NONRESIDENT ALIEN INHERITANCE OF NEBRASKA LAND: 1854-1971

I. INTRODUCTION

The right of nonresident aliens to inherit domestic land is a problem which has puzzled the Anglo-American courts for ages. At common law, nonresident aliens could acquire such realty by purchase, but were completely barred from inheriting both real or personal property. And, even though they could obtain land by purchase, they could only hold it subject to divestiture by the King through a process known as "inquest for office known."  

The underlying reasons for the disability thus imposed upon nonresident aliens were a deep-seated fear of aliens and concern for national defense. Lord Coke once stated that inheritance by aliens "tends to destruction tempore bellie; for then strangers might fortify themselves in the heart of the realm and be ready to set fire to the commonwealth."  

Likewise, Blackstone wrote that since aliens did not owe any allegiance to the crown, "the defense of the kingdom would have been defeated" by permitting them to inherit.  

Until recently in this country, legislatures by statute and courts by judicial decision had either denied nonresident aliens the right to inherit land completely, or placed severe limitations thereon.  

The State of Nebraska presents a particularly interesting study of the various approaches a state may use in regulating alien inheritance. The state's changing treatment of the problem virtually covers the whole scale of possibilities. Through the years Nebraska has moved from a statutory view that all aliens (resident and nonresident) should be permitted to inherit freely, to the position that all nonresident aliens should be completely barred from inheriting Nebraska realty, and finally, to its present stand that

nonresident aliens may inherit if certain requirements are first satisfied.

It is the purpose of this article to briefly examine the legislative and judicial development of Nebraska's treatment of the inheritance rights of nonresident aliens and to explore the ramifications and possible unconstitutionality of the statute which presently controls these rights in Nebraska.

II. CHANGING LAWS

On May 30, 1854 the Senate and House of Representatives of the United States of America in Congress assembled enacted an Act to Organize the Territory of Nebraska. Section 6 of that Act provided that "no law shall be passed interfering with the primary disposal of the soil."

On April 19, 1864 Congress passed an act to enable the people of Nebraska to form a constitution and state government and offered to admit said Territory to the Union upon certain conditions therein specified. One such condition was that the State's constitution not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence. In 1866, the people of Nebraska having formed an acceptable constitution, Congress found the qualifications necessary for admission to have been met, and on February 9, 1867 Nebraska was admitted to the Union.

The constitution which Nebraska adopted on February 9, 1866 included within its Declaration of Rights, a provision stating:

No distinction shall ever be made by law between resident aliens and citizens in reference to the possession, enjoyment, or descent of property.

Article II of that constitution provided:

The people of the State, in their right of sovereignty, are declared to possess the ultimate property in and to all lands within the jurisdiction of the State; and all lands the title which shall fail from a defect of heirs, shall revert, or escheat to the people.

Extending itself beyond the limitations of the constitution, the

7. Id.
9. Id. (emphasis added).
11. Id. art II, § 3 (1866).
first Nebraska Legislature adopted, revised, amended and consolidated the laws of the Territory into the first Revised Statutes of the State of Nebraska, and included within the statutory provisions dealing with real estate the following provision:

Any alien may acquire and hold real estate or interest therein, by purchase, devise, or descent, and he may convey, mortgage and devise the same, and if he shall die intestate, the same shall descend to his heirs; and in all cases such real estate shall be held, conveyed, mortgaged or devised, or shall descend in like manner and with like effect as if such alien were a native citizen of the United States.\(^{12}\)

This statute was re-enacted in full in 1885.\(^{13}\)

However, on March 31, 1887 this statute was amended to prohibit nonresident aliens from acquiring or holding real estate in the State of Nebraska. The amended statute read as follows:

No nonresident alien shall hereafter acquire or hold any real estate or interest therein in the State of Nebraska by purchase, devise or descent: Provided however, That any alien now owning real estate or interest therein, may convey, mortgage, or devise the same, and if he shall die intestate the same shall descend to his heirs and such real estate or interest therein may be held, conveyed, or mortgaged or devised by him, and shall descend in like manner, and with like effect as if such alien were a native citizen of the United States.\(^{14}\)

In 1890, the Nebraska Supreme Court construed section 1 of chapter 65 of the 1877 Laws of Nebraska, which denied a nonresident alien, an alien-foreign who had no intent to becoming a citizen, and all foreign corporations the right to acquire or own, hold or possess, by right, title, or descent accruing thereafter, any real estate in the State of Nebraska. The court in *Carlow v. Aultman*\(^{15}\) stated that a private individual plaintiff may not take advantage of that section and that title held by a foreign corporation “is valid against everyone but the state, and can be divested only by proceedings brought by the state for that purpose.”\(^ {16}\)

On March 16, 1889 the above statute was repealed and a new statute was enacted again restricting nonresident aliens and corporations not incorporated under the laws of Nebraska, in their right to

\(^{12}\) Neb. Stat. ch. 43, § 59 (1866) (emphasis added).

\(^{13}\) Neb. Stat. ch. 73, § 54 (1885).

\(^{14}\) See Laws of Neb. ch. 62, p. 563 (1887). This amendment was codified in chapter 73, sections 54, 63, 64 and 65 of the Compiled Statutes of 1887.

\(^{15}\) 28 Neb. 672, 44 N.W. 873 (1890).

\(^{16}\) 28 Neb. at 876.
acquire or hold real estate. The new statute provided, in part, as follows:

Section 1. Nonresident aliens and corporations not incorporated under the laws of the State of Nebraska are hereby prohibited from acquiring title to or taking or holding any lands or real estate in this state by descent, devise, purchase or otherwise, only as hereinafter provided, except that the widow and heirs of aliens who have heretofore acquired lands in this state under the laws thereof, may hold such lands by devise or descent for a period of ten (10) years and no longer, and if at the end of such time herein limited such lands so acquired have not been sold to a bona fide purchaser for value, or such alien heirs have not become residents of this state, such lands shall revert and escheat to the State of Nebraska . . . .

Section 2 . . . .

The heirs or persons who would have been entitled to such lands, shall be paid by the state of Nebraska the full value thereof, as ascertained by appraisement upon the oaths of the judge, treasurer and clerk of the county where such lands lie, and such lands shall then become subject to the law, and shall be disposed of as other lands belonging to the state; Provided, That the expense of the appraisement shall be deducted from the appraised value of the land.

Section 3. Any nonresident alien who owns land in this state at the time this act takes effect, may dispose of the same during his life to bona fide purchasers for value, and may take security for the purchase money with the same rights as to securities as a citizen of the United States.17

The Act made clear that it was not intended to prevent nonresident aliens or foreign corporations from holding or acquiring or enforcing a lien upon Nebraska real estate or interest therein; however, all lands acquired by enforcing such lien or by judgment for any debt were required to be sold within ten years after the title thereto was perfected in such party and in default of such sale, title would escheat to the State of Nebraska.18

The act further made it clear that:

[N]othing in this act shall be construed to prohibit any nonresident alien or foreign corporation from purchasing and acquiring title to so much real estate as shall be necessary for the purpose of erecting and maintaining a manufacturing establishment, and

Provided further, That the provision of this act shall not

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17. See Laws of Neb. ch. 58, p. 483 (1889) and Neb. Comp. St. ch. 73, §§ 70, 71, 72 and 73 (1889).
18. Id. § 4.
apply to any real estate lying within the corporate limits of cities and towns.\textsuperscript{19}

In \textit{Bahuaud v. Bize},\textsuperscript{20} Federal District Judge Munger held that the provisions of the aforesaid Act, in prohibiting nonresident aliens from acquiring real estate by inheritance or otherwise were inoperative under the terms of a treaty between the United States and France, entered into in 1853. The treaty provided that citizens and subjects of France were entitled to acquire real estate by inheritance in all respects the same as a citizen of the United States in those states by whose laws an alien was permitted to hold real estate by purchase or otherwise. Since the Nebraska constitution and statutes allowed resident aliens to hold and acquire real estate in the same manner as citizens, the terms of the treaty permitted the citizens and subjects of France to also hold and acquire real estate in the same manner as citizens, even though they were nonresident aliens, and would not, in the absence of the treaty, have been so permitted. The rationale of Judge Munger’s decision was that by Article VI of the United States Constitution,\textsuperscript{21} all treaties with foreign nations are the supreme law of the land and binding upon the several states, and thus, any disability imposed on the inheritance rights of nonresident aliens by Nebraska was inoperable in face of such a treaty. The \textit{Bahuaud} decision has since been followed in Nebraska.\textsuperscript{22}

The question of who is a “resident alien” was settled in 1901. In that year the Supreme Court of Nebraska in \textit{Glynn v. Glynn},\textsuperscript{23} was faced with the claims of the heirs at law of an alien resident of Nebraska who died intestate. Some of these heirs were nonresident aliens, others were aliens residing in another state and still others were citizens of the United States. The lands in ques-

\textsuperscript{19} Id. This section also held the act inapplicable to realty needed for the construction and operation of railroads.
\textsuperscript{20} 105 F. 485 (D. Neb. 1901).
\textsuperscript{21} U.S. \textsc{const.} art. VI, provides:

\textquoteleft[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

\textsuperscript{23} 62 Neb. 872, 87 N.W. 1052 (1901).
tion were situated within the corporate limits of the village of Beth-
any Heights, located in Lancaster County, Nebraska.

