

1-1-1958

Aliens in Florida

S. A. Bayitch

Follow this and additional works at: <https://repository.law.miami.edu/umlr>



Part of the [Law Commons](#)

Recommended Citation

S. A. Bayitch, *Aliens in Florida*, 12 U. Miami L. Rev. 129 (1958)

Available at: <https://repository.law.miami.edu/umlr/vol12/iss2/2>

This Leading Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

UNIVERSITY OF MIAMI LAW REVIEW

VOLUME XII

WINTER, 1958

NUMBER 2

ALIENS IN FLORIDA

S. A. BAYITCH

PART ONE: INTRODUCTION

The ideal of equality of man has been adopted in principle; yet no country has ventured to abrogate the legal differences between nationals and aliens. By now in most countries the remnants of the primitive rule assigning aliens a place outside of the law and granting them protection only as a matter of grace, have withered away.¹ While there exist distinct political sovereignties, law will have to consider the "inherent distinctions recognized throughout the civilized world between citizens and aliens."² "The years have not destroyed nor diminished the importance of citizenship."³

This country has constantly adhered to a liberal policy of inviting aliens to "share with us the opportunities and satisfactions of our land. As such visitors and foreign nationals they are entitled in their persons and effects to the full protection of our laws."⁴ In a general way, it may be stated that aliens are "in several respects . . . on equal footing with citizens but in others have never been conceded legal parity with the citizens."⁵

The legal status of aliens⁶ is predicated upon an interwoven combination of rules derived from the national government and from the several states.⁷ Moreover, treaties contain provisions which, under the supremacy clause,⁸ directly benefit aliens in many respects. In some of these treaties aliens are granted an equal position with citizens (equal or national treatment) or they are given privileges granted to nationals of any third country

* The author is Professor of Law, University of Miami.

1. BERNHEIM, *THE HISTORY OF THE LAW OF ALIENS* (1885).

2. *Johnson v. Eisentrager*, 339 U.S. 763, 767 (1950).

3. *Id.*, at 763.

4. *Carlson v. Landen*, 342 U.S. 524, 534 (1952).

5. *Harsiades v. Shaughnessy*, 342 U.S. 580, 586 (1952).

6. BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD*, 33 (1915); CUTLER, *THE TREATMENT OF FOREIGNERS*, 27 *AM. J. INT'L L.* 227 (1933); GIBSON, *ALIENS AND THE LAW* (1940); HEALY, *LA CONDITION JURIDIQUE DE L'ETRANGER SPECIALEMENT AUX ETATS-UNIS*, 27 *RECUEIL DE COURS* 405 (1929); KOHLER, *Legal Disabilities of Aliens in the United States*, 16 *A.B.A.J.* 113 (1930).

7. Bayitch, *Conflict Law in United States Treaties*, 8 *MIAMI L.Q.* 501 (1954), 9 *MIAMI L.Q.* 9, 125 (1955); brought up-to-date as vol. 1 of the *INTERNATIONAL LEGAL STUDIES*, publ. by the University of Chicago (1955). This edition hereinafter cited as *CONFLICT LAW*. WILSON, *THE INTERNATIONAL LAW STANDARD IN TREATIES OF THE UNITED STATES* (1953).

8. U.S. CONST. art. VI, par. 2.

(most-favored-nation treatment);⁹ in others, the position of aliens is regulated by substantive rules. Finally, general principles of international law¹⁰ are applied by courts of the land in recognition that "apart from treaty obligations there has grown up a body of customs defining with more or less certainty the duties owing by all nations to alien residents."¹¹

In return, aliens present in this country are "bound to obey all the laws of the United States not immediately relating to citizenship."¹² They owe, it is said, a qualified and temporary allegiance to their host sovereign;¹³ in consequence, they are subject to its legislative and administrative jurisdiction, within the limits of international law and treaties. This rule is well expressed in the Convention on the Status of Aliens (Habana, 1928)¹⁴ determining "aliens subject, as are nationals, to local jurisdiction and laws, due consideration given to the limitations expressed in conventions and treaties" (Art. 2). The same rule was repeated by the Convention on Rights and Duties of States (Montevideo, 1933)¹⁵ in the sense that "The jurisdiction of the state within the limits of the national territory applies to all the inhabitants", granting nationals as well as aliens "the same protection of the law and the national authorities."

ALIENS UNDER FEDERAL LAW

There can be no doubt that in matters affecting aliens the federal government has far reaching powers. First, Congress has the exclusive power to legislate on naturalization (Article I, Section 8 of the Constitution); it also exercises legislation in matters of admission,¹⁶ exclusion,¹⁷ control,¹⁸ and expulsion of aliens,¹⁹ the administration of which is entrusted to federal

9. CONFLICT LAW 22, 25.

10. Borchard, *The Minimum Standard of the Treatment of Aliens*, 38 MICH.L.REV. 445 (1940); Potter, *International Legislation on the Treatment of Foreigners*, 24 AM. J. INT'L L. 748 (1930); ROTH, *THE MINIMUM STANDARD OF INTERNATIONAL LAW APPLIED TO ALIENS* (1949).

11. *Radich v. Hutchins*, 95 U.S. 210, 211 (1877); also *Fong Yue Ting v. United States*, 149 U.S. 724 (1893) that "By the law of nations, doubtless, aliens residing in a country . . . acquire, in one sense, a domicile there; and, while they are permitted by the nation to retain such a residence and domicile, are subject to its laws and may invoke their protection against other nations . . ."

12. *Chy Lung v. Freeman*, 92 U.S. (II Otto) 275 (1875); *Nichimura Ekiu v. United States*, 142 U.S. 651 (1892); *Turner v. Williams*, 194 U.S. 279 (1903); *Knauff v. Shaughnessy*, 338 U.S. 537 (1950). 1 HYDE, *INTERNATIONAL LAW* 216 (1947).

Resident alien must testify before Congressional committee, *Eisler v. United States*, 170 F.2d 273 (1948).

13. *Carlisle v. United States*, 83 U.S. (16 Wall.) 147 (1872).

14. 46 STAT. 2753.

15. 49 STAT. 3097.

16. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889); *Nichimura Ekiu v. United States*, 142 U.S. 651 (1892); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1952); *Shaughnessy v. Mezei*, 345 U.S. 206 (1953).

17. *Hines v. Davidovitz*, 312 U.S. 52 (1941).

18. *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1892); *Carlson v. Landon*, 342 U.S. 524 (1952); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952). *Boudin, The Settler Within Our Gates*, 26 N. Y. U. L. REV. 266, 451, 634 (1951).

19. *Yick Wo v. Hopkins*, 118 U.S. 356, 369, (1886). Cf. *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953) and *Shaughnessy v. Mezei*, 345 U.S. 206 (1953).

officers. Second, the executive branch, through the President as the "sole organ" of the nation in international relations, may regulate the position of aliens in this country by entering into treaties with foreign governments.

At the same time, the federal government assures aliens residing in this country²⁰ all the privileges guaranteed by the Constitution not reserved expressly to nationals, an attitude well expressed in a dissenting opinion:

An alien who is assimilated in our society, is treated as a citizen so far as his property and his liberty is concerned. He can live and work here and raise a family, secure in personal guarantees every resident has, and safe from discrimination that might be leveled against him because he was born abroad. Those guarantees of liberty and livelihood are the essence of freedom which this country from the beginning has offered to people of all lands.²¹

The alien has been "accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights."²² Among these privileges²³ the most important to aliens is the

20. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). Cases decided by the Supreme Court deal with aliens legally admitted. There is no statement concerning constitutional rights of an illegally present alien, except in *Shaughnessy v. Mezei*, 339 U.S. 763, 769 (1950) that "aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law." Cf. *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

The interamerican convention on the status of aliens (1928, see note 14 *supra*) demands states to "extend to foreigners, domiciled or in transit through their territory, all individual guarantees extended to their own nationals, and the enjoyment of essential civil rights without detriment, as regards foreigners, to legal provisions governing the scope of and usages for the exercise of said rights and guaranties" (art. 5). It is doubtful whether, under this treaty, aliens are entitled to the equal privileges available under the Constitution only to nationals; however, it appears that the term "civil rights" is used in the Latin American sense, i.e., to include rights recognized to persons under general provision of the civil and not public law. However, there are no cases to support either interpretation.

Quite a few treaties, e.g., the same interamerican convention contain the provision that "Foreigners must not mix in political activities which are the exclusive province of citizens of the country in which they happen to be . . ." (art. 7). This provision may impair guarantees available to resident aliens, e.g., the privilege of free speech, in which case the treaty provision would be unconstitutional.

21. *Justice Douglas in Harisiades v. Shaughnessy*, 342 U.S. 580, 599 (1952).

22. *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950).

