adjudicated in several ways. The alien may bring an action in the federal courts if he claims his interest arises out of a treaty.⁵⁰ He can wait to assert his claim in support of, or in opposition to, a petition for distribution. If some relative claiming as next of kin to the exclusion of an alien's claim, or the public administrator purporting to act by reason of the alien's asserted disability to take as sole heir, or his disability to qualify as executor or administrator, seeks appointment as administrator, the issue of the alien's right to take under Probate Code section 259 may be litigated in the absence of all claimants not directly involved in that question. The decision will be *res judicata* as to all parties to that determination, but will not bind other claimants who are not parties. This immediate determination of the claim is authorized as necessary to the determination of the question of who is the proper person within the priorities stated in Probate Code section 422 to claim appointment as administrator. That question can be settled only after the court has found whether or not the alien claimant does in fact have a valid claim to an interest in the estate.⁵¹

Burden of Proof—Upon Whom?

The burden of proof laid by section 259.1 is a substantive requirement of law, not just a procedural regulation. The 1945 amendment creating the presumption of the existence of reciprocal rights and shifting the burden of proof was a substantive change in the law which cannot be given retroactive effect because it would destroy vested rights.⁵² The proper construction is that sections 259 et seq. are laws of succession.⁵³ Nonresidents were made ineligible to inherit in the absence of reciprocal rights. Title to property of a decedent's estate passes at death to the heir or devisee (Prob. Code, 300). If the estate had once vested in the heirs the Legislature had no power thereafter by a subsequent law to divest it. The statute in effect at the time of the death of decedent must control.⁵⁴

The September 1947 amendments produced the present sections replacing upon the aliens nonresident the burden of proving reciprocity. There is no presumption that foreign law is the same as California law where the foreign law is not proved.⁵⁵

⁵⁰Estate of Knutzen, 31 Cal.2d 573.

⁵¹*Ibid.*

⁵²Estate of Thramm, 80 Cal.App.2d 756.

⁵³Estate of Knutzen, 31 Cal.2d 573.

⁵⁴Estate of Giordano, 85 Cal.App.2d 588; Estate of Thramm (dictum).

⁵⁵Estate of Knutzen, 31 Cal.2d 573.

There is nothing arbitrary (lack of "due process") in the provisions placing the burden of proof on the nonresident aliens, who presumably are in a much better position than residents to obtain information concerning the law of their country of residence.⁵⁶

Section 259.1 and the burden of proof there imposed control the claims of anyone purporting to act as successor in interest to the alien nonresident claimant or by reason of the asserted disability of the alien arising out of his alienage and nonresidence. In the Bevilacqua case the public administrator asserted that sections 259 et seq. did not apply to him, that the statute was limited in its operation to nonresidents and did not impose any burden of proof upon the state nor upon its officer, the public administrator; and that he claimed as an official performing governmental functions under an official duty. The court stated the rule of statutory construction that general language will not be interpreted as applying to agencies of the government in the absence of a specific expression of legislative intent. It then said that the rule is applied where otherwise the result would be to infringe upon sovereign governmental powers.⁵⁷ Where, however, no impairment of sovereign powers would result, the reason underlying this rule . . . ceases to exist and the Legislature may properly be held to have intended that the statute apply to governmental bodies even though it used general statutory language only.⁵⁸

Under Probate Code section 422, the next of kin, when entitled to share in the estate, has priority over the public administrator and when a relative makes a prima facie showing that he is the next of kin and entitled to share in the estate, the public administrator, if he seeks to obtain letters, must undertake the burden of disproving those claims.⁵⁹

Burden of Proof—How Satisfied?

California has held that where an alien nonresident enemy claimed as sole heir to personal property of one who died in this country during World War I, he might be entitled to a continuance, until peace, of a proceeding for distribution of the estate, brought by parties claiming in a more remote degree, where he could not fully establish his claims because of the war.⁶⁰ If this decision still is good law, it would seem probable that California courts would allow similar delays to aliens resident in allied countries occupied by enemy forces or residing in neutral countries cut off from free communication.