In distinguishing which of these heirs were "resident aliens" and which were not, the court found that only those aliens residing within the State of Nebraska could be considered "resident aliens" within the meaning of the term as used in the Bill of Rights of the Constitution of Nebraska. As the court stated:

The words "aliens" and "citizens," as used in this section of the bill of rights, relate to the political status of persons as respects their relation to the United States, while the word "resident" immediately preceding the word "aliens" relates to the status of persons with respect to the state of Nebraska. Thus, a subject of Great Britain who lived in Nebraska would be a "resident alien" within the meaning of this phrase in the bill of rights, whilst, had he resided in Illinois, he would not have been a resident alien. . . . There is nothing in this section alone which confers any rights of inheritance upon such of the brothers and sisters of the deceased who at all times were subjects of the Queen of Great Britain, and resided in Ireland; neither does it confer any rights upon the children of Maria Gildea, [a sister of the deceased] who resided in the state of Illinois, and who, if they inherit at all, must trace their pedigree through their mother, an alien. The construction to be placed upon this section in so far as it applies to the facts of the present case, is that the law makes no difference as to the right of inheritance between persons who are citizens of the United States and aliens who are residents of this state. However, the court concluded that because of the provisions of section 4 of the 1889 statute which excluded lands lying within the corporate limits of cities and towns, "the non-resident aliens could inherit." As the court explained:

As we view it, the provisions of the act of 1889, as applied to lands outside of the corporate limits of cities and towns, was but the re-enactment of the common law doctrine that an alien could not take land by descent. True, it went further, and prohibited the acquisition by purchase or otherwise. The proviso specially provides that the act shall not apply to lands within the corporate limits of cities and towns, and, by implication at least, is a legislative declaration that lands within the corporate limits of cities and towns should remain unaffected by the common law doctrine of inheritance, and that the general law of descent should apply. If this were not the intention of the legislature, we should have the anomalous condition of a statute

24. See text at note 7 supra.
25. 62 Neb. at 874, 87 N.W. at 1052.
prohibiting non-resident aliens from taking real estate in this state outside of the corporate limits of cities and towns, with a proviso that it had no application to lands lying within cities and towns, and a common law prohibiting aliens from taking by descent lands in cities and towns. The effect of this would be to render nugatory the proviso declaring that the act should not apply to lands within cities and towns. It seems to us clear that the limitation upon the power of non-resident aliens to acquire land by purchase, devise or descent, applies only to lands situated without the corporate limits of cities and towns, and that, by fair implication, lands within the corporate limits of cities and towns should remain unaffected by the common law doctrine on the subject.  

In 1903 in Dougherty v. Kubat, the high court of Nebraska was urged to reconsider Glynn v. Glynn, "both upon the merits of the construction there adopted and on the ground that the statute, so construed, is unconstitutional." The court refused to reconsider the merits, but did consider the constitutional questions raised by the plaintiff in this instance. These questions were (a) can a legislative act entitled "An act restricting non-resident aliens ... in their right to acquire and hold real estate" extend its operation beyond restriction and prohibition to confer upon non-resident aliens the power to acquire and hold property within cities and villages, which aliens did not possess at common law; and (b) does a statute which operates only upon lands outside corporate limits of cities and villages instead of upon all lands in the state, constitute local and special legislation, contrary to section 15, article 3 of the Constitution?

The court in an opinion written by Roscoe Pound, who was sitting as a commissioner of the court because of a backlog of cases, answered the first inquiry by finding that there was no legal right to be restricted because at common law an alien had no right to inherit and hence the restriction provision merely restated the common law. Whereas, the portion of the act which allowed an alien to acquire city property was viewed in itself, as a further "restriction" on his powers of ownership. In the words of the court:

But it is obvious that chapter 15a, Compiled Statutes (Annotated Statutes, sec. 6950), of itself, without any supplementary legislation, was enough to exclude and prohibit ownership of real property by aliens, and that an act leaving them free to acquire and hold city property, while con-

26. 62 Neb. at 876-77, 87 N.W. at 1053.
27. 67 Neb. 269, 93 N.W. 317 (1903).
29. 67 Neb. at 271, 93 N.W. at 318.
Continuing their common-law disabilities as to agricultural lands, is, in substance, a restriction for their power as to ownership of lands, substituted for a prohibition. The legislature seems to have assumed that all men had a natural, if not a legal, right to acquire and hold property, and the meaning evidently was that such natural right was to be restricted by law. The common law gave no legal right, and the existing statute in this state, which was repealed, prohibited alien ownership without any exceptions. Hence there was no legal right to restrict. Taking the words in the sense in which they must have been intended, the title does not conflict with the construction this court has put upon the statute.\textsuperscript{30}

The second objection was met by the finding that the legislature is empowered to make reasonable classifications and so long as such classifications are not arbitrary or unreasonable and the statute operates equally upon all persons or objects within the class, it is a constitutional enactment. The rational basis underlying the differentiation of city lands from agricultural lands was found as follows:

In this case there is an obvious and reasonable distinction between lots in the corporate limits of cities and villages and the larger tracts outside which, in this state, are agricultural or grazing lands. No particular mischief might flow from alien ownership of city property, while alien ownership of agricultural lands is a well known source of political and social disturbance. It can not be said that the classification adopted is arbitrary or unreasonable.\textsuperscript{31}

Hence, such classification was not found to be special legislation in violation of Nebraska's constitution nor to be violative of equal protection (although this aspect was not raised in such a form).

In 1913, the power of the Nebraska legislature to cut off the rights of nonresident aliens to inherit land from United States citizens was considered in the federal case of Toop \textit{v.} Ulysses Land Co.\textsuperscript{32} The federal district court held that the legislature did have

\begin{footnotes}
\item[30] 67 Neb. at 272, 93 N.W. at 318.
\item[31] 67 Neb. at 273, 93 N.W. 318-19.
\item[32] 278 F. 840 (D. Neb. 1913). The heirs were subjects of Great Britain. The statute in question was Neb. Stat. ch. 73, § 70 (1911), which provided as follows:
Non-resident aliens and corporations not incorporated under the laws of the state of Nebraska, are hereby prohibited from acquiring title to or taking or holding any lands or real estate in this state by descent, devise, purchase, or otherwise, only as hereinafter provided, except that the widow and heirs of aliens who have heretofore acquired lands in this state under the laws thereof, may hold such lands by devise or descent for a period of ten (10) years and no longer, and if at the end of such time herein limited, such lands,
such power, and that the power could be exercised without violating the state constitutional provisions forbidding discrimination between citizens and resident aliens. The court reasoned that the statute was directed only against nonresident aliens, and not against resident aliens. The narrow holding was that nonresident alien heirs of citizens were entirely barred from rights to receive Nebraska lands by descent or devise, while nonresident alien heirs of aliens who had acquired land in Nebraska prior to 1889 could hold the lands by devise or descent for a period not to exceed ten years. The court refused to construe the part of the statute excepting the widow and heirs of aliens for a ten year period as also applying to the heirs of citizens. In doing so the court relied upon the following language drawn from the decision of the Illinois supreme court in Wunderle v. Wunderle:

It is urged that the act of 1887 should be liberally construed, and that such liberal construction would have the effect of extending the exception named in section 1 to the alien heirs of citizens, as well as to the heirs of aliens; in other words, we are asked to so construe the exception as to give the non-resident alien kindred of citizens the right to take lands by descent or devise, and hold the same for three or five years, so as to make sale, or acquire an actual residence in the state. This would involve the insertion of the words “and the alien heirs of citizens” after the words “except that the heirs of aliens.” By such a construction we would make the legislature say what it has not said. It is not the province of the judiciary to make laws, but to construe and interpret them and pass upon their validity. But here the legislature has expressly declared that the heirs of certain aliens shall take and hold land for limited periods, subject to the privilege of avoiding their escheat to the state by a sale of them, or by acquiring an actual residence in the state, within said periods. But the act of 1887 nowhere declares, nor is there anything on its face to indicate, that the legislature intended

33. Article 1, § 25 of the Nebraska constitution, as then in effect, provided that “no distinction shall ever be made by law between resident aliens and citizens in reference to the possession, enjoyment or descent of property.”

34. The holding was criticized by the Nebraska Supreme Court in State ex rel. Toop v. Thomas, 103 Neb. 147, 170 N.W. 839, rehearing denied, 172 N.W. 690 (1919). See also 81 Harv. L. Rev. 355 (1967).

35. 278 F. at 841.

36. 144 Ill. 40, 33 N.E. 195 (1893).
thereby to declare that the nonresident alien kindred of citizens should so take and hold lands for certain periods.\textsuperscript{37}

The Toop decision was appealed to the Supreme Court of the United States, but the appeal was dismissed for lack of jurisdiction.\textsuperscript{38} The Court stated that it thought that a contention that the statute was repugnant to the Fourteenth Amendment was "too frivolous to afford a basis for jurisdiction. . ."\textsuperscript{39} A treaty with Great Britain was found by the Court not to alter or override the state statute because the treaty did not go into effect until two years after the death of the decedent and was in no way retroactive.\textsuperscript{40}

The Supreme Court of Nebraska was presented with the same problem in State v. Toop,\textsuperscript{41} and adopted the same view as had the federal court, to-wit: nonresident aliens heirs of American citizens owning land in Nebraska had no right to take real estate under the Nebraska statutes. This was held to be true even if the American citizen had acquired his land prior to March 16, 1889.\textsuperscript{42} The court was of the opinion that it would be entering the field of legislation if it were to allow the nonresident alien heirs of citizens to inherit, when the plain words of the statute allowed only nonresident alien heirs of aliens to inherit. And while the court stated there was no valid reason for drawing a distinction between nonresident alien heirs of aliens and the nonresident alien heirs of citizens as to property acquired prior to March 16, 1889, it would not rewrite the statute. The next of kin residing in the United States were allowed to take as if the nonresident alien kin were nonexistent.\textsuperscript{43} This view was later followed in Metzger v. Metz-
ger, where an American decedent devised land to nonresident aliens.

Thus, prior to 1920 there was only one class of nonresident alien heirs who had the right to take and hold Nebraska land: The nonresident alien widow and heirs of aliens who had acquired lands prior to March 16, 1889, and these could hold only for a period of ten years at the end of which time they must have either sold the land to a bona fide purchaser for value, or have themselves become Nebraska residents, in default of which the land would escheat to the state. Nonresident alien widows and heirs of aliens who acquired Nebraska lands after March 16, 1889; and, nonresident alien widows and heirs of citizens who acquired lands either before or after March 16, 1889 took nothing.

The Nebraska statutes also apparently barred a nonresident alien from taking or holding Nebraska realty in trust for the use and benefit of another. The Nebraska Supreme Court so interpreted the statutes in regard to a foreign corporation.