23. Freedom of speech, *Bridges v. California*, 314 U.S. 252 (1941), *Bridges v. Wixon*, 326 U.S. 135 (1945); right to work, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), *Truax v. Raich*, 239 U.S. 33 (1915), *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948); protection of property, *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931), *Silesian-American Corp. v. Clark*, 332 U.S. 469 (1947); habeas corpus, *Nichimura Ekiu v. United States*, 142 U.S. 651 (1892); due process, incl. trial by jury, *Wong Wing v. United States*, 163 U.S. 228 (1896). However, they apply to a lesser extent in deportation proceedings, *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950). Aliens may be interrogated by immigration officers without warrant, 66 STAT. 233, 8 U.S.C. § 1357 (a)(7) (1952), *Amaya v. United States*, 247 F.2d 847 (1957). Enemy aliens may be removed in accordance with 50 U.S.C. § 21 (1952). *Ludecke v. Watkins*, 335 U.S. 160 (1948); *Jaeger v. Carusi*, 342 U.S. 347 (1952).

Aliens on temporary parole under statutes 8 U.S.C.A. § 212 (d) (5), have no rights derived from the Constitution, but solely those rights and privileges which Congress sought to confer, *Application of Paktorovics*, 156 F. Supp. 813 (S.D. N.Y. 1957).

KONVITZ, THE ALIEN AND THE ASIATIC IN AMERICAN LAW (1946). Comment, *Aliens and the Constitution*, 20 U. CHI. L. REV. 547 (1953). Note, *Extent of Constitu-*

equal protection clause providing that no state shall "deny to any person within its jurisdiction the equal protection of the laws" (Fourteenth Amendment). Implementing this provision, a federal statute²⁴ provides that:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all the laws and proceedings for the security of persons and property as it is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and extractions of every kind, and no other.

This statute has been held to extend to aliens.²⁵ Consequently, not only citizens, but any "other person within the jurisdiction thereof" (i.e. United States), deprived of any rights under the Constitution and laws has an action for redress²⁶ in federal district courts.²⁷ Any deprivation under color of law, statute, etc., of "any inhabitant of any State, Territory or District" of constitutional rights, also constitutes a criminal offense.²⁸

STATE POWERS OVER ALIENS

In discussing the law of a state and aliens it seems proper to outline first the position states occupy in this respect under the general constitutional law.

Federal v. State Powers. In regard to legislation the states have retained all powers except those delegated to Congress as, for example, matters of naturalization and of commerce with foreign nations. Powers thus remaining in the states may further be curtailed by federal authority only through the treaty-making power or by legislation under the necessary and proper clause.²⁹ The question then remains whether or not, through some radiation from the exclusive power vested in the executive branch of the national government to conduct foreign affairs by means other than treaties, state powers over aliens within their jurisdiction have been further curtailed.

tional Protection Afforded to Resident Aliens, 19 ALBANY L.REV. 62 (1955); also ALEXANDER, RIGHTS OF ALIENS UNDER THE FEDERAL CONSTITUTION (1931).

It may be added here that according to FLA. STAT. § 250.53 (1957) in case of war or of imminent danger of war, the governor has the right to require aliens to register; a wilful failure to comply on the part of alien constitutes a misdemeanor. Since this measure is limited to war conditions, *Hines v. Davidovitz*, 312 U.S. 52 (1941), may not be in point. However, there can be no doubt that duties imposed on residents of the state (owners of houses, hotels, etc.) to report aliens staying there remain unaffected; cf. *Keller v. United States*, 213 U.S. 138 (1909).

24. REV. STAT. § 1977 (1875), 42 U.S.C. 1981 (1952).

25. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *United States v. Wong Kim Ark*, 169 U.S. 649 (1898); *Truax v. Raich*, 239 U.S. 33 (1915); *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948). KONVITZ, CIVIL RIGHTS IN IMMIGRATION (1953).

26. 17 STAT. 13 (1875), 8 U.S.C. § 43 (1952); REV. STAT. § 1978 (1875), 42 U.S.C. § 1982 (1952).

27. 28 U.S.C. § 1343 (1952).

28. 18 U.S.C. § 242 (1952).

29. The doctrine developed in *Missouri v. Holland*, 252 U.S. 416 (1920), was never applied to cases involving federal power over aliens.

In this respect the Supreme Court has repeatedly indicated that state powers over aliens are limited by the fact that "the regulation of aliens is so intimately blended and intertwined with responsibilities of the national government"³⁰ in the field of international affairs that "when the national government by treaty or statute has established rules and regulations touching the rights, privileges, obligations or burdens of aliens as such, the treaty or statute is the supreme law of the land",³¹ thus emphasizing that the "federal power in the field affecting foreign relations be left entirely free from local interference."³² "Broad constitutional powers" were found to be vested in the national government in regard to the "conduct of aliens before naturalization" while states "are granted no such powers."³³

Foreign affairs are conducted in two ways: by the executive branch of the federal government through the traditional activities of the diplomatic representatives on the one hand, and through treaties with foreign nations on the other. This distinction is reflected clearly in the Constitution; it also affects the problem under discussion. While a mere diplomatic action does not affect and is independent from municipal law, federal as well as state, both are automatically affected by the other method of exercising "external powers",³⁴ namely by treaties.³⁵ It is generally recognized that the area where the treaty-making power may be exercised is not limited to matters within the delegated legislative powers of Congress. However, it seems questionable to declare, in a sweeping way, both treaties and federal statutes to be equally superior to state law in situations where aliens are involved.³⁶ There

30. *Hines v. Davidovitz*, 312 U.S. 52, 66 (1941). Donelson, *Federal Supremacy and the Davidovitz Case*, 29 Geo. L.J. 755 (1941).

31. *Id.* at 62.

32. *Id.* at 63.

33. *Takahashi v. Fish and Game Commission*, 334 U.S. 410, 418 (1948).

34. *United States v. Belmont*, 301 U.S. 324, 330 (1937).

35. 2 BUTLER, *THE TREATY-MAKING POWER OF THE UNITED STATES* 1 (1902); CORWIN, *NATIONAL SUPREMACY: TREATY POWER VS. STATE POWER* (1913); DEVLIN, *THE TREATY POWER UNDER THE CONSTITUTION OF THE UNITED STATES* 224 (1908); MITCHELL, *STATE INTERESTS IN AMERICAN TREATIES* (1936); TUCKER, *LIMITATIONS ON THE TREATY-MAKING POWER UNDER THE CONSTITUTION* 135 (1915). Burke, *Federal Treaties and State Sovereignty*, 46 DICK. L.REV. 246 (1947); Thompson, *State Sovereignty and the Treaty-Making Power*, 11 CALIF. L.REV. 242 (1923); Wright, *Treaties as Law in National Courts with Especial Reference to the United States*, 32 IND. L.J. 1 (1956) and other studies provoked by the Bricker amendment.

36. In *Hines v. Davidovitz*, 312 U.S. 62, 66 (1941), the Court relied on a quote from *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824), that "the act of Congress, or the treaty is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it." In the *Gibbons* case the question of federal powers in matters of interstate commerce was in issue; in this sense the "act of Congress" must be understood. On the contrary, in the *Davidovitz* case no question of interstate commerce was involved; it hardly could be assumed in regard to an alien residing in this country.

It is interesting to note that the opinion in the *Davidovitz* case (at 62, note 9) relies on *The Federalist* in regard to "the inherent danger of state action." A careful reading of No. 3, 4, 5, 42 and 80 listed there, reveals that the danger considered in the *Federalist* is limited to that coming from foreign enemies. Moreover, the reading discloses that the general government shall be charged with "the intercourse with foreign nations" (No. 42) and federal powers be "exercised principally on external

is no sound reason to disregard, in this respect, the fundamental constitutional principle that the ceiling for treaties is set only in the inhibitions of the Constitution while congressional enactments are limited to delegated powers.³⁷

Naturally, it cannot be denied that the treatment in this country of aliens or foreign interests not only by state, but also by federal authorities, may affect relations with foreign nations. Conflicts may and have arisen between federal and state law on the one side, and treaties on the other, a possibility inherent in the dual system of government. These cannot be prevented because of the separation of powers in the national government on the one hand and because of the sovereignty retained by the states over their own internal affairs on the other. The Constitution wisely refrained from establishing precautionary rules. Instead, by the supremacy clause, prevailing authority has been conferred upon treaties and upon congressional enactments within the delegated powers. It follows that the states are free to legislate in matters of their general and original powers, except where the matter is preempted by treaties³⁸ or by *intra vires* enactments of Congress. The possibility, or even probability, that actions by states may affect aliens or alien interests and, in an indirect way, may become one of the factors influencing, on the diplomatic level, relations with the alien's home country, cannot disturb the constitutional allocation of powers and controls. Faced with a challenge to a California statute requiring reciprocity for succession by aliens there, on the ground that the statute is "an extension of

objects, as war, peace, negotiation, and foreign commerce . . . The powers reserved to the several states will extend to all the objects which in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State" (No. 45).