⁵⁶Estate of Bevilacqua, 31 Cal.2d 580.

⁵⁷*Ibid.*, citing 12 Cal.2d 140, 48 Cal.App.2d 337.

⁵⁸*Ibid.*, citing 21 Cal.2d 399.

⁵⁹*Ibid.*, citing 210 Cal. 262, 142 Cal. 125, 26 Cal.App.2d 319.

⁶⁰Re Henricks (1919), 180 Cal. 175.

Estate of Blak held that a resident national of the Occupied Netherlands who was unable to communicate with the United States could appear through her government by its authorized agent, its ambassador.⁶¹ Montana, with a similar statute, permitted an appearance for a resident national of Occupied Denmark to be made by the minister to this country although the Danish government was in power and control of enemy occupation forces.⁶²

The existence of reciprocal rights may be proved by treaty with the country of the alien's residence.⁶³ But section 259 "does not refer to treaties, and there is nothing in its wording which requires the construction that 'reciprocal rights' as used . . . means 'rights established by treaty'. Such a construction would defeat the obvious purpose of the statute which was to permit a nonresident alien to inherit when the laws of his country would permit an American citizen to inherit under the same circumstances. Evidence of the foreign domestic law is therefore admissible to prove the existence of reciprocal inheritance rights."⁶⁴

California permitted proof of reciprocity to be made through introduction of a translation of Dutch domestic statutes certified correct by the ambassador of the Royal Netherlands' government-in-exile, and accompanied by a certificate of the United States State Department that it similarly interpreted Dutch law, that the law had not been changed by the government-in-exile, that the United States recognized that government as the only legal government of the Netherlands, and that such law was regarded as controlling although all the domestic territory was occupied and de facto governed by the German armies.⁶⁵ The state Supreme Court then held that "right to take and receive . . ." in section 259 meant "legal right" and so found reciprocity to exist.

Reciprocal rights have also been established in other states by the opinion of eminent jurists (including the Lord High Justice) of the country concerned,⁶⁶ and by the treatises of eminent professors and testimony as to the unwritten law by a lawyer (legation legal counselor) who had conducted cases in point in the country concerned.⁶⁷ In the latter case it was admitted that there were no statutes nor decisions directly in point, but in practice reciprocity did exist ("the idea [that an alien might not be competent to take] is completely foreign to the Danish legal mind.")

⁶¹*Estate of Blak*, 65 Cal.App.2d 232.

⁶²*Estate of Nielsen*, 118 Mont. 304, 165 P.2d 792.

⁶³*Allen v. Markham*, 156 F.2d 653.

⁶⁴*Ibid.*, *Estate of Knutzen*, 31 Cal.2d 573.

⁶⁵*Estate of Blak*, 65 Cal.App.2d 232.

⁶⁶*Duke of Richmond v. Milne* (1841), 17 La. 312, 36 Am.Dec. 613.

⁶⁷*Nielsen's Estate*, 118 Mont. 304, 165 P.2d 792 (Denmark during the German occupation).

General Conclusions

California's statutes impose a number of restrictions limiting the effect of Civil Code section 671 and restricting the right of nonresident aliens to take various kinds of property from California estates, whether by gift, bequest, devise or succession. Where such an alien would otherwise be qualified to take, Probate Code section 259, as a further restriction, requires proof of the existence of a reciprocal right in Americans to take like property upon a nondiscriminatory basis from an estate in the alien's country.

Such statutes as those here discussed are clearly within the constitutional power of the state. They are controlling except to the extent that they may be suspended for the time being by an existent over-riding federal treaty.

While this principle is clear, it may be very difficult to advise, as to an alien's rights in a given case, whether some treaty is or may be applicable. The difficulties are increased when war exists with the country concerned, or diplomatic relations have been suspended, or the contracting government has been overthrown and replaced by a *de facto* government, or by a *de jure* government which has not specifically assumed and recognized a pre-existent treaty.