It was also clear, at least as to a foreign corporation, that if such a corporation, having no right to hold Nebraska land, conveyed it to a party who in turn sold it to a third party, the third party's case admitted that there appeared to be a contrary view in Toop v. Palmer, 97 Neb. 802, 151 N.W. 301 (1915). See also Nelson v. Nielsen, 113 Neb. 453, 203 N.W. 640, 642 (1925), where it was said as to one possibly a nonresident alien: "It may be true that she will not be permitted to hold the disputed land because of the Nebraska statute . . .; But if by our law the same is ever escheated to the State it must be by appropriate proceedings and upon full compensation."


44. 108 Neb. 613, 188 N.W. 229 (1922).

45. The aliens were enemy aliens at the time of the decedent's death. Such aliens were, however, allowed to take with respect to the proceeds in partition as to town lots. The alien property custodian was not allowed to take since the war was over.

46. See State v. Toop, 107 Neb. 391, 186 N.W. 371 (1922); Metzger v. Metzger, 108 Neb. 613, 188 N.W. 229 (1922); Pierson v. Lawler, 100 Neb. 783, 161 N.W. 419 (1917). In this latter case, a treaty was held to give at least a three year period to the nonresident alien's heir to sell the land inherited. The treaty was with Great Britain and the alien resided in Scotland. See also Fischer v. Skelner, 101 Neb. 553, 163 N.W. 861 (1917); Mac-Clintock, Aliens Under the Federal Laws of the United States, 4 Ill. L. Rev. 95, 109 (1909).

47. Gould v. Board of Home Missions, 102 Neb. 526, 167 N.W. 776 (1918). The heir or next of kin were allowed to raise the question of the corporation's right to so hold. Accord, Stock v. Schmidt, 129 Neb. 311, 261 N.W. 552 (1935).
vendor could obtain specific performance against him, even though the third party claimed the title was not marketable. The Nebraska Supreme Court held that such a purchaser took the title free from the claims of the state.48

In 1920, the Nebraska constitution was amended so as to allow regulation of the rights of all aliens irrespective of regulation of the rights of American citizens. The amendment provided:

The rights of aliens in respect to the acquisition, enjoyment and descent of property may be regulated by law.49

It was also provided that there should be no discrimination between citizens of the United States with respect to the “acquisition, ownership, possession enjoyment or descent or property.”

The Nebraska legislature lost little time in exercising its power to regulate resident as well as nonresident alien property rights. In 1921, the legislature enacted a statute which for the first time limited the property rights of resident aliens.50 Aliens were forbidden to acquire title to or to take hold any realty or any leases extending for more than a five year period, by descent or devise, purchase or otherwise. Resident aliens were permitted to take by descent or devise, but even they were required to sell such property within a five year period. If the land was not sold, title would escheat to the state.

It was provided that any alien could be a purchaser at an execution sale under his own judgment, or could acquire realty by enforcing a specific claim, but here again he could hold it for only ten years.51 In default of such a sale, the property would escheat to the state. No limitation was laid down as to the realty needed for construction and operation of railroads, public utilities and common carriers,52 the erection and maintenance of manufacturing establishments, and realty within the corporate limits of cities and towns.

48. Lord v. Schulz, 115 Neb. 33, 211 N.W. 210 (1926). The court distinguished the case from Gould v. Board of Home Missions, 102 Neb. 526, 167 N.W. 776 (1918), on the ground that there a will was involved, while in the Lord case the grantor for a valuable consideration to be received from the grantee, executed a deed of general warranty which in terms conveyed a fee simple title. An ordinary devisee was considered not to have the same equitable rights and obligations as a purchaser for value.
52. The exception as to public utilities and common carriers was added on March 28, 1931. Laws of Neb. ch. 128, p. 361 (1931), and Neb. Comp. Stat. § 76-505 (Supp. 1937).
Even control through a corporation was forbidden. The state was directed at alien control, and not alien ownership of stock. Thus, if a domestic corporation owning land in Nebraska elected an alien majority to the board of directors, it would have been treated as an alien under the statute. And under the aforesaid statute a corporation, if incorporated in a state other than Nebraska, could not succeed to the title of Nebraska real estate, and any title so acquired was subject to escheat to the state.

The Nebraska Supreme Court avoided the harshness of the aforesaid rule in May v. American Red Cross by application of the doctrine of equitable conversion. The court reasoned that under the law of Nebraska, where a testator directed a sale of a specific tract of land for the purpose of paying certain bequeaths from the proceeds, a court of equity would consider the conversion of land into personalty as having already occurred. However, Semrad v. Semrad makes it clear that absent a direction by the decedent ordering that the land be sold and the proceeds be distributed to the nonresident aliens, the nonresident aliens take nothing.

In Semrad, the decedent had died intestate in Nebraska, leaving no wife, issue or parents surviving. There were, however, a number of heirs, all of whom were nonresident aliens residing in Czechoslovakia. At the time of his death he owned certain Nebraska realty which did not lie within the corporate limits of any city or village, or within three miles thereof. The Nebraska Supreme Court held that in the absence of a treaty between the United States and Czechoslovakia,

under the provisions of section 76-401, R.R.S. 1943, that, on the death of a citizen who leaves only alien kindred, his real property that is not within any of the exceptions specified by statute reverts to and vests in the state at the death of such citizen without the necessity of affirmative

55. 140 Neb. 43, 299 N.W. 272 (1941).
56. Coyne v. Davis, 98 Neb. 763, 154 N.W. 547 (1915). See also In re Estate of Kulp, 122 Neb. 157, 239 N.W. 636 (1931); In re Secrest's Estate, 109 Neb. 431, 191 N.W. 663 (1922). In the May decision the testator gave his land to a trustee with directions to sell it and pay the income from the proceeds to the testator's brother during the brother's life and at the brother's death, the principal sum was to be paid to the American Red Cross. 140 Neb. at 46, 299 N.W. at 274. But cf. In re Sautter's Estate, 142 Neb. 42, 55, 5 N.W. 2d 263, 270 (1942), wherein the court held that a devise to a "foreign corporation is void even though a conveyance to such corporation would only be voidable."
57. 170 Neb. 911, 104 N.W.2d 338 (1960).
The court concluded that the district court judgment ordering partition of the realty among the nonresident alien heirs was void because the state had not been made a party to the partition action.\(^5\)

III. CONSTITUTIONALITY OF THE NEBRASKA LAW BARRING ALIEN INHERITANCE

Finally, in 1971, the Nebraska alien inheritance provision required an in-depth analysis in *Shames v. Nebraska*.\(^6\) The plaintiffs, residents of Syria and sole heirs of an Iowa resident who died intestate leaving land in Nebraska, sued in the federal district court in Nebraska to enjoin enforcement by Nebraska Probate Court of that provision barring nonresident aliens from inheriting Nebraska land\(^6\) and that provision calling for escheat to the state when there are no resident citizens or aliens capable of inheriting.\(^6\) A three judge federal court upheld the provision against a challenge that they amounted to an intrusion by the state into federal government’s field of foreign affairs. In reasoning to this conclusion, however, each of the three judges expressed a different view as to how these challenges which were based upon the due process and equal protection clauses should be treated. Nevertheless, there was unanimous agreement that injunctive relief was not called for.

A basic premise upon which all three judges agreed was that Nebraska, in barring nonresident aliens from inheriting Nebraska land, did not unconstitutionally intrude into the federal field of foreign affairs. This aspect of the case is fully discussed in the opinion of Chief Judge Robinson.\(^6\)

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58. 170 Neb. at 913, 104 N.W.2d at 340 (emphasis added).
59. 170 Neb. at 918, 104 N.W.2d at 343.
61. *Neb. Rev. Stat.* § 76-402 (Reissue 1966), which provides:
Aliens and corporations not incorporated under the laws of the State of Nebraska are prohibited from acquiring title to or taking or holding any land, or real estate, or any leasehold interest extending for a period for more than five years or any other greater interest less than fee in any land, or real estate in this state by descent, devise, purchase or otherwise, except as provided in sections 76-403 to 76-405.

For the original version see note 32 *supra*.
62. *Neb. Rev. Stat.* § 76-401 (Reissue 1966), which provides:
Upon the failure of heirs, the title shall vest at once in the state, without an inquest or other proceedings in the nature of office found.
63. 323 F. Supp. at 1325-1332.
The plaintiffs’ contention that the Nebraska statutes constituted an unconstitutional invasion by the state into foreign affairs, was based primarily upon the decision of Zschernig v. Miller. In Zschernig, the United States Supreme Court held that an Oregon alien inheritance statute, as applied, involved Oregon in the field of foreign affairs and international relations, and therefore, as applied, the statute was unconstitutional. Foreign affairs and international relations were recognized to be entrusted solely to the federal government under the United States Constitution.

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64. 389 U.S. 429 (1968). The appellants in Zschernig were citizens of East Germany and sole heirs of an Oregon decedent who died intestate leaving personal property. The appellees, members of the State Land Board, had petitioned an Oregon Probate Court for escheat of the property pursuant to an Oregon statute which provides:

1. The right of an alien 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 inhabitants and citizens of the United States, is dependent in each case:
   a. Upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as inhabitants and citizens of the country of which such alien is an inhabitant or citizen;
   b. 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 country; and
   c. Upon proof that such foreign heirs, distributees, devisees or legatees may receive the benefit, use or control of money or property from estates of persons dying in this state without confiscation, in whole or in part, by the governments of such foreign countries.
2. The burden is upon such nonresident alien to establish the fact of existence of the reciprocal rights set forth in subsection (1) of this section.
3. If such reciprocal rights are not found to exist and if no heir, devisee or legatee other than such alien is found eligible to take such property, the property shall be disposed of as escheated property. Ore. Rev. Stat. § 111.070 (1957).

Nebraska’s most recent statute on nonresident alien inheritance, at note 127 infra, is quite similar to the Oregon provision.