37. *Savage v. Jones*, 225 U.S. 501, 533 (1911).—In the split decision *Hines v. Davidovitz*, 312 U.S. 52 (1941) the dissenting opinion is reminiscent of *The Federalist* No. 42, note 36 *supra*: "The national government has exclusive control over the admission of aliens . . . but after entry, an alien resident within a state, like a citizen, is subject to the police powers of the state and, in the exercise of that power, state legislatures may pass laws applicable exclusively to aliens so long as the distinction taken . . . is not shown without rational basis" (at 76).

Federal-state relations in matters of aliens have also been determined, in some cases, by the power of Congress over commerce with foreign nations. *Henderson v. Mayor of New York*, 92 U.S. 259 (1875), and *People v. Compagnie Générale Transatlantique*, 107 U.S. 59 (1882).

Recent decisions follow trends justified by federal supremacy in international relations as expressed in the *Davidovitz* case. So, for example, *Pennsylvania v. Nelson*, 350 U.S. 497, 504 (1956); *cf.*, *State v. Diez*, 97 So.2d 105 (Fla. 1957). It is unfortunate that the fundamental distinction between internal and external powers has been neglected; lately it was well stated in *United States v. Curtis-Wright Export Corp.*, 299 U.S. 304, 315 (1936): "The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect to our *internal affairs* (emphasis added). In that field, the primary purpose of the Constitution was to carve from the general mass of legislative powers then possessed by the States such portions as it was thought desirable to vest in the federal government, leaving those not included in the enumerated, still in the state."

38. *Chirac v. Chirac*, 2 Wheat. 259, 272 (1817); *Hauenstein v. Lynham*, 100 U.S. 483 (1879); *Blythe v. Hickley*, 180 U.S. 333, 341 (1901).

state powers into the field of foreign affairs which is exclusively reserved by the Constitution to the federal government," the Supreme Court held that "what California has done will have some *incidental or indirect effect in foreign countries. But that is true of any state laws which none would claim cross the forbidden line*" (emphasis added).³⁹

This position seems eminently sound. Under the Constitution states are only prevented from engaging in activities on the diplomatic level, that is by appointing ambassadors or by entering into treaties.⁴⁰ This restriction, however, does not deprive or even affect their sovereignty in administering their internal affairs. It cannot be seriously contended that a state legislating in internal affairs so as to regulate persons under its jurisdiction, including aliens, or by adjudicating disputes involving aliens or alien interests, engages in the exercise of "external powers." If the treatment of aliens should create difficulties in relation to foreign powers, then the way is open to the national government to take the appropriate diplomatic action or to make use of its treaty-making power. By choosing the second way of action, it not only will make sure that the desirable rule will become the law of the land, but will also know that the respective foreign government wants such action to be taken in regard to its nationals. Furthermore, the federal government may, in many instances, wisely leave the foreign government to make the first move by the time honored means of diplomatic intervention and use the wide possibilities it affords.⁴¹

Still another argument is advanced to support the exclusion of the states from acting in matters of aliens. This is the contention that aliens are, in a peculiar way, subject to the federal government because they have been admitted by its executive branch acting under the authority of a congressional enactment. It cannot be denied that the "federal privilege to enter and abide"⁴² implied in the admission would become ineffective if, by discriminatory legislation affecting employment or occupations, states could prevent aliens from residing within their borders. As weighty as they may be, these considerations lend no support to the extreme position reflected in recent cases claiming, in matters affecting aliens generally, for the federal government a "superior authority"⁴³ with regard to the "conduct of aliens," and, at the same time, restricting state powers "within narrow limits"⁴⁴

39. *Clark v. Allen*, 331 U.S. 503, 516 (1947).

40. U.S. CONST. art. I, § 10, prohibiting states from entering into treaties; art. II, authorizing the President to appoint ambassadors (§ 2) as well as receive them (§ 3); cf. THE FEDERALIST No. 42.

41. It is significant that in no case discussed here diplomatic intervention in favor of the alien involved is indicated.

42. *Truax v. Raich*, 239 U.S. 33, 39 (1915); *Gegiow v. Uhl*, 239 U.S. 3 (1915). Cf. *Watson v. Centro Espanol de Tampa*, 158 Fla. 796, 30 So.2d 288, 290 (1947).

43. *Hines v. Davidovitz*, 312 U.S. 52, 67 (1941).

44. *Takahashi v. Fish and game Commission*, 344 U.S. 410, 420 (1948). McKinlay, *Washington Fisheries Code of 1949—Constitutionality of Discriminatory Provisions*, 24 WASH.L.REV. 274 (1949).

Finally, there remains the argument derived from the congressional power over naturalization. First of all, rules regulating naturalization, by their very nature, do not impose standards of conduct enforceable against violation. These rules list optional requirements to be met by those aliens who decide to apply for naturalization. Therefore, it may be said that they operate in an area completely distinct from that involving the general state police power to regulate the conduct of the people under its jurisdiction.⁴⁵ At first glance, one can determine that the argument also is tainted with an inherent weakness. Admitting for the sake of argument that the legislative power over naturalization extends to general regulation of "the conduct" of aliens, such an argument would only be valid in regard to those aliens who are admitted as immigrants; this would leave unexplained the numerous class of nonimmigrant aliens and those immigrant aliens not desiring to naturalize.⁴⁶

Equal Protection. Civil rights except those available only to nationals, like the equal privileges clause, guaranteed by the Constitution, must be observed by the several states. One of them, crucial in regard to aliens, is the standard of equal protection under the Fourteenth Amendment, imposing upon states the duty to apply both federal and state law uniformly to situations they control. "Though the law itself be fair on its face and impartial in appearance, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."⁴⁷ At the same time, equal protection is a "pledge of the protection of equal laws."⁴⁸ Only where there is reasonable justification for differentiating in the solution of a legislative problem, may different classes be established. In regard to aliens, the equal protection clause prohibits states from discriminating against aliens "as such"⁴⁹ alienage

45. A federal enactment establishing conditions "upon the performance of which the continued liberty of the alien to reside within . . . this country may be made to depend" does not interfere with the police powers of the state, *Zakonaite v. Wolf*, 226 U.S. 272, 275 (1912); however, no power has been granted to Congress to "control all the dealings of our citizens with resident aliens. If that be possible, the door is open to the assumption by the National Government of an almost unlimited body of legislation," *Keller v. United States*, 213 U.S. 138, 148 (1909), except where citizens violate immigration laws. *Lees v. United States*, 150 U.S. 476 (1893); *United States v. Bitty*, 208 U.S. 393 (1908); *Lutwak v. United States*, 344 U.S. 604 (1953).

46. It is significant that in no case discussed here the immigration status of the alien was considered.

The legislative power of Congress over naturalization was not regarded as affecting foreign affairs (*contra Hines v. Davidovitz*, 312 U.S. 52, 62, 1941); the matter was given to Congress because of difficulties arising out of dissimilarities in state laws (THE FEDERALIST, No. 45). I CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES, 130, 438, 487 (1953).

47. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). Tussman and tenBroek, *The Equal Protection of Laws*, 37 CALIF. L. REV. 341, 356 (1949). TAYLOR, DUE PROCESS OF LAW AND THE EQUAL PROTECTION OF THE LAWS 725 (1917).

48. *Ibid.*

49. *Truax v. Raich*, 239 U.S. 33, 42 (1915). Harper, *Due Process in State Labor Legislation*, 26 MICH.L.REV. 599 (1928).

being here "an end in itself."⁵⁰ "Plainly irrational discrimination against aliens," particularly "legal imposition of distinct, unusual and extraordinary burdens and obligations upon aliens—such as subjecting them alone, though perfectly law-abiding, to indiscriminate and repeated interception and interrogation by public officials"⁵¹ is forbidden. Consequently, "the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits."⁵²

Testing the constitutionality of discriminatory statutes, the Supreme Court has taken into consideration the following criteria: the evil to be prevented, which includes the interest to be protected and the danger to be avoided; the class of people from whom the threatened danger emanates; and the methods to combat the evil, *i.e.*, legal means to cope with the problem.

The authority to identify the interest to be protected is within the discretionary powers of the states, provided the subject matter is one constitutionally within their legislative power. The interest may be the common property of the people of the state, like seabeds for planting oysters,⁵³ or wildlife,⁵⁴ or opportunity to work on public works,⁵⁵ while the danger may be a depletion of resources or other disadvantages to citizens. In some instances a "special public interest" is necessary to justify discriminatory legislation; this was found in state laws prohibiting aliens from holding or inheriting land,⁵⁶ the "quality and allegiance of those who own, occupy and use the farm lands within its borders (being) matters of highest importance and (affecting) the safety and power of the state itself."⁵⁷

The difficult part of this analysis lies in the question whether or not aliens constitute the class from which the danger comes. By and large, it is held that "alien race and allegiance may bear in some instances such a relation to a legislative object . . . as to be made the basis of a permitted classification."⁵⁸ However, since the test cannot be exact, the Supreme Court allows a broad area of discretion.⁵⁹ In spite of the fact that it is

50. *Ibid.*

51. *Hines v. Davidovitz*, 312 U.S. 52, 66 (1941).