The suspension or abrogation of a treaty may be implied from a variety of acts or conditions, and may affect less than all provisions of a treaty. As a general rule, treaty rights in aliens to take and hold property tend to subsist even though most other treaty rights have become void or inoperative. Regardless of the voluntary exile or ejection of a governmental group from a foreign country, so long as our government recognizes that group as the *de jure* government of such country all treaties made with or assumed by that government are controlling upon our courts as establishing the law of that country.

Similarly that body of rules which such a group asserts to be the domestic law of the country of which it is the recognized *de jure* government will be, if our state department concurs, the controlling law of that country insofar as our courts are concerned regardless of the nonpresence of that group within the boundaries of its country and regardless of such group's complete absence of control over such territory. This remains true even though some rival government is in fact presently enforcing quite different rules of law within the foreign country. Section 259 is satisfied by proof of a recognized legally-existent right of reciprocity regardless of the present enforceability of that right.

Reciprocal rights need not be established by treaty, but the statute is satisfied if the foreign country's internal law in fact would not discriminate against an American claimant to an estate there. Where the alien depends

upon treaty rights American courts will take judicial notice of the existence and content of a treaty. It would seem necessary for the alien, at some stage of the proceedings, to assert the existence of an applicable treaty.

When the issue of the effect of section 259 has been raised the burden is now squarely placed, by section 259.1, upon any alien nonresident claimant to prove the existence of reciprocal rights. This burden is a substantive requirement which cannot be modified subsequent to the death of the person whose estate is in litigation. This substantive burden is also imposed upon any person who, in a public or private capacity, asserts any claim to an estate as successor in interest to such an alien, or whose purported interest in, or right to control over, the corpus of the estate is dependent upon the unestablished existence of some right in such an alien to take some portion of the estate.

An alien claimant may appear in person, but he need not do so. He may appear through a local lawyer, his attorney in fact, or the properly authorized diplomatic representative of his country. Perhaps one asserting the existence of a right in an alien to take may be entitled to a reasonable delay for such period as may reasonably be necessary where war prevents the collection or presentation of the proofs needed to establish such right.

It seems clear that, with the marked increase in the population of California and of the number of refugees within its borders, Probate section 259 will require a great increase in California's reference materials manifesting foreign nations' domestic laws and evidencing the foreign relations and treaties of the United States. Many conflicts-of-laws questions may also be presented for determination.

Unsettled Questions

A number of interesting questions remain unsettled. When a treaty grants reciprocal rights as to "immovables and interests therein," what definition of "immovables" will be applied in a given case? Section 259 requires that reciprocity exist in the country of the alien's "citizenship and residence." When the claimant is a citizen of one foreign country but resident or domiciled in another, must he prove reciprocal rights to exist in one or both such countries? If in one only, will that one be designated by the court or has the alien an option to make proof as to either? Is the word "residence" to be interpreted as meaning "domicile" or as "current residence" only?

Where California would distribute property to designated persons and "to their descendants by right of representation" (as under Probate Code secs. 228 and 229) and the normal first taker is barred by section 259, will any descendant of such taker be eligible to take? The common law rule of escheat has been phrased as stating that when the first taker was barred for

alienage, the next more remote relative would take as though the first taker *had never existed*.⁶⁸

Another problem arises with respect to countries which may apply pure communist theory and hence completely forbid any holding of private property. Obviously such a country would not be discriminating between the rights of American claimants and those granted its own citizens. The literal *right* "to take . . . on the same basis as citizens of such foreign country, without discrimination" would exist. Would our courts declare that reciprocity existed, or hold that "to take" necessarily implies that there must be a legal possibility of the existence of some estate which could pass and be taken? This question may arise in litigation as a result of the governmental imposition in Eastern Europe of limitations upon the total value, quantity, and kind of property which may be privately held.

⁶⁸See footnote 46 and textual matter to which it refers.