65. Id.

66. It should be noted that the Supreme Court had previously rejected such a contention as “farfetched” in Clark v. Allen, 331 U.S. 503, 517 (1947). In Clark, the petitioners argued that the rights of American citizens to inherit in foreign nations by offering nonresident aliens reciprocal rights of inheritance in the United States was a policy to be determined solely by the Federal Government on a national basis and not for each individual state to determine on its own. The Supreme Court stated that the rights of descent and distribution are matters to be determined by state law except where an overriding federal policy, such as a treaty which required a specific method and form of devolution. 331 U.S. at 517. There were no applicable treaty provisions relating to succession of personal property, and the Court thus found no basis for state law to yield with regard to personalty. The
and state courts in administering inheritance laws could not intrude into such affairs.

Chief Judge Robinson in Shames interpreted Zschernig "as concerned primarily with the application of the reciprocity clause of [the Oregon statute] by the Oregon Probate Courts." He stated as follows:

Unlike the Oregon statute, the Nebraska statute herein challenged does not contain such a reciprocity provision or any provision which concerns itself with the application of the statute. If it did contain such a provision it would not be unconstitutional on its face but would become so only if it was applied in such a manner as to intrude upon the foreign affairs of the United States.

Judge Robinson concluded that the Zschernig decision sought to correct the practice of the Oregon Probate Courts in severely criticizing certain foreign nations while making findings that there was no reciprocity between such nations and Oregon. Such criticism had constitutional effects since it "caused an adverse affect upon the foreign dealings and affairs of the United States. . . ."

Court held that the California statute involved did not "cross the forbidden line" and interfere with the federal government's domain over foreign affairs because the only effect the statute might have in foreign nations would be merely "incidental or indirect." 331 U.S. at 517.

Section 259, Cal. Prob. Code, in 1942 provided:

The rights of aliens not residing within the United States of 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 and the proceeds thereof 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.

Section 259.2 provided:

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.

The condition with respect to receipt of moneys in the United States was repealed in 1945, while the Clark case was pending. Cal. Stat. 1945, ch. 1160, § 1, effective September 15, 1945. Under the original act, the nonresident alien had the burden of establishing the existence of reciprocal rights. Under the 1945 amendment the non-existence of such reciprocal right was placed on him who challenged the right of the non-resident alien to take.

Section 259.2 was repealed.

67. 323 F. Supp. at 1326.
68. Id.
69. 323 F. Supp. at 1327-28. That Judge Robinson was correct in his conclusion about Zschernig cannot be doubted. Justice Douglas stated in the majority opinion of Zschernig that "[t]he statute as construed seems to make unavoidable judicial criticism of nations established on a more authoritarian basis than our own." 389 U.S. at 440. There is similar lan-
As for the effect of *Zschernig* upon the Nebraska statutes, Judge Robinson spoke for the court as follows:

Our analysis of the *Zschernig* decision, our reading and examination of the Nebraska statutes challenged herein and the history of those statutes as reported in the decision (sic) of Nebraska courts compels us to conclude that the Nebraska statutes are not unconstitutional on any basis set forth in *Zschernig*.

Circuit Judge Lay agreed with Chief Judge Robinson’s conclusion that the Nebraska statutes did not constitute an “impermissible interference with federal power over foreign affairs.” Senior Judge Van Pelt also did not disagree with Chief Judge Robinson on this point. However, on the issues of whether the nonresident aliens were denied due process or equal protection under the Fourteenth Amendment to the United States Constitution, the court was split.

Chief Judge Robinson concluded that “[p]laintiffs’ contentions in this regard are without merit.” Circuit Judge Lay stated that he did not “find it necessary to pass on the issues of due process or equal protection under the Fourteenth Amendment since they are not within the pleadings before us.”


Plaintiffs contended that the Nebraska statutes challenged, deprived them “and other nonresident aliens of their property without due process of law, as guaranteed by the Fourteenth Amendment to the United States Constitution,” and also asserted that “when the challenged statutes are read in conjunction with Section 76-414, R.R.S. 1943, they are denied equal protection of the law as guaranteed by the equal protection clause of the Fourteenth Amendment of the United States Constitution.”

The provisions of Sections 76-402 to 76-413 shall not apply to any real estate lying within the corporate limits of cities and villages or within three miles thereof, nor to any manufacturing or industrial establishment referred to in Section 76-413. 

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COMMENTS

Judge Van Pelt found that although plaintiffs had no standing under the equal protection clause of the Fourteenth Amendment, because by its terms it "extends its protection only to those persons within the jurisdiction of the state," he could find "no comparable limitation in the language of the due process clause." 77

Judge Robinson rejected the equal protection challenge on the same grounds as did Judge Van Pelt. 78 And, although Judge Robinson recognized, as did Judge Van Pelt, that the due process clause by its terms applies to all persons whether within or without the jurisdiction of the state, he was of the opinion that even if the plaintiffs were entitled to due process under the Fourteenth Amendment, the Nebraska statutes did not in fact deprive them of property without due process. Hence, it was necessary for him to decide if the plaintiffs were entitled to due process. 79 He thus fol-

76. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.


78. Judge Robinson reasoned that:

The Fourteenth Amendment to the United States Constitution provides: No state shall . . . deny to any person within its jurisdiction the equal protection of its laws. Thus before a state must accord Fourteenth Amendment Equal Protection Rights to any person, that person must be physically present within its borders. Therefore, while aliens residing within a state are clearly entitled to the equal protection of its laws, the same is not true of nonresident aliens, and a state is not constitutionally required to accord the equal protection of its laws to this latter group of aliens. Accordingly, this Court concludes that the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution has no application to the nonresident alien plaintiffs appearing in this case. 323 F. Supp. at 1333.

The following cases were cited by Judge Robinson in support of his conclusion: Yick Wo v. Hopkins, 118 U.S. 356 (1888); Wormsen v. Moss, 177 Misc. 19, 29 N.Y.S. 2d 798 (1941); Templar v. Michigan State Board of Examiners, 131 Mich. 254, 90 N.W. 1058 (1902); Takahashi v. Fish & Game Commission, 30 Cal. 2d 719, 185 P.2d 805, rev'd on other grounds, 334 U.S. 410 (1947).

79. 323 F. Supp. at 1333. In regard to the issue of whether nonresident aliens were entitled to due process, Judge Robinson stated: "The Supreme Court has never indicated in unequivocal terms whether a State is required to give due process to nonresident aliens." 323 F. Supp. at 1333. And in footnote 18 of his opinion he notes:


Judge Robinson's assertion that the question of whether a state is required to afford due process in relation to property situated within its borders to
allowed the same approach in regard to the Nebraska provisions as

an alien outside its borders has never been answered in unequivocal terms is undoubtedly correct. The reason that the question is yet unanswered by the highest Court is that it has never had to make the determination. However the Court has on at least one notable occasion indicated that a nonresident cannot be deprived of property situated within the United States without due process of law. The Court made this indication through Chief Justice Hughes in Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931), which case is cited by Judge Van Pelt in his dissent in Shames. In Russian Volunteer Fleet vessels were being constructed in an American harbor. A Russian corporation was assignee of the contract rights of the party for whom the vessels were being built. The United States Shipping Board Emergency Fleet Corporation, acting under the authority conferred by an act of June 15, 1917, requisitioned these contracts; the Emergency Fleet Corporation fixed the amount of compensation to which it felt the Russian corporation was entitled. The Russian corporation, being dissatisfied with the amount of compensation awarded it, commenced an action in the United States Court of Claims under the provisions of the act of June 15, 1917. The Court of Claims dismissed the petition for want of jurisdiction, reasoning that since the United States had not recognized the Union of Soviet Socialist Republics in Russia, the petitioner was not entitled to maintain its suit in view of section 155 of the Judicial Code (28 U.S.C. § 261). The United States Supreme Court granted certiorari and reversed. The only real question confronting the Court was one of statutory construction: was the petitioner entitled to prosecute its claim in the Court of Claims under 28 U.S.C. § 261? The Court could have answered this question with a mere affirmative but it went further, and Chief Justice Hughes for a unanimous Court stated:

The petitioner was an alien friend, and as such was entitled to the protection of the Fifth Amendment of the Federal Constitution. Wong Wing v. United States, 163 U.S. 228, 238, compare Yick Wo v. Hopkins, 118 U.S. 356, 369; Santa Clara County v. Southern Pacific R. Co., 118 U.S. 394, 396; Truax v. Raich, 239 U.S. 33, 39; Terrace v. Thompson, 263 U.S. 197, 216; Home Insurance Co. v. Dick, 281 U.S. 397, 411. 282 U.S. at 489.

and further declared:

As alien friends are embraced within the terms of the Fifth Amendment, it cannot be said that their property is subject to confiscation here because the property of our citizens may be confiscated in the alien's country. The provision that private property shall not be taken for public use without just compensation establishes a standard for our Government which the Constitution does not make dependent upon the standards of other governments. The act of Congress should be interpreted in the light of its manifest purpose to give effect to the Constitutional guaranty. 282 U.S. at 491-92.

Since the statements in regard to the fifth amendment were not needed to arrive at the result reached, they might be considered dicta. However, there can be little doubt from a fair reading of the opinion that Hughes intended to bottom the case on the Constitution and not the statute. The case, at least, reflects the view of the Supreme Court in 1931, that nonresident aliens were entitled to rights under the just compensation clause of the Fifth Amendment. The statement: "The Fifth Amendment gives to each owner of property his individual right", 282 U.S. at 491, implies that no distinction on the basis of residency or citizenship is to be drawn. Judge Van Pelt's dissent in Shames cites with approval the following quotation from Sardino v. Federal Reserve Bank, 361 F.2d 106 (2d Cir. 1966):

The Government's second answer that 'the Constitution of the
United States confers no rights on nonresident aliens' is so patently erroneous in a case involving property in the United States that we are surprised it was made. Throughout our history the guarantees of the Constitution have been considered applicable to all actions of the Government within our borders—and even to some without. Cf. Reid v. Covert, 354 U.S. 1, 5, 8, 77 S. Ct. 1222, 1 L. Ed. 2d 1148 (1957). . . . This country's present economic position is due in no small part to European investors who placed their funds at risk in its development, rightly believing they were protected by constitutional guarantees; today, for other reasons, we are still eager to attract foreign funds. In Russian Volunteer Fleet v. United States, 282 U.S. 481, 489, 491-92, 51 S. Ct. 229, 75 L. Ed. 473 (1931), the Court squarely held that an alien friend is entitled to the protection of the Fifth Amendment's prohibition of taking without just compensation even when his government was no longer recognized by this country. And the Court has declared unequivocally, with respect to nonresident aliens owning property within the United States, that they 'as well as citizens are entitled to the protection of the Fifth Amendment.' United States v. Pink, 315 U.S. 203, 228, 62 S. Ct. 552, 86 L. Ed. 796 (1942). See also Guessefeldt v. McGrath, 342 U.S. 308, 317-19, 72 S. Ct. 338, 96 L. Ed. 342 (1952). 323 F. Supp. 1339.