52. *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948).

53. *McCready v. Virginia*, 94 U.S. 391 (1876) denying equal privileges to a citizen of another state of the Union because the Constitution grants no interest in "property" of the state to a non-citizen.

54. *Patsone v. Pennsylvania*, 232 U.S. 138 (1913).

55. *Heim v. McCall*, 239 U.S. 175 (1915).

56. *Terrace v. Thompson*, 263 U.S. 197 (1923); *Porterfield v. Webb*, 263 U.S. 225 (1923); *Webb v. O'Brien*, 263 U.S. 313 (1923); *Frick v. Webb*, 263 U.S. 326 (1923); *Oyama v. California*, 332 U.S. 633 (1948).

57. *Terrace v. Thompson*, 263 U.S. 197, 221 (1923).

58. *Ohio ex rel. Clarke v. Deckenbach*, 274 U.S. 392, 396 (1927); *Patsone v. Pennsylvania*, 232 U.S. 138, 144 (1913). *Tusman and tenBroeck*, *supra* note 47, at 343.

59. *Ohio ex rel. Clarke v. Deckenbach*, 274 U.S. 392, 397 (1927); see *Kneier, Discrimination Against Aliens by Municipal Ordinances*, 26 *Geo. L.J.* 143 (1928).

difficult, if not impossible, to isolate precisely the source of possible danger, nevertheless, it must be shown that aliens are or reasonably "might be considered to define those from whom the evil mainly is to be feared."⁶⁰ It is not necessary that a state confine its enactment "to those classes of cases where the need is deemed to be the clearest;"⁶¹ it is sufficient that "the danger is characteristic of the class named"⁶² in the light of the "legislative appraisal of local conditions."⁶³ If in the evaluation of probabilities by the legislator an entire class, *i.e.*, aliens, is made subject to the act and not only the objectionable members of it "selected by more empirical methods,"⁶⁴ the statute nevertheless will pass the test since there is no need for what Justice Holmes termed "abstract symmetry"⁶⁵ based on "the specific difference that experience is supposed to have shown to mark the class."⁶⁶ Consequently it is not sufficient to invalidate a discriminatory state law to show that "others may do the same thing and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named."⁶⁷ It must be remembered that the "machinery of government would not work if it were not allowed a little play in its joints."⁶⁸ The state is free to direct its legislative action against "what it deems the evil as it actually exists without covering the whole field of possible abuses."⁶⁹

The choice of methods "for controlling an apprehended evil"⁷⁰ is a matter of legislative discretion based on an evaluation of local conditions.

In applying these standards the Supreme Court appears reluctant to question the wisdom of state legislatures. It prefers to presume a mere "possibility of a rational basis" for the enactment, provided that the underlying facts have been impliedly admitted or "generally assumed."⁷¹ The evaluation of factors involved in a legislative action being a matter of local experience, the Court "ought to be very slow to declare that state legislature was wrong in its facts."⁷² It will suffice if the Court "has no such knowledge of local conditions as to be able to say that it (the state) is manifestly wrong."⁷³ After all, the law "does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as its means allow."⁷⁴

60. *Patsone v. Pennsylvania*, 232 U.S. 138, 144 (1913).

61. *Miller v. Wilson*, 236 U.S. 373, 384 (1915).

62. See note 60 *supra*.

63. *Ibid.*, also *Ohio ex rel. Clarke v. Deckenbach*, 274 U.S. 392, 397 (1927).

64. *Ohio ex rel. Clarke v. Deckenbach*, 274 U.S. 392, 397 (1927).

65. See note 60 *supra*.

66. *Ibid.*

67. *Ibid.*

68. *Bain Peanut Co. v. Pinson*, 282 U.S. 499, 501 (1931).

69. See note 60 *supra*.

70. *Ohio ex rel. Clarke v. Deckenbach*, 274 U.S. 392, 397 (1927).

71. *Ibid.*

72. See note 60 *supra*.

73. *Ibid.*

74. *Buck v. Bell*, 274 U.S. 200, 208 (1927).

PART TWO — THE LAW IN FLORIDA

Aliens in Florida may be affected by discriminatory statutes using two pairs of criteria. One is citizenship and alienage, the other residence and nonresidence. Nationality being controlled exclusively by the federal statutes, Florida has no power to confer upon aliens any kind of state citizenship because "the constitution and statutes of the state of Florida do not make any one a citizen of Florida who is not a citizen of the United States residing in the state of Florida."⁷⁵ However, aliens may acquire domicile (or residence) provided they "live here with the intent to remain here permanently."⁷⁶ It follows that aliens may be discriminated against not only on the ground of their alienage; they may be affected, like citizens may be, by the distinction between residents and nonresidents. It should be added that this latter distinction is not eliminated in situations where, under a treaty, aliens are granted equal (national) treatment.

In many instances, domicile (or residence) is defined by statute. Outside of such *ad hoc* definitions, the notion as understood in common law will be used, the term being not one "of fixed legal definition but taking on shades of meaning according to the statutory framework in which it is found."⁷⁷

ACCESS TO COURTS

Generally aliens are subject to the courts of the country where they reside. This means not only that they may be brought into courts as defendants in civil and criminal cases, but also that aliens may appear there as parties plaintiff to prosecute their claims.

Aliens as plaintiffs. Aliens may institute legal proceedings in proper courts as parties plaintiff in any type of procedure available under the

75. *Stewart v. State ex rel. Dolcimascolo*, 119 Fla. 117, 161 So. 379 (1935); the dissenting opinion claiming for the state the right to confer "state citizenship" relies on *Dred Scott v. Sanford*, 19 How. 393 (1855); cf. *Lach v. Robineau*, 9 F.2d 406 (S.D. Fla. 1925).

76. *Chaves v. Chaves*, 79 Fla. 602, 84 So. 672 (1920); the "landmark case" being *Smith v. Croom*, 7 Fla. 81 (1857), according to *Bloomfield v. City of St. Petersburg Beach*, 82 So.2d 364 (Fla. 1955). See 11 FLA. JUR. 1 (1957). On the problem in general, KENNAN, A TREATISE ON RESIDENCE AND DOMICILE (1924); Beale, *Residence and Domicil*, 4 IOWA L. BULL. 3 (1918); Reese and Green, *That Elusive Word, "Residence"*, 6 VAND.L.REV. 561 (1953); Reese, *Does Domicile Bear a Single Meaning*, 55 COL. L. REV. 589 (1955); Stern, *Conflict of Laws*, 8 MIAMI L. Q. 209, 213 (1954), 10 MIAMI L. Q. 257, 164 (1956). Note, 61 HARV. L. REV. 1232 (1948).

Domicile once established may be evidenced by filing a sworn statement in the circuit court, FLA. STAT. § 222.17 (1957). REP. ATT'Y GEN., 1949-50, 284, 287 (1950), and 1951-52, 355 (1952). Trowbridge, *Domicile Problems of "Winter Residents"*, 11 MIAMI L. Q. 375, 384 (1957).

77. *Kristensen v. McGrath*, 179 F.2d 796, 801 (D.C. Cir. 1949), *aff'd* under *McGrath v. Kristensen*, 340 U.S. 162 (1950), adding that "The definition varies with the statute" (175).

lex fori.⁷⁸ This rule benefits not only friendly aliens but also enemy aliens "until administrative or legislative action is taken to exclude them. Were this not true, contractual promises held out to them under our laws would become no more than teasing illusions. The doors of our courts have not been shut to peaceable law abiding aliens . . . to enforce rights growing out of legal occupations."⁷⁹

Free access to courts in favor of aliens is also guaranteed by Section 4 of the Declaration of Rights:

All courts in this state shall be open, so that every person for any injury done him in his land, goods, person or reputation shall have remedy, by due process of law, and right and justice shall be administered without sale, denial or delay.

In view of this broad language aliens cannot be denied access to the courts of the state for the protection of their rights. In situations, however, where the facts of the case warrant it, courts may decline jurisdiction under the common law doctrine of *forum non conveniens*.⁸⁰ Special provisions apply in regard to the access to courts by foreign corporations.⁸¹

78. 2 HYDE, *INTERNATIONAL LAW* 879 (1947); Beale, *The Jurisdiction of Courts over Foreigners*, 26 HARV.L.REV. 193, 283 (1913); Coudert, *Rights and Remedies of Aliens in National Courts*, PROC. AM. SOC'Y INT'L L. 192 (1911); Wilson, *Access-to-Courts Provisions in United States Commercial Treaties*, 47 AM.J.INT'L L. 20 (1953); also CONFLICT LAW 28.