Pink, cited in the above quotation, involved an attempt by the State of New York to distribute the assets located within that state, of a Russian insurance corporation which had been nationalized by the Union of Soviet Socialist Republics. Among those who had been given rights by the decree of the New York Court of Appeals were a number of foreign creditors of the Russian government. The question was raised as to whether the rights of these foreign creditors were protected by the Fifth Amendment due process clause from power of the United States to seize these assets pursuant to the provisions of a certain assignment whereby Russia had assigned certain claims to the United States. The discussion in Pink is quite limited. It recognizes the argument in behalf of the foreign creditors, and cites Russian Volunteer Fleet with approval. The Court stated that "aliens as well as citizens are entitled to the protection of the Fifth Amendment." 315 U.S. at 228. It goes on to say, however, that "[a] State is not precluded . . . by the Fourteenth Amendment from according priority to local creditors as against creditors who are nationals of foreign countries and whose claims arose abroad." 315 U.S. at 228. The Court completely avoided the aliens' claims to protection under the due process clause by upholding the claim of the United States on the basis of the powers of the President in the conduct of foreign relations.

The other case cited in the quote from Sardino is Guessefeldt v. McGrath, 342 U.S. 308 (1952). In Guessefeldt the question was whether an alien who was outside the borders of the United States was entitled to recover property which had been seized by the Alien Property Custodian pursuant to the provisions of the Trading with the Enemy Act. The alien plaintiff brought an action to recover it under another provision of that same act. The only question which the Court in Guessefeldt had to resolve was whether the particular alien involved was included among those to whom Congress had intended to extend the right to recover. Thus, all the court had to do, as in Russian Volunteer Fleet was construe a statute. And the Court's statement in Guessefeldt that friendly aliens are protected by the Fifth Amendment requirement of just compensation," 342 U.S. at 318, is even more clearly dicta than the same language in Russian Volunteer Fleet.

Sardino, supra, involved a challenge by a Cuban national of regulations issued by the Secretary of Treasury freezing all bank deposits of such individuals. The Court upheld the regulations as a legitimate means of keeping money out of the hands of a government engaged in activities which constitute a threat to our national security.
another three-judge federal court had in *Bjarsch v. DiFalco*, when considering the New York inheritance provisions. *Bjarsch* involved an action to have the New York alien nonresident inheritance statute declared unconstitutional and to have its enforcement enjoined. As to a challenge that the statute deprived aliens of their property without due process of law, the court, without considering

Judge Van Pelt recognized that the circumstances in *Sardino* were distinguishable from the *Shames* situation. *Sardino* involved money, not realty, and ownership was already clearly established by the nonresident alien, unlike in *Shames*. 323 F. Supp. at 1339. In addition all of the foregoing cases (i.e., *Russian Volunteer Fleet*, *Pink*, *Guessefeldt*, and *Sardino*), are distinguishable from *Shames* in that none of them were inheritance cases. It cannot be doubted that unlike the contractual rights involved in the former cases, the intestate succession rights involved in *Shames*, are generally matters of grace within the sound discretion of the state legislature. As noted by Justice Harlan in his concurring opinion in *Zschernig v. Miller*, 389 U.S. 429, 459 (1968): “[T]he appellants concede that Oregon might deny inheritance rights to all nonresident aliens.”

Thus, it is one thing to say that a nonresident alien cannot be deprived of vested contractual rights to property within a state and quite another to say he cannot be barred from inheriting property within the same state. The former involves an area which can seldom be infringed by a state, the latter is an area solely within the province of the state.

In addition it should be noted that there is authority contrary to the foregoing cases.

In *Bridges v. Wixon*, 326 U.S. 135 (1945), the Court said:

The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. 326 U.S. at 161 (concurring opinion).

In *Cermeno-Cerna v. Farrell*, 291 F. Supp. 521 (C.D. Cal. 1968), a federal district court stated:

Recognizing that aliens outside the United States cannot complain of a lack of due process or equal protection of the law, it is clear that aliens residing or present within the United States must be afforded both procedural due process and equal protection. 291 F. Supp. at 528.

And, in the recent Supreme Court case of *Graham v. Richardson*, 39 U.S.L.W. 4732 (June 14, 1971) the Supreme Court speaking through Justice Blackman said:

The Fourteenth Amendment provides, ‘[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.’ It has long been settled, and it is not disputed here, that the term ‘person’ in this context encompasses lawfully admitted resident aliens as well as citizens of the United States. . . . 39 U.S.L.W. at 4733.

Note that he does not include nonresident aliens within the term ‘person’. Aliens who are citizens of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts, shall have the privilege of prosecuting claims against the United States in the Court of Claims, whereof such court, by reason of their subject matter and character, might take jurisdiction. 28 U.S.C. § 261.

whether nonresident aliens were entitled to due process, concluded
the statute satisfied the requirements of due process in any event.

In holding that the Nebraska statutes did not deny nonresident
aliens their property without due process of law, Judge Robinson
relied heavily upon the cases of Terrace v. Thompson,81 Porter-
field v. Webb,82 Webb v. O'Brien,83 Frick v. Webb.84 All of these
cases concerned alien land laws which were challenged as violating
the due process and equal protection clauses of the Fourteenth
Amendment when applied to aliens who were not entitled to citi-
zenship under the naturalization laws. The challenged statutes, in
substance, provided that no alien could own, take, have or hold legal
or equitable title, or the right to any benefit of any land, and
that land conveyed to or for the use of aliens in violation of the
statute would escheat to the state. It was made a misdemeanor,
punishable by fine or imprisonment or both, to knowingly trans-
fer land or the right to the control, possession or use of land to
such aliens.

The Supreme Court upheld the statutes as valid exercises of
the police power of the states involved. In Terrace, the Court held
that "legislation applying alike to all aliens withholding from them
the right to own land, cannot be said to be capricious or to
amount to an arbitrary deprivation of liberty or property, or to
transgress the due process clause."85 The Court further held, "[T]he
state act is not repugnant to the equal protection clause of and does
not contravene the Fourteenth Amendment."86

Judge Robinson noted that the statute upheld in the Porter-
field, O'Brien and Frick cases, was later invalidated by the Supreme
Court of California in Sei Fujii v. State.87 That court reasoned
that the 1923 cases were no longer good law, relying upon the
United States Supreme Court case of Oyama v. California.88 In
Oyama the California Alien Land Law had been applied to effect
an escheat to the state of certain agricultural lands recorded in
the name of a minor American citizen because they had been paid
for by his father, a Japanese alien ineligible for naturalization who
was appointed as his son's guardian. The United States Supreme
Court held that the son had been deprived of the equal protec-

81. 263 U.S. 197 (1923).
82. 263 U.S. 225 (1923).
83. 263 U.S. 313 (1923).
84. 263 U.S. 326 (1923).
85. 263 U.S. at 218.
86. 263 U.S. at 222.
88. 332 U.S. 633 (1948).
tion of the laws contrary to the Fourteenth Amendment. The Court reasoned that the Alien Land Law, as applied in that case, discriminated against the citizen's son in that it created a statutory presumption that the conveyance financed by a father, ineligible for citizenship and unable to hold or acquire land in California, was not a gift to the son but that the land was held for the father's benefit, while a similar conveyance by a citizen father to a citizen son would have been considered a gift. The Court concluded that such discrimination against the citizen son, solely on the basis of his racial descent, could not be justified under the equal protection clause.

In *Sei Fujii*, the California Supreme Court struck down the entire Alien Land Law, on equal protection grounds, because in the court's view the statute discriminated against resident aliens.

However, Judge Robinson was of the view that *Sei Fujii* and *Oyama* opinions found the 1923 cases to be invalid "only in regard to The Fourteenth Amendment Equal Protection Right therein expressed,"\(^8^9\) and that they in no way disturbed the holdings of the 1923 cases in regard to the due process clause.\(^9^0\) A fair reading of the *Oyama* and *Sei Fujii* cases supports Judge Robinson's conclusions.

In addition, the cases of *Takahashi v. Fish & Game Commission*,\(^9^1\) and *Graham v. Richardson*,\(^9^2\) cast doubt on the 1923 opinion, but again only insofar as they relate to the equal protection clause. This seems clear from the following statement in *Takahashi*:

> The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under nondiscriminatory laws.\(^9^3\)

The foregoing language was cited approvingly in *Graham*.\(^9^4\)

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89. 323 F. Supp. at 1335.
90. Id.
91. 334 U.S. 410 (1948). In *Takahashi* a California statute which denied commercial fishing licenses to aliens ineligible for citizenship was invalidated on the ground that it violated the equal protection clause in that it prevented resident, although ineligible, aliens from earning a living as fishermen.
92. 39 U.S.L.W. 4732 (June 14, 1971). In *Graham*, the United States Supreme Court held that statutes of Arizona and Pennsylvania which denied welfare benefits to resident aliens or aliens who had not resided in the United States for a specific number of years were violative of the equal protection clause.
93. 334 U.S. at 420.
94. 39 U.S.L.W. at 4733.
Judge Robinson concluded that the 1923 cases were still good law insofar as they upheld the provisions of the state statutes which completely barred nonresident aliens from owning or inheriting land, as valid exercises of the state's police power and as not violative of the due process clause of the Fourteenth Amendment. 95

Judge Robinson also considered the additional argument of the plaintiffs that the statutes deprived the decedent of his liberty without due process of law under the Fourteenth Amendment insofar as they did not allow him to dispose of his property as he desired. He concluded that they did not have standing to raise this issue. 96 In so concluding he relied upon the case of Tileston v. Ullman. 97 However, in view of the Supreme Court decisions holding that where the possessor of a right cannot himself assert it, others may be permitted to assert it for him, 98 Judge Robinson's holding on this point seems somewhat questionable. However, in view of the fact that decedent had died intestate, and thus, had not expressed any desire as to the disposition of his property, the argument of plaintiffs on this point was the most tenuous.