Courts now disregard whether or not the alien plaintiff is legally present in this country, *Roberto v. Hartford Ins. Co.* 177 F.2d 811 (7th Cir. 1949); *Santangelo v. Santangelo*, 137 Conn. 404, 78 A.2d 245 (1951), and follow *Janusis v. Long*, 284 Mass. 403, 188 N.E. 228 (1933), rejecting *Coules v. Pharis*, 212 Wisc. 558, 250 N.W. 404 (1933).

The sweeping statement in *Heine v. New York Life Ins. Co.* 50 F.2d 382, 386 (1931) that "no alien has a constitutional right to sue in the United States (i.e. federal) courts" relies erroneously on *Kline v. Burke Construction Co.*, 260 U.S. 266 (1922), where the Court stated that *diversity* jurisdiction is only indirectly derived from the Constitution (233), and disregards the equal protection clause of the Constitution.

79. *Ex parte Kawato*, 317 U.S. 69, 78 (1942); the rule does not include non-resident aliens, *Ex parte Colonna*, 314 U.S. 510 (1942); *Johnson v. Eisentrager*, 399 U.S. 763, 776 (1950). Cf. *Farbenfabriken Bayer v. Sterling Drug*, 148 F.Supp. 733, 736 (D.N.J. 1957).

80. The result in *Simicich v. Simicich*, 9 Fla. Supp. 45 (1956) could be supported by this doctrine but not by holding that the alien plaintiff "in absence of any applicable and governing treaty provision, cannot assert in this court, as a matter of right, his alleged cause of action which, if it exists, accrued in a foreign country," i.e. the alleged divorce ground, defendant wife residing in Italy. Supposed plaintiff was an Italian national, access to court is guaranteed by Treaty with Italy, Feb. 2, 1948, art V, 63 STAT. (2) 2255, T.I.A.S. No. 1965.

81. Under FLA.STAT. § 613.04 (1957), corporations incorporated in a foreign country, except banking and trust companies, have no access to courts before complying with the requirements established in FLA.STAT. c. 613 (1957). However, numerous treaties have superseded this provision, among others the Declaration on the juridical personality of foreign companies (1939, T.S. 973) and treaties of friendship and commerce granting corporations access to courts without local registration or domestication (e.g. Israel, Aug. 23, 1951, art. V, 4, 5 U.S.T. 550, T.I.A.S. No. 2948; Germany, Oct. 29, 1954, art. V, 1, 7 U.S.T. 1839, T.I.A.S. No. 3450; Nicaragua, 1956, art. V, 1, ratified but not yet in force). *Walker Provisions on Companies in United States Commercial Treaties*, 50 AM. J. INT'L L. 373, 383 (1956); Wilson, *supra* note 78, CONFLICT LAW 30.

Access to courts in favor of aliens on equal footing with citizens is guaranteed expressly in many treaties and has been expanded to include also administrative tribunals and agencies.⁸²

In regard to proceeding *in forma pauperis* Florida statutes⁸³ provide that "insolvent and poverty stricken persons having actionable claims" may receive "the services of the several courts, sheriffs, clerks and constables of the county in which they reside, without charge or cost to themselves," provided they meet requirements as set up by the statute. Since the rule is couched in general terms, it applies equally to aliens who reside in the country where they want to litigate. It may be added that in many instances treaties contain provisions relating to this kind of proceedings.⁸⁴

Concerning security for costs, nonresident plaintiffs are required to post a bond in the amount of hundred dollars at the commencement of the suit.⁸⁵ This provision will affect nonresident aliens even in cases where they are granted, under applicable treaty, access to courts on equal footing with nationals since such discrimination is directed against nonresidents generally and not limited to nonresident aliens.⁸⁶ On the contrary, security for judgment (*cautio judicatum solvi*) is unknown to Florida law.⁸⁷ Consequently, treaty provisions in this matter are of no practical importance in this state.

In actions brought by aliens, state courts will determine their jurisdiction in accordance with general provisions of the *lex fori*. However, there are treaties in force, modifying the jurisdiction of courts, including that of state courts. One of the treaties which should be mentioned is the Convention for the Unification of Certain Rules relating to International Transportation by Air (Warsaw, 1929).⁸⁸ In article 28 the Convention provides that an action for damages "must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either

82. See note 78 *supra*.

83. FLA. STAT. § 58.09 (1957).

84. The common provision usually contained in the protocol to treaties reads: "The term 'access' . . . comprehends, among other things, legal aid, security for costs and judgment" (Protocol to the treaty with Nicaragua, 1956).

An exceptional provision is contained in the treaty with Germany (note 81, *supra* Protocol, 7) granting in regard to procedure in *forma pauperis* national treatment to German national in this country only in federal courts; in turn, American nationals in Germany may invoke this privilege only before German courts "in type of cases which in the United States of America would fall within the federal jurisdiction or could be brought (removed?) before Federal courts."

It may be added that in federal courts only citizens may proceed *in forma pauperis*, 28 U.S.C. § 1915 (1952).

85. FLA. STAT. § 58.01 (1957).

86. See Wilson, *supra* note 78. In this regard the treaty with Germany (note 81, *supra*, Protocol, 6) grants national treatment provided the national has his permanent residence or the company its establishment (main or branch), or the national or company has sufficient property "in the territory of that Party before the courts of which the suit is pending" to cover such costs.

87. For security in equity proceedings, FLA. STAT. § 62. 22 (1957).

88. 49 STAT. 3000.

before the court of the domicile of the carrier, or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination."⁸⁹ It is apparent that one or the other of these alternatives may change the *lex fori* in actions involving provisions of the Convention.

Aliens present in this state who enjoy diplomatic or consular privileges are exempt, within the limits established by international law and treaties, from local jurisdiction. In cases where foreign ambassadors or ministers appear as plaintiffs or in actions "to which consuls or vice consuls of foreign states are parties," state courts exercise jurisdiction concurrent with the federal Supreme Court.⁹⁰

Aliens as defendants. There are no special provisions in force in Florida as to the amenability of aliens to state courts in regard to either jurisdiction or venue⁹¹. State courts will take jurisdiction over aliens provided general requirements to establish jurisdiction and venue are met. However, an ever increasing body of statutory law is being enacted to adapt strict common law requirements to the hastened pace of life, particularly in matters of business. Relying not on alienage but on nonresidence coupled with some typical acts within the state by the otherwise nonresident defendant, a considerable expansion of judicial powers has been achieved which affects aliens. As an example of this type of statute, section 47.16⁹² provides that "residents of any other . . . country, and all foreign corporations" accepting the privilege "extended by law to nonresidents and others to operate, conduct, engage in, or carry on a business or business venture in the state, or have an office or agency in the state"⁹³ are deemed to have appointed the secretary of the state as their agent for service in any action arising out of such activities.⁹⁴

Claims held by domestic claimants against nonresident debtors, including nonresident aliens, enjoy important privileges. One of them is the right

89. CONFLICT LAW 33, Cf. *Berner v. United Airlines*, 149 N.Y. Supp.2d 335 (1956), 157 N.Y. Supp. 2d 884 (1956); *Tumarkin v. P.A.W.A. Inc.*, 1956 U.S. & Can. Av. Rep. 383; *Scarf v. T.W.A.* 22 J. AIR L. & COMM. 493 (1955); *Wolf v. Aerovias Guest*, 1954 U.S. Av. Rep. 399 (1954); *Goodman v. P.A.A.*, 148 N.Y. Supp.2d 353 (1956); *Re Walrep's Estate*, 306 P.2d 213 (Wash. 1957).

90. 28 U.S.C. § 1251 (b) (1) (1952).

91. Like 28 U.S.C. § 1391 (d), providing that aliens may be sued in any district. Enemy aliens may be made defendants, *Russ v. Mitchell*, 11 Fla. 80, 87 (1865); *Hovey v. Elliott*, 167 U.S. 409 (1897); *Watts, W. & Co. v. Unione Austriaca Navigazione*, 248 U.S. 9 (1918).