Judge Van Pelt was of the opinion that if the statute provided for compensation to the plaintiffs for the land which escheated to the state under the statutes, then it would be "difficult to conceive how plaintiffs were denied any rights under the Fourteenth Amendment." 99 He stated that it was "readily apparent that the statute [as originally enacted] applied only to nonresident aliens, and provided for full compensation to any person 'who could have been entitled to such lands.'" 100 It was his opinion that the Su-

95. 323 F. Supp. at 1335.
96. 323 F. Supp. at 1336.
97. 318 U.S. 44 (1943). In Tileston, a doctor brought a declaratory judgment action and contended that a statute barring him from giving advice as to the use of contraceptives was unconstitutional. The Court held he could not rely on his patients rights to life, which the law allegedly violated.
98. In Pierce v. Society of Sisters, 268 U.S. 510 (1925), where a parochial school challenged the constitutionality of a statute requiring parents to send children to public schools, the plaintiff in a federal court action was allowed to assert the rights of the parents in defending its own property rights. And in NAACP v. Alabama, 357 U.S. 449 (1958), the NAACP in resisting a state order to disclose its membership lists was allowed to assert the rights of its members. See also Jeffrey Mfg. Co. v. Blagg, 235 U.S. 571 (1915); Traux v. Raich, 239 U.S. 33 (1915); Barrows v. Jackson, 346 U.S. 249 (1953). See generally Sedler, Standing to Assert Costitutional Jus Tertii in the Supreme Court, 71 YALE L.J. 599 (1962). In Shames it is obvious the decedent could no longer assert his own rights.
99. 323 F. Supp. at 1341 (dissenting opinion).
100. Id. at 1342 (dissenting opinion). As originally enacted the statute provided in pertinent part:
Section 1. Non-resident aliens and corporations not incorporated
Supreme Court in *Toop v. Ulysses Land Co.*, 101 had dismissed as “frivolous” a contention that the statute was repugnant to the Fourteenth Amendment,102 because “the statutory scheme provided for compensation to those heirs who would have been entitled to the land.”103 However, it should be noted that the compensation portion of the statute was not even mentioned in either the lower court104 or the Supreme Court opinions.105

In addition, it must be noted that in the case of *State v. Thomas*,106 the Nebraska Supreme Court did adopt the interpretation which Judge Van Pelt placed on the original compensation portions of the statute. However, subsequently in *State v. Toop*,107

under the laws of the state of Nebraska, are hereby prohibited from acquiring title to or taking or holding any lands or real estate in this state by descent, devise, purchase or otherwise, only as hereinafter provided, except that the widow and heirs of aliens who have heretofore acquired lands in this state under the laws thereof, may hold such lands by devise or descent for a period of ten (10) years and no longer, and if at the end of such time herein limited such lands so acquired have not been sold to a bona fide purchaser for value, or such alien heirs have not become residents of this state, such lands shall revert and escheat to the state of Nebraska, and it shall be the duty of the county attorney in the counties where such lands are situated to enforce forfeitures of all such lands as provided by this act.

Section 2. Whenever any such lands shall revert and escheat to the state of Nebraska as provided in this act, it shall be the duty of the county attorney of the county in which such lands are situated to proceed against such alien in the district court of the county where the land is situated, for the purpose of having such forfeiture declared. Service of summons may be had upon the non-resident alien defendants by publication as provided in the Statutes of Nebraska for the service of summons by publication in cases of foreclosure of mortgages, and the court shall have power to hear and determine the questions presented in such cases and to declare such lands escheated to the state; and when such forfeiture shall be declared by the district court it shall be the duty of the clerk of the court to notify the governor of the state that the title to such lands is vested in the state by the decree of the said court, and the clerk of the court shall present the auditor of public accounts with the bill of costs incurred by the county in prosecuting such case, who shall issue a warrant to the clerk of the court on the state treasurer to repay the county for such costs incurred.

The heirs or persons who would have been entitled to such lands, shall be paid by the state of Nebraska the full value thereof, as ascertained by appraisement upon the oaths of the judge, treasurer and clerk of the county where such lands lie, and such lands shall then become subject to the law, and shall be disposed of as other lands belonging to the state; Provided, That the expense of the appraisement shall be deducted from the appraised value of the land. *Laws of Neb. ch. 58, pp. 483-85 (1889).*

102. Id. at 582-83.
103. 323 F. Supp. at 1342 (dissenting opinion).
104. 278 F. 840 (D. Neb. 1913).
106. 103 Neb. 147, 170 N.W. 839 (1919).
the court said in regard to Thomas that "we now conclude that our interpretation of the statute in that case was wrong, and, in so far as it is at variance with the view expressed herein, it is disapproved." In this latter case the court held that the decedent's land passed directly to his next of kin, who were citizens of the United States, and title or interest to the land did not pass to his nonresident alien next of kin, nor were they entitled to compensation.

Judge Van Pelt notes that section 1 of the original act was amended in 1921 to eliminate the statutory distinction between resident and nonresident aliens, while the section providing for compensation to the heirs who would have been entitled to the lands remained unchanged. He further notes in the case of Nelson v. Nelson, it was concluded that "the widow of a decedent, who died owning land in Nebraska, was a nonresident alien," the court there said:

It may be true that she will not be permitted to hold the disputed land because of the Nebraska statute above referred to, section 5687, Comp. St. 1922; but if by our law the same is ever escheated to the state it must be by appropriate proceedings and upon full compensation.

Thus it is Judge Van Pelt's view that under the 1921 amendment even a nonresident alien was entitled to full compensation. The foregoing quotation clearly supports his view.

However, the statutes were amended in 1939 and then revised in 1943. Prior to the 1943 revision, the forerunner of the Nebraska Revised Statute § 76-408 (Reissue 1966) provided in part:

Whenever any such lands shall revert and escheat to the State of Nebraska, as provided in this article, it shall be the duty of the county attorney (to bring escheat proceedings in the county court) . . . . The heirs or persons who would have been entitled to such lands shall be paid by the State of Nebraska the full value thereof. . . .

Judge Van Pelt points out that "[t]he Revisor eliminated the phrase 'this article' and substituted 'sections 76-403, 76-405 and 76-411.'" In his view, however, "even though § 76-402 is not

108. 107 Neb. at 400, 186 N.W. at 374.
111. 113 Neb. 453, 203 N.W. 640 (1913).
112. 113 Neb. at 459, 203 N.W. at 642.
114. 323 F. Supp. at 1343 (dissenting opinion).
specified in § 76-408, a proper interpretation is that compensation must be paid when land escheats under §§ 76-401, -402 . . . 

However, § 76-402 unlike §§ 76-403, -405, and -411 does not contain an escheat provision. It merely bars all aliens

Whenever any such lands shall revert and escheat to the State of Nebraska, as provided in sections 76-403, 76-405 and 76-411, it shall be the duty of the county attorney of the county in which such lands are situated, to proceed against such alien in the district court of the county where the land is situated for the purpose of having such forfeiture declared. Service of summons may be had upon the nonresident alien defendants by publication as provided in the statutes of Nebraska for the service of the summons by publication in cases of foreclosure of mortgages, and the court shall have the power to hear and determine the questions presented in such cases and to declare such lands escheated to the state. When such forfeiture shall be declared by the district court, it shall be the duty of the clerk of the court to notify the Governor of the state that the title to such lands is vested in the state by the decree of the court. The clerk of the court shall present the Director of Administrative Services with the bill of costs incurred by the county in prosecuting such case, who shall issue a warrant to the clerk of the court on the state treasury to repay the county for such costs incurred. The heirs or persons who would have been entitled to such lands shall be paid by the State of Nebraska the full value thereof, as ascertained by appraisement upon the oaths of the judge, treasurer, and clerk of the county where such lands lie, and such lands shall become subject to the law, and shall be disposed of as other lands belonging to the state; Provided, the expense of the appraisement shall be deducted from the appraised value of the land.

116. 323 F. Supp. at 1344 (dissenting opinion).
118. Neb. Rev. Stat. § 76-403 (Reissue 1966) provides:
The widow and heirs of aliens, who have prior to March 16, 1889, acquired lands in this state under the laws thereof, may hold such lands by devise or descent for a period of ten years and no longer, and if at the end of such time such lands, so acquired, have not been sold to a bona fide purchaser for value, such lands or other interest therein shall revert and escheat to the State of Nebraska. It shall be the duty of the county attorney in the counties where such lands are situated to enforce forfeitures of all such lands or other interests therein as provided by section 76-408.

Any resident alien may acquire title to lands in this state by devise or descent only, provided such alien shall be required to sell and convey said real property within five years from the date of acquiring it, and if he shall fail to dispose of it to a bona fide purchaser for value within that time, it shall revert and escheat to the State of Nebraska.