92. FLA. STAT. § 47.16 (1957).

93. Note the added par. (2) (1957).

94. FLA. STAT. § 47.29 (1957). Other situations involve nonresident owners or operators of motor vehicles, FLA. STAT. § 47.29 (1957); foreign insurers, FLA. STAT. § 625.30 (1957). For additional citations, see FLA. STAT. § 47.33 (1957). There are no Florida cases involving jurisdiction over aliens.

to attach property for a debt already due.^{95 96} Vessels and similar craft, domestic as well as foreign, may be attached where damage was caused.⁹⁷

Actions against aliens enjoying diplomatic or consular privileges are generally outside of the jurisdiction of state courts. Actions against foreign ambassadors or ministers, including their domestics, are to be brought exclusively in the Federal Supreme Court, provided such action is "not inconsistent with the law of nations."⁹⁸ Federal district courts have original jurisdiction of any civil suit against foreign consuls or vice consuls "exclusive of the courts of the States."⁹⁹ As a consequence, state courts retain only criminal jurisdiction in cases against consuls or vice consuls provided no immunity applies under international law of treaties.¹⁰⁰

PUBLIC OFFICES

It is understandable that positions in the legislative, executive and judicial branch of the state government are reserved to citizens. This follows

95. FLA. STAT. § 76.04 (1957).

96. In regard to the Pennoyer doctrine, *Royalty v. Florida Nat'l Bank of Jacksonville*, 173 So. 689 (Fla. 1937).

97. FLA. STAT. § 76.32 (1957). In criminal cases, public defenders established by c. 30143, 1 (2) GEN. ACTS AND RESOLUTIONS 205 (1955), functioning in Dade County under an ordinance adopted by the County Commissioners, are available regardless of nationality of the accused; same in regard to the Legal Aid Bureau for Dade County sponsored by the County Bar Association, c. 30445, 1 (2) GEN. ACTS AND RESOLUTIONS 638 (1955).

98. 28 U.S.C. § 1251 (a) (2) (1952).

99. 28 U.S.C. § 1351 (1952).

100. Convention relating to the duties, rights, prerogatives and immunities of consular agents (Habana, Feb. 20, 1928, 47 STAT. 1976, T.S. No. 843). Among bilateral treaties the following may be mentioned: Colombia, May 4, 1850, 10 STAT. 900, T.S. No. 55; Costa Rica, Jan. 12, 1948, 1 U.S.T. 247, T.I.A.S. No. 2045; Cuba, Apr. 22, 1926, 44 STAT. 2471, T.S. No. 750; El Salvador, Feb. 22, 1926, 46 STAT. 2817, T.S. No. 827; Honduras, Dec. 7, 1927, 44 STAT. 2618, T.S. No. 764, and Mexico, Aug. 12, 1942, 57 STAT. 800, T.S. No. 985. 2 HYDE, INTERNATIONAL LAW 1340 (1947).

Foreign governments enjoy sovereign immunity under the general principles of international law, Comment, *The Jurisdictional Immunity of Foreign Sovereigns*, 63 YALE L. J. 1148 (1954). This immunity, however, was recently restricted (26 DEP'T STATE BULL. 984, 1952; Bishop, *New United States Policy Limiting Sovereign Immunity*, 47 AM.J.INT'L L. 93, 1953), particularly with regard to government owned enterprises. Note, *Sovereign Immunity of Foreign Government-Owned Airlines*, 18 J.AIRL.&COMM. 455, 1951; Brandon, *Sovereign Immunity of Government Owned Corporations and Ship*, 39 CORN.L.Q. 425, 1954. Recent treaties contain express provisions, e.g. the Treaty of Friendship and Commerce with Italy (1948, 63 STAT. 2255, T.I.A.S. No. 1965) providing that "No enterprise of either High Contracting Party which is publicly owned or controlled, shall if it engages in commercial, manufacturing, processing, shipping or other business activities within the territories of the other . . . Party, claim or enjoy, either for itself or for its property, immunity therein from taxation, from suit, from execution of judgment, or from any other liability to which a privately owned and controlled enterprise is subject therein" (art. XXIV, 6). Subsequent treaties included "government agencies and instrumentalities . . . to the extent that it engages in . . . business activities," e.g. with Ireland, Jan. 21, 1950, art. XV, 3, 1 U.S.T. 785, T.I.A.S. No. 2155; Japan, April 2, 1953, art. XVIII, 2, 4 U.S.T. 2063, T.I.A.S. No. 2863; Germany, Oct. 29, 1954, art. XVIII, 2, 7 U.S.T. 1893, T.I.A.S. No. 3593; Nicaragua, Jan. 21, 1956, art. XVIII, 3; Netherlands, March 27, 1956, art. XVIII, 3, in addition to the agreement providing for nonassertion of sovereign immunity from suit of air transport enterprises, June 19, 1953, 4 U.S.T. 1610, T.I.A.S. No. 2828.

not only from special provisions in the constitution¹⁰¹ but is justified because of the lack of allegiance to this state on the part of aliens, and, even more important, because of the ambiguity of their allegiance.¹⁰²

Members of both grand and petit juries must be "citizens of this state . . . and have resided in the state for one year and in their respective counties for six months;"¹⁰³ this provision limits the jury function to citizens of the United States.¹⁰⁴

On the contrary, aliens may sit as arbitrators. The newly adopted act relating to commercial arbitration¹⁰⁵ follows the nondiscriminatory rule traditional in common law.¹⁰⁶

Although the right to vote is reserved to citizens of the United States residing in Florida,¹⁰⁷ aliens are eligible to join the state militia provided they "have declared their intention to become citizens."¹⁰⁸

FAMILY LAW

In Florida a few provisions in this field are in force referring expressly to aliens. This means that the substantive Florida family law will apply in all cases where it controls under the applicable conflict rule.

Apparently, Florida courts will take jurisdiction in divorce actions regardless of the nationality of the parties, provided the plaintiff has "resided six months in the state before the filing of the bill of complaint."¹⁰⁹ Domestic relations are affected by another provision, which concerns special service in cases of adoption where nonresidents, who might be aliens, are involved.¹¹⁰ It is interesting to note that among the data necessary for adoption, nationality does not appear.

With reference to guardianship, Florida law grants foreign guardians, namely "guardians, curators, conservators or committees, duly obtained in any . . . country and certified or exemplified according to law" the right

101. Members of the legislature, FLA. CONST. art. III, § 4; governor, FLA. CONST. art. IV, § 3. State *ex rel.* Att'y Gen. v. George, 23 Fla. 585, 3 So. 81 (1887).

102. *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952). Williams, *Correlation of Allegiance and Protection*, 10 CAMBR. L.J. 84 (1948). Before naturalization aliens are required to renounce their former allegiance under oath, 8 U.S.C. § 1448 (1952). Employment in the public school system is not open to aliens, REP. ATT'Y GEN. 1939/40, 202 (1940).

103. FLA. STAT. § 40.01 (1957).

104. *Keech v. State*, 15 Fla. 591, 604 (1876); in regard to grand juries *Cotton v. State*, 85 Fla. 197, 95 So. 668 (1923). Same rule applies in federal courts, 28 U.S.C. § 1861 (1952). GIBSON, ALIENS AND THE LAW 144 (1940).

105. Laws of Fla. c. 57 (1957).

106. Bayitch, *Treaty Law of Private Arbitration*, 10 ARB.J. 188 (1955).

107. FLA. CONST. art. IV, § 1; FLA. STAT. § 97.041 (1957).

108. FLA. CONST. art. XIV, § 1; FLA. STAT. § 250.02 (1957). After 1952 the "first paper" became an optional step in naturalization proceedings, 66 STAT. 255, 8 U.S.C. § 1445 (1952).

109. FLA. STAT. § 65.02 (1957).

110. FLA. STAT. § 72.13 (1957).

to maintain actions here;¹¹¹ they also may be sued in this state "with reference to property real or personal in this state . . . and may defend any suit, action or proceedings in any court of this state."¹¹² Foreign guardians also may manage the property of a nonresident ward;¹¹³ however, they must designate a resident agent.¹¹⁴ For a nonresident incompetent with property in Florida, a resident guardian will be appointed.¹¹⁵ For a resident incompetent, a nonresident guardian may be appointed; however, his powers do not extend to the incompetent's property.¹¹⁶

PROPERTY

The common law has developed an elaborate set of rules, feudal in origin, imposing prohibitive limitations upon the holding of land by aliens.¹¹⁷ States have retained jurisdiction in these matters and may, therefore, maintain such limitations and modify or abolish them. This power to discriminate against aliens has been held compatible with the equal protection clause of the Federal Constitution on the ground that it is within the police power of the state to control the holding of land by aliens, a question involving special public interest,¹¹⁸ subject, of course, to the law emanating from treaties.¹¹⁹ Recently a new trend, favorable to aliens, indicates that this type of discrimination may be, nevertheless, considered violative of the equal protection clause.¹²⁰

From early times Florida has taken a most liberal position and has granted aliens, in regard to property, equal treatment with its own citizens.¹²¹ Later these principles were incorporated into the Constitutions of 1868 and

111. FLA. STAT. § 744.15(1) (1957).

112. FLA. STAT. § 744.15(2) (1957).

113. FLA. STAT. § 744.16 (1957).

114. FLA. STAT. § 744.16(2)-17 (1957).

115. FLA. STAT. § 744.18 (1957).

116. FLA. STAT. § 744.27(2) (1957).

117. 1 POWELL, *THE LAW OF REAL PROPERTY* 368 (1949); 6 THOMPSON, *COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY* 270 (1940); 5 TIFFANY, *LAW OF REAL PROPERTY* 216 (1939); also *CONFLICT LAW* 75, note 217.

118. See note 56 *supra*.

119. Wilson, *Property Protection Provisions in United States Commercial Treaties*, 45 *AM. J. INT'L L.* 83 (1951), *INTERNATIONAL LAW STANDARDS IN TREATIES OF THE UNITED STATES* 92 (1953), and *Natural Resources Provisions in United States Commercial Treaties*, 48 *AM. J. INT'L L.* 355 (1954); *CONFLICT LAW* 69, *Chirac v. Chirac*, 15 U.S. (2 Wheat.) 259 (1817); *Beard v. Rowan*, 34 U.S. (9 Pet.) 299 (1835); *Hauenstein v. Lynham*, 100 U.S. 483 (1879).

120. *Kenji Namba v. McCourt*, 185 Ore. 579, 204 P.2d 569 (1949); *Fuji v. State*, 38 Cal. 2d 718, 242, P. 2d 617 (1952); *State v. Oakland* 287 P. 2d 39 (1955). Note, *The Alien Land Laws: a Reappraisal*, 56 *YALE L.J.* 1017 (1947).

121. An Act regulating descents (Nov. 18, 1829) provided in § 21 "That aliens of any country or nation whatever, may purchase, hold, enjoy, sell, convey or devise any lands and tenements in this Territory to the same extent and with the same right as citizens of the United States." The Act of February 17, 1833 expressed the same rule by providing "That aliens may take, receive and hold real estate in this Territory, either by purchase or descent."

that of 1885.¹²² In 1925 the provision was amended. In principle, non-discriminatory treatment of aliens was maintained; however, the legislature was given the "power to limit, regulate and prohibit the ownership, inheritance, disposition, possession and enjoyment of real property in the state of Florida by foreigners who are not eligible to become citizens of the United States under the provisions of the laws and treaties of the United States." This power has never been exercised.¹²³ Moreover, because of changes in the Immigration and Naturalization Act abolishing race as a ground for ineligibility to citizenship,¹²⁴ the area of possible legislative action under the amended constitutional provision has been greatly reduced.

Aliens' property, generally, is protected under the due process clause of the Federal Constitution.¹²⁵ The same rule applies under section 12 of the Florida Declaration of Rights.¹²⁶

Furthermore, it is to be kept in mind that international law guarantees to aliens their property and other vested rights. Many treaties contain express provisions related to such protection¹²⁷ and establish conditions under which expropriation may be effectuated.¹²⁸

122. DECLARATION OF RIGHTS § 18 (1868): "Foreigners, who have, or shall hereinafter become bona-fide residents of the State, shall enjoy the same right in respect to possession, enjoyment, and inheritance as native-born citizens." The 1885 version reads: "Foreigners shall have rights as to the ownership, inheritance and disposition of property in this State as citizens of the State." REP. ATT'Y GEN. 1935-36, 757 (1936), and 1945-46, 770 (1946).

123. REP. ATT'Y GEN. 1945-46 (1946). It may be added here that the Supreme Court in *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948) held that the "use of the federally created racial ineligibility for citizenship" as a basis for discriminatory state legislation against exercise by aliens of profession is unconstitutional. In regard to holding of land, see note 120 *supra*.

124. *Succession of White*, 85 So.2d 528, 537 (La. 1956).

125. Where there is no applicable treaty, the President may set a date for enemy aliens to remove their assets "consistent with public safety, and according to dictates of humanity and national hospitality", REV. STAT. § 4068 (1875), 50 U.S.C. § 22 (1952). On property custodian, Fla. Stat. § 47.51 (1957).

126. "No person shall be deprived of life, liberty, or property without due process of law; nor shall private property be taken without just compensation." FLA. CONST., DECLARATION OF RIGHTS § 1, lists the right of "acquiring, possessing and protecting property" among the "inalienable rights" belonging to "all men."

Aliens may invoke the homestead privilege against forced sale (FLA. CONST. art. X, § 1) on grounds advanced in favor of tax exemption (note 209 *infra*); however, such alien will be bound by § 4 of the same Article in regard to limitation on alienation, in spite of a treaty, if any, granting "free disposition" over property (*Todok v. Union State Bank*, 281 U.S. 449, 1929).

127. Wilson, *Property Protection Provisions in United States Commercial Treaties*, 45 AM. J. INT'L L. 83 (1951); CONFLICT LAW 125, 133. Williams, *International Law and the Property of Aliens*, 9 BRIT. Y. B. INT'L L. 1 (1928); THOMAS AND THOMAS, NONINTERVENTION, THE LAW AND ITS IMPORT IN THE AMERICAS 338 (1956).

128. ADJAANSE, CONFISCATION IN PRIVATE INTERNATIONAL LAW (1956); RE, FOREIGN CONFISCATION IN ANGLO-AMERICAN LAW (1950); Worsley, *Observations on the Public and Private International Law Relating to Expropriation*, 5 AM. J. COMP. L. 577 (1956).

EMPLOYMENT

Discriminatory provisions against employment of aliens are quite common,¹²⁹ particularly in foreign countries. Florida, on the contrary, discriminates in only a few cases. One of the positions closed to aliens is that of business agent for a labor union.¹³⁰ The other is employment with race tracks or frontons; their employees must not only be nationals of the United States, but also bona fide residents of Florida.¹³¹ Certain limitations upon employment may also arise under federal law¹³² from the immigration status of the alien.

Generally, it may be stated that there is no discrimination against aliens in the various schemes of social security (compensation for injuries, unemployment).^{132a} However, there is an important discrimination against alien nonresident beneficiaries under the Workmen's Compensation Statutes.¹³³ Such beneficiaries are entitled to full benefits only if they reside in this country or in Canada. Beneficiaries residing in other countries are discriminated against; only the surviving spouse and children, or if there is no widow or are no children, the surviving father or mother, provided the deceased has supported them either wholly or in part during the last year before his injury are entitled to claim benefits. Further, the commission may, in its discretion or upon application of the insurance carrier,

129. GIBSON, *ALIENS AND THE LAW* 119 (1940); KONVITZ, *THE ALIEN AND THE ASIATIC IN AMERICAN LAW* 171 (1946); Chamberlain, *Aliens and the Right to Work*, 18 A.B.A.J. 379 (1932); Fellman, *The Alien's Right to Work*, 22 MINN. L. REV. 137 (1938); O'Connor, *Constitutional Protection of the Alien's Rights to Work*, 18 N.Y.U. L. Q. REV. 483 (1941). Notes, *Constitutionality of Legislative Discrimination against the Alien in his Right to Work*, 83 U. PA. L. REV. 74 (1934); *Constitutionality of State Legislation Affecting Aliens*, 17 N.Y. U. L. Q. REV. 242 (1940); *Refugees and the Professions*, 83 HARV. L. REV. 112 (1939).

130. FLA. STAT. § 447.4 (1957).

131. FLA. STAT. § 550.27 (1957).

132. Nonimmigrant students may be permitted by the district director of the Service to accept employment only if he is satisfied that the student has no "sufficient means to cover his expenses, and that the desired employment will not interfere with his carrying successfully a course of study of the required scope." In case of practical training, the educational institution must endorse such application, 8 C. F. R. § 214 (f) (7). For student official trainees, note recent amendments, 22 FED. REC. 2909 (1957).

Other limitations imposed upon aliens by their immigration status concern workers admitted for temporary service, labor or training (8 C. F. R. § 214, h 1957); Mexican agricultural workers (8 C. F. R. § 214, k, 1957) and skilled and unskilled laborers under 8 C. F. R. § 212, a (1957).

Violation is ground for deportation, 8 U.S.C.A. § 1251. Comment, *Delevelopments in the Law of Immigration and Naturalization*, 66 HARV. L. REV. 643, 683 (1953). It may be added that prior to 1952 immigration under labor contract was illegal (*Lees v. United States*, 150 U.S. 476, 1893).

132a. Workmen's compensation includes employees, meaning "every person engaged in any employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written, including aliens, . . ." FLA. STAT. § 440.02 (2) (a) (1957).

Unemployment compensation covers "any service performed by an employee for the person employing him," (a), provided service is localized within the state, FLA. STAT. § 443.03 (5) (a) and (d) (1957).

133. FLA. STAT. § 440.16 par. (8) (1957). See 2 LARSON, *WORKMEN'S COMPENSATION* 117 (1952); 9 SCHNEIDER, *WORKMEN'S COMPENSATION* 77 (1957).

pay a lump sum of one half of the amount as determined by the commission, but not to exceed \$1000.00.¹³⁴

Generally, treaties in force do not change these discriminatory provisions since they grant national treatment only to beneficiaries "within the territory" of the other contracting country. Only in a few treaties, as, for example, in treaties with El Salvador¹³⁵ and Honduras¹³⁶ nonresident beneficiaries nationals of either of contracting countries and "within any of the territories of the other, shall regardless of their alienage or residence outside of the territory where the injury occurred, enjoy the same rights and privileges as are or may be granted to nationals and under like conditions."