120. Neb. Rev. Stat. § 76-411 (Reissue 1966) provides:
The statutes of Nebraska shall not prevent the holders, whether aliens or corporations not organized under the laws of the State of Nebraska, of liens upon real estate or any interest therein, from holding or taking valid title to the real estate subject to such liens, nor shall it prevent any such alien or corporation from enforcing any such lien or judgment for any debt or liability, nor from becoming a purchaser at any sale made for the purpose of collecting or enforcing the collection of such debt or judgment; Provided, how-
from acquiring any interest in real estate "except as provided in 
sections 76-403 to 76-405."\textsuperscript{121} And when an alien who does \textbf{not} 
come within these latter provisions, and cannot therefore acquire 
by inheritance an interest in land, the land will escheat to the 
state "at once" under the terms of § 76-401.\textsuperscript{122} And as the Ne-
braska Supreme Court said in \textit{Semrad v. Semrad}:\textsuperscript{123} "Section 
76-408, R.R.S. 1943, clearly refers to the exceptions and provisions 
of section 76-403, 76-405, and 76-411, R.R.S. 1943, and not to section 
76-401, R.R.S. 1943, which provides for the vesting of title in the 
state without legal action."\textsuperscript{124}

Thus, Judge Van Pelt was undoubtedly correct when he re-
marked: "It is more probable that the meaning of the statute 
was inadvertently changed in 1943, and that under the present 
scheme no compensation is to be paid."\textsuperscript{125} And, since no compen-
sation could be paid he "would declare the statute invalid."\textsuperscript{126}

\section*{IV. NEBRASKA'S PRESENT ALIEN 
INHERITANCE STATUTE}

In 1963, the Nebraska Unicameral enacted a statute setting 
forth specific conditions upon which nonresident aliens would be 
allowed to take real or personal property, or the proceeds thereof, 
in this state, by intestate succession on testamentary disposition.\textsuperscript{127}

\begin{itemize}
\item \textit{ever}, all lands so acquired shall be sold within ten years after the 
title thereto shall be perfected in such alien or foreign corporation, 
and in default of such sale within such time, such real estate shall 
revert and escheat to the State of Nebraska.
\item 121. \textit{NEB. REV. STAT.} § 76-402 (Reissue 1966).
\item 122. \textit{NEB. REV. STAT.} § 76-401 (Reissue 1966). \textit{See note 62 supra.}
\item 123. 170 Neb. 911, 104 N.W.2d 338 (1960).
\item 124. 170 Neb. at 917, 104 N.W.2d at 342.
\item 125. 323 F. Supp. at 1344 (dissenting opinion).
\item 126. \textit{Id.}
\item 127. \textit{NEB. REV. STAT.} § 4-107 (Supp. 1969) provides:
\begin{enumerate}
\item The right of an alien not residing within the United States 
or its territories to take either real or personal property or the pro-
ceeds thereof in this state by succession or testamentary disposition, 
upon the same terms and conditions as inhabitants and citizens of 
the United States, is dependent in each case:
\item (a) Upon the existence of a reciprocal right upon the part of 
citizens of the United States to take real and personal property and 
the proceeds thereof upon the same terms and conditions as inhabi-
tants and citizens of the country of which such alien is an inhabi-
tant:
\item (b) 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 country; and
\item (c) Upon proof that such nonresident alien heirs, distributees, 
devisees, or legatees may receive the benefit, use, or control of prop-
erty or proceeds from estates of persons dying in this state without
\end{enumerate}
\end{itemize}
In enacting the present statute, Nebraska has aligned itself with a substantial number of American states which have enacted either "benefit" or "reciprocity" provisions. The reciprocity statutes provide for nonresident alien inheritance only if it is shown that the foreign country of which the nonresident alien heir is a citizen allows American heirs of its citizens to inherit property within its borders upon the same terms as citizens of that country inherit property. These provisions often call for escheat to the confiscation in whole or in part, by the governments of such foreign countries.

(2) The burden is upon such nonresident alien to establish the fact of existence of the reciprocal rights set forth in subsection (1) of this section.

(3) If such reciprocal rights are not found to exist, the property shall be delivered to the State Treasurer to be held for a period of five years from date of death during which time such nonresident alien may show that he has become eligible to receive such property. If at the end of such period of five years no showing of eligibility is made by such nonresident alien, his rights to such property or proceeds shall be barred.

(4) At any time within the one year following the date the right of such nonresident alien has been barred, any other person other than an ineligible nonresident alien who, in the case of succession or testamentary disposition, would have been entitled to the property or proceeds by virtue or the laws of Nebraska governing intestate descent and distribution had the nonresident alien predeceased the decedent, may petition the district court of Lancaster County for payment or delivery of such property or proceeds to those entitled thereto.

(5) If no person has petitioned the district court of Lancaster County for payment or delivery of such property or proceeds within six years from the date of death of decedent, such property or proceeds shall be disposed of as eschated property.

(6) All property other than money delivered to the State Treasurer under this section may within one year after delivery be sold by him to the highest bidder at public sale in whatever city in the state affords in his judgment the most favorable market for the property involved. The State Treasurer may decline the highest bid and reoffer the property for sale if he considers the price bid insufficient. He need not offer any property for sale if, in his opinion, the probable cost of sale exceeds the value of the property. Any sale held under this section shall be preceded by a single publication of notice thereof at least three weeks in advance of sale in an English language newspaper of general circulation in the county where the property is to be sold and the cost of such publication and other expenses of sale paid out of the proceeds of such sale. The purchaser at any sale conducted by the State Treasurer pursuant to this section shall receive title to the property purchased, free from all claims of the owner or prior holder thereof and of all persons claiming through or under them. The State Treasurer shall execute all documents necessary to complete the transfer of title.

128. § 259 of the California Probate Code is the prototype reciprocal rights statute, and it provides in part as follows:

The right of aliens not residing within the United States to take real [and personal] property in this State by succession or testamentary disposition is dependant 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.
state if the alien heir cannot sustain the burden of showing reciprocity and if there are no other domestic heirs.\textsuperscript{129} The benefit statutes usually require the nonresident alien to show that he will be able to enjoy the benefit, use and control of the inheritance before probate court will release it to him.\textsuperscript{130} Unlike the reciprocity provisions, the benefit statutes usually are not confiscatory since if the heir cannot meet his burden of proof,\textsuperscript{131} the property or prov-

of which such aliens are residents . . . CAL. PROB. CODE § 259 (1956).

Note the similarity between California's statute and Nebraska's, note 127 supra, and the Oregon statute involved in the Zschernig case, note 64 supra. For similar enactments in other states, see ARIZONA REV. STAT. ANN. § 14-212 (c) (1956); IOWA CODE § 576.8 (Supp. 1966); MONT. REV. CODE ANN. § 91-520 (1964); NEV. REV. STAT. §§ 134.230, 130.240, 134.250 (1957); N.C. GEN. STAT. § 64-3 (1965); ORLA. STAT. tit. 60, § 121 (1963); WYO. STAT. ANN. § 2-43.1 (Supp. 1967). See also Note, State Statutes Affecting the Inheritance and Distribution of Estates to Foreign Heirs, 19 U. ILL. L. F. 141, 142-43 (1967).

129. CAL. PROB. CODE § 259.1 (1942): "The burden shall be upon such nonresident aliens to establish the fact of existence of the reciprocal rights . . ." This section was amended, however, in 1945 so as to place the burden of establishing the non-existence of such reciprocal right upon him who challenged the right of the non-resident aliens to take. The Nebraska statute, however, adopts California's original approach. See note 127 supra.

Reciprocity statutes also usually provide that "[i]f such reciprocal rights are not found to exist and if no heir, devisee or legatee other than alien is found eligible to take such property, the property shall be disposed of as escheated property." Ore. Rev. Stat. § 111.070(3) (1957) (repealed 1969). The Nebraska statute contains the same provision, see note 127 supra. See also Zschernig v. Miller, 389 U.S. 429 (1968).

130. Typical of these statutes is § 2218-2 of the New York Surrogate Court Procedure Act, which provides:

Where it shall appear that a beneficiary would not have the benefit or use of control of the money or property due him or where other special circumstances make it desirable that such payment should be withheld the decree may direct that such money or property be paid into court for the benefit of the beneficiary or the person or persons who may thereafter appear to be entitled thereto. The money or property so paid into court shall be paid out only upon order of the court or pursuant to the order on judgment of a court of competent jurisdiction. N.Y. Surr. Ct. Pra. Law Sec. 2218-2 (Supp. 1968).

Other "benefit" statutes are CONN. GEN. STAT. ANN. § 45-278 (1960); FLA. STAT. ANN. § 731.28 (1964); MD. ANN. CODE art. 93, § 161 (1963); MASS. ANN. LAWS ch. 206, § 27A (Supp. 1966); MICH. STAT. ANN. § 27.3178 (306a) (1962); N.J. REV. STAT. § 3A: 25-10 (1953); OHIO REV. CODE ANN. §§ 2113.81-83 (Supp. 1962); PA. STAT. ANN. tit. 30, §§ 320.737, 1156 (Supp. 1966); R. I. GEN. LAWS ANN. § 33-13-13 (1958).


In any such proceeding where it is uncertain that an alien benefici-

ary . . . would have the benefit or use or control of the money
ceeds thereof is paid into court until such time as the heir can es-

establish that he will receive the benefit of the inheritance.\textsuperscript{132}

The Nebraska statute, of course, constitutes a blending of the
reciprocity and benefit provisions. It is not as harsh as the usual re-
ciprocity statute,\textsuperscript{133} yet is more severe than the usual benefit stat-
ute.\textsuperscript{134}

The constitutionality of both the reciprocity and benefit statutes
is governed by the same constitutional test.\textsuperscript{135} All such statutes
are apparently constitutional on their face,\textsuperscript{136} but can become un-
constitutional if the state courts, in applying them, engage in se-
vere criticism of the foreign nations\textsuperscript{137} in which the nonresident
alien heirs reside.

Thus, under the present state of the law the Nebraska statute
is apparently constitutional on its face, and unless the Nebraska
courts engage in the type of conduct which the United States Su-
preme Court disapproved in \textit{Zschernig}, it should also withstand
any constitutional challenge to its application.

However, Justice Stewart in a concurring opinion in \textit{Zschernig},
joined by Justice Brennan, expressed doubt that such statutes could
ever be applied in a constitutional manner when he said:

Any realistic attempts to apply any of the three criteria (of

or property due him the burden of proving that the alien benefi-
ciary will receive the benefit or use of control of the money or
property due him shall be upon him or the person claiming from,
through or under him.

\textit{See} subsection (1) (c) of the Nebraska statute, note 127 \textit{supra}.

\textsuperscript{132} \textit{See} note 131 \textit{supra}. \textit{See also} subsection (3) of the Nebraska stat-
ute, note 127 \textit{supra}.

\textsuperscript{133} \textit{See} note 129 \textit{supra}.

\textsuperscript{134} \textit{See} note 131 \textit{supra}.

\textsuperscript{135} As to the constitutionality of the reciprocity statutes see \textit{Zschernig}
v. Miller, 389 U.S. 429 (1968). As to the benefit provision see Goldstein v.

\textsuperscript{136} \textit{Id}. \textit{See also} Clark v. Allen, 337 U.S. 503 (1947), which rejected a
challenge that California's reciprocity statute was unconstitutional on its
face.

\textsuperscript{137} In regard to Oregon's reciprocity type statute considered in \textit{Zscher-
nig}, Justice Douglas said "[t]he statute as construed seems to make un-
avoidable judicial criticism of nations established on a more authoritar-
127, 133 (S.D.N.Y. 1970), a three judge panel in considering the constitution-
ality of New York's benefit statutes, stated that,

\textit{In} applying such statute, whether the law be a reciprocity pro-
vision or a benefit, use and control provision, they appear to warn
the state courts not to inquire into or evaluate the administration of
foreign law, or the credibility and policies of foreign govern-
ments. Thus a court is limited to a 'routine reading' of foreign
country's laws on a 'just matching' of such laws with the laws of the
state involved . . . .
the Oregon statute) would necessarily involve the Oregon courts in an evaluation, either express or implied, of the administration of foreign law, the credibility of foreign diplomatic statements, and the policies of foreign governments.\(^\text{138}\)

And he, like the majority, was of the opinion that such an “evaluation” would “launch the State upon a prohibited voyage into a domain of exclusively federal competence.”\(^\text{139}\)

Only time will tell whether the Nebraska courts can apply the Nebraska reciprocity and benefit statute in such a manner as to avoid interfering with the foreign relations power of the federal government.

Even if the Nebraska courts can apply the statute so as to avoid a Zschernig challenge, the provision is still subject to challenge under article III, section 4 of the Nebraska constitution which provides in part, as follows: “And no laws shall be amended unless the new act contain the section or sections as amended and the sections or section shall be repealed.”\(^\text{140}\)

The rule followed in applying the aforesaid provision was set out by the Nebraska Supreme Court in *State ex rel Farmer’s Mutual Ins. Co. v. Moore*,\(^\text{141}\) as follows:

This constitutional provision has been frequently before this court for consideration, and it is the rule, well settled, that where an act of the legislature is not complete in itself, but is amendatory of a former law, to which it does not refer, it is within the constitutional inhibition quoted above. In other words, the fundamental law of the state requires all the parts of amended law to be incorporated in the act, and the old law so amended to be repealed. If said constitutional provision is disregarded or not complied with in the amendment of a prior act the new law is void. It is also firmly established in this state, by a long line of decisions, that an act complete in itself is not inimical to said constitutional provision, although such act may be repugnant to, or in conflict with, a prior law, which is not

\(^{138}\) 389 U.S. at 442 (concurring opinion) (emphasis added).

\(^{139}\) Id.

\(^{140}\) In regard to this provision of the Nebraska constitution, the state supreme court commented in *Chicago, B. & Q. R.R. v. County of Box Butte*, 166 Neb. 603, 608, 90 N.W.2d 72, 76 (1958), as follows:

The people of this state in enacting the Constitution saw fit to provide that in all cases the law as amended shall be given in full, with such reference to the old law as will clearly show for what the new law is substituted. The wisdom of the constitutional provision is not a matter for this court to determine. The constitutional limitation placed upon the Legislature in amending existing statutes must be followed, and where, as here, its terms are not complied with, the act is void and of no force or effect.

\(^{141}\) 48 Neb. 870, 67 N.W.876 (1896).
referred to nor in express terms repealed by the later act. In such case the earlier statute will be construed to be repealed by implications.\textsuperscript{142}

Like most rules, the above is easier to state than it is to apply. In some cases the court has upheld statutes which failed to refer to original prior laws on the same subject as constitutional because it found them to be original and independent legislation,\textsuperscript{143} while in other seemingly indistinguishable cases the court has struck down such statutes as amendatory in nature.\textsuperscript{144}

The new alien inheritance statute in no way expressly refers to or expressly repeals any of the prior alien inheritance legislation contained in Chapter 76, Article 4 of the Nebraska Revised Statutes.\textsuperscript{145} Thus, its constitutionality under article III, section 14 of the Nebraska constitution depends upon whether it is amendatory of the prior legislation, or instead, constitutes a whole new act, complete in itself.

The title to the new act\textsuperscript{146} states that it relates to the inheritance of property by nonresident aliens, and calls for escheat of said property if they do not meet the requirements set forth therein. However, it does not purport to be a whole new law on alien inheritance rights or escheat. It relates only to nonresident aliens and does not attempt to redefine escheat.\textsuperscript{147} It would seem the only two statutes with which it possibly conflicts are the provision which in effect bars nonresident aliens from inheriting land,\textsuperscript{148} and the

\textsuperscript{142} 48 Neb. at 873, 67 N.W. at 877.
\textsuperscript{143} Yellow Cab Co. v. Nebraska State Ry. Comm., 175 Neb. 150, 120 N.W.2d 922 (1963); Omaha Parking Authority v. Omaha, 163 Neb. 97, 77 N.W.2d 862 (1956); Jensen v. Omaha Public Power District, 159 Neb. 277, 66 N.W.2d 591 (1954); Nebraska Mid-State Reclamation Dist. v. Hall County, 152 Neb. 410, 41 N.W.2d 397 (1950); Rocky Mountain Lines v. Cochran, 140 Neb. 376, 299 N.W. 596 (1941); Livestock Nat. Bank v. Jackson, 137 Neb. 161, 288 N.W. 515 (1939); Hinman v. Temple, 133 Neb. 268, 274 N.W. 605 (1937); Rumsey v. Saline County, 102 Neb. 302, 167 N.W. 66 (1918).
\textsuperscript{145} NEB. REV. STAT. § 4-107 (Supp. 1969) was introduced by L. B. 488 (Laws of Neb. 1963 at 103), the title to which provided as follows:
An Act relating to aliens; to provide conditions under which a nonresident alien may take property in this state by succession or testamentary disposition; to provide a burden of proof; to provide when other persons may take such property; to provide for escheat as prescribed; and to provide for disposition of escheated property.
\textsuperscript{146} Id.
\textsuperscript{147} Escheat is currently defined in NEB. REV. STAT. § 76-402 (Reissue 1966). See note 62 supra.
\textsuperscript{148} NEB. REV. STAT. § 76-402 (Reissue 1966). See note 61 supra.
provision exempting land within three miles of cities and villages from the operation of such bar.\footnote{149} Insofar as the former statute refers to "corporations not incorporated" under the laws of the State of Nebraska as well as to aliens, it could not be said that it has been entirely repealed by implication by the new statute, and such patchwork repeal would hardly be condoned even if express. Moreover, when the repeal must be considered to be by implication, it is absurd.

In addition, the new act relates not just to land, as did the prior statute,\footnote{150} but also to personal property. In this regard, it is an expansion of prior law, and the Nebraska Supreme Court has held that where a statute "is in addition and supplementary to [prior provisions on the subject to which it relates and] enlarges [thereon it] must be considered amendatory of the former acts [and] (i)f such legislation is permissible under" article II, section 14, "It would be difficult to suggest any legislation that would be effected and controlled by that provision."\footnote{151} The court has also said that where new enactment accomplishes "nothing of independent nature and its effect is wholly confined to 'changes' of what theretofore existed . . . [t]herefore must be regarded as nothing but an amendatory act and strictly within the scope of the constitutional limitation controlling in the enactment of statutes for an exclusively amendatory purpose . . . ."\footnote{152}

However, if it can be said that the new statute is as equally subject to the construction that it is a new independent act complete in itself as it is subject to the construction that it is an amendatory act, then its constitutionality would probably be upheld, and any inconsistent provision in prior law held to be repealed by implication.\footnote{153}

\begin{itemize}
\item \footnote{149} Neb. Rev. Stat. § 76-414 (Reissue 1966). See note 73 supra.
\item \footnote{150} Neb. Rev. Stat. § 76-402 (Reissue 1966). See note 61 supra.
\item \footnote{151} Minier v. Burt County, 95 Neb. 473, 482, 145 N.W. 977, 980 (1914).
\item \footnote{152} Beal v. Bauman, 126 Neb. 566, 569, 254 N.W. 256, 257 (1934). See also Sovereign v. State, 7 Neb. 409 (1878).
\item \footnote{153} In the case of Bridgeport Irr. Dist. v. United States, 40 F.2d 827 (8th Cir. 1930) the Eighth Circuit Court of Appeals was called upon to decide the constitutionality of a state law relating to irrigation districts in view of article III, section 14. The court said:
\begin{quote}
This act was either amendatory of sections 3465 and 3466, supra, or it was an independent act complete in itself. If it be held to be amendatory of these sections 3465 and 3466, then it was unconstitutional because it violated section 14, article 3 of the Constitution of Nebraska, which provides that no law shall be amended unless the new act contains the section or sections as amended and the section or sections so amended shall be repealed (citations omitted). Where a statute is susceptible of two constructions, one of which will uphold the validity of the act, while the other will render it unconstitutional, the one which will sustain the constitu-
\end{quote}
\end{itemize}
Whether the two possible constructions which could be placed on the statute are in fact equally acceptable is a question which will apparently have to be resolved ultimately by the Nebraska Supreme Court. All that can be said at this point is that the constitutionality of Neb. Rev. Stat. § 4-107 (Reissue 1969) is at best doubtful.

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