PROFESSIONS

Contrary to the liberal attitude adopted by Florida in regard to land and employment, there are in force considerable limitations affecting aliens' professional activities.¹³⁷ The list of occupations closed to aliens under Florida law is lengthy: architects,¹³⁸ bank directors,¹³⁹ beauticians,¹⁴⁰

134. Similar discrimination exists now under the Federal Social Security Act as amended 1956, 70 STAT. 829 (Supp. IV, 1957), 42 U. S. C. § 405(c) (5).

On the problem of discrimination Andrews, *Discrimination against Nonresident Aliens*, 13 AM. LAB. LEG. REV. 232 (1925); Hyde and Watson, *The Equities of Nonresident Dependents under Workmen's Compensation Laws*, 7 ILL. L. REV. 414 (1931). Comment, *Position of Aliens under the Modern Compensation Laws*, 11 MINN. L. REV. 57 (1927).

135. Treaty with El Salvador, Feb. 22, 1926, art. II, 46 STAT. 2817, T. S. No. 827.

136. Treaty with Honduras on Trade and Commerce, Dec. 7, 1927, art. II, 45 STAT. 2618, T. S. No. 764. Discrimination is compatible with treaties with Italy, Feb. 2, 1948, art. II § 2, 63 STAT. (2) 2255, T. I. A. S. No. 1965; Ireland, Jan. 21, 1930, art. IV § 2, 1 U. S. T. 785; T. I. A. S. No. 2155; Israel, Aug. 23, 1951, art. IV, § 2, 5 U. S. T. 550, T. I. A. S. No. 2948; Greece, Aug. 3, 1951, art. IX, § 2, 5 U. S. T. 1829, T. I. A. S. No. 3057; Japan, Apr. 2, 1953, art. III, 4 U. S. T. 2063, T. I. A. S. No. 2863; Nicaragua, Jan. 21, 1956, art. IV § 2. Cf. *Maiorano v. Baltimore & Ohio R. R.*, 213 U.S. 268 (1908); *McGovern v. Philadelphia & Dearing Ry.*, 235 U.S. 389 (1919); *Liberato v. Royer*, 270 U.S. 535 (1926). For additional data, CONFLICT LAW 55.

On the contrary, both the treaty with El Salvador, note 135 *supra*, and with Honduras, *supra*, provide for national treatment "regardless of alienage or residence outside of the territory where the injury occurred."

137. 1 HYDE, INTERNATIONAL LAW 656 (1947); Brause, *State Laws Barring Aliens from Professions and Occupations*, 3 IMMIG. & NATUR. SERV. MO. REV. 281 (1946). Notes, 1947-48 Term of the Supreme Court: *the Alien's Right to Work*, 49 COLUM. L. REV. 257 (1949); *Constitutionality of Restrictions on Alien's Right to Work*, 57 COLUM. L. REV. 1012 (1957).

138. FLA. STAT. § 467.11 (1957) regarding admission without examination; an alien has to have filed his intention to become a citizen and holds an unexpired certificate issued by a foreign country.

139. FLA. STAT. § 656.12(2) (1957), affecting directors of industrial saving banks; in other types of banks at least one director must be a national, FLA. STAT. § 608.09 (1957). Organizers of building and loan associations must be residents of the State, FLA. STAT. § 665.02 (1957); and directors residents of the county, FLA. STAT. § 665.11 (1957).

140. FLA. STAT. §§ 477.06 (1)(a), 477.07(1) and 477.12 (1957). For barbers a license issued by a foreign country is sufficient, FLA. STAT. § 476.11 (1957). Certificate as a teacher in beauty culture schools presupposes citizenship, FLA. STAT. § 477.08(6) (1957).

chiroprodists,¹⁴¹ dental hygienists,¹⁴² dentists,¹⁴³ employment agencies,¹⁴⁴ fortune tellers, clairvoyants, astrologers, mediums, etc.,¹⁴⁵ insurance agents,¹⁴⁶ lawyers,¹⁴⁷ masseurs and masseuses,¹⁴⁸ medical technologists,¹⁴⁹ naturopathic physicians,¹⁵⁰ nurses,¹⁵¹ notaries,¹⁵² optometrists,¹⁵³ osteopaths,¹⁵⁴ pharmacists,¹⁵⁵ psychologists,¹⁵⁶ physical therapists,¹⁵⁷ physicians,¹⁵⁸ public accountants,¹⁵⁹ and real estate agents.¹⁶⁰

Additional requirements are imposed on applicants for dog and horse racing permits; they may be required to disclose, among other information, the nationality of members of the applicant association or corporation.¹⁶¹ A similar provision applies to applicants for fronton licenses.¹⁶²

In commercial activities involving trade between countries parties to a treaty, treaty merchants enjoy considerable privileges.¹⁶³ Some treaties also have eliminated discriminatory local provisions based on alienage in regard

141. FLA. STAT. § 461.03 (1957).

142. FLA. STAT. § 466.37 (1957).

143. FLA. STAT. § 466.13 (1957).

144. FLA. STAT. § 449.02(2) (1957).

145. FLA. STAT. § 205.411 (1957). The statute requires residence and voter registration which is tantamount to citizenship, FLA. STAT. § 97.041 (1957).

146. Life insurance agents, FLA. STAT. § 634.06 (1957); fire, casualty and security insurance agents, FLA. STAT. § 627.79 (2)(b) (1957). REP. ATT'Y GEN. 1949-50, 534 (1950). National treatment is granted to Canadians. Insurance adjusters must be bona fide residents of the state, FLA. STAT. § 636.26(1) (1957).

147. FLA. SUP. CT. RULES, art. 19; FLA. STAT. § 454.031 (1957).

148. FLA. STAT. § 480.06(1) (1957); bona fide residence is required in addition. REP. ATT'Y GEN. 1943-44, 423 (1944); 1949-50, 463 (1950).

149. FLA. STAT. § 483.08 (1957).

150. FLA. STAT. § 462.05 (1955). This statute was repealed by Laws of Fla. c. 57-129 which provides only for renewal of existing licenses and bars issuance of new ones.

151. FLA. STAT. § 464.111(2) (1957), or has "legally declared intention of becoming a citizen"; see note 108, *supra*. REP. ATT'Y GEN. 1943-44, 408, 409 (1944); 1945-46, 575 (1946); 1947-48, 457, 459 (1948); 1949-50, 452.

152. REP. ATT'Y GEN. 1933-34, 583 (1934); 1943-44, 172 (1944); 1947-48, 627; 1951-52, 215 (1952).

153. FLA. STAT. § 463.09 (1957).

154. FLA. STAT. § 459.06(4) (1957).

155. FLA. STAT. § 465.071(1)(b) (1957).

156. FLA. STAT. § 490.04(1)(b) (1957).

157. LAWS OF FLA. c. 57-67 § 3(1).

158. FLA. STAT. § 458.05(2)(a) (1957). Cf. *Watson v. Centro Espanol de Tampa*, 158 Fla. 796, 30 So.2d 288 (1947).

159. FLA. STAT. § 473.08(1) (1957). On foreign certificates, FLA. STAT. §§ 473.14 and 473.19 (1957). According to FLA. STAT. § 472.07 (1957) the state board of engineer examiners may enter into reciprocal agreements "with any . . . foreign country" for registration of land surveyors; besides, a certificate of registration may be issued to any person holding a "legal certificate of registration from the proper authorities in the . . . country adjudged of sufficiently high standard . . ."

160. FLA. STAT. § 475.17 (1957).

161. FLA. STAT. § 550.02(5)(b) (1957).

162. FLA. STAT. § 551.04(2)(a) (1957).

163. Wilson, *Treaty-Merchant Clause in Commercial Treaties of the United States*, 44 AM. J. INT'L L. 145 (1950). Cf. *Lau Ow Bew v. United States*, 144 U.S. 47 (1892) and *Hing Lowe v. United States*, 230 F.2d 664 (9th Cir. 1956).

to the exercise of certain professions.¹⁶⁴ According to the treaty with Greece¹⁶⁵ and Israel,¹⁶⁶ for example, treaty aliens "shall not be barred from practising the professions within the territory of the other Party merely by reason of their alienage; but they shall be permitted to engage in professional activities therein upon compliance with the requirements regarding qualifications, residence and competence that are applicable to nationals of such other Party." A similar provision is found in the treaty with Japan,¹⁶⁷ excepting the professions of notary public and port pilot (Protocol, 5). On the other hand, according to the treaty with Italy,¹⁶⁸ treaty aliens are permitted to engage, in conformity with the applicable laws and regulations, in "commercial, manufacturing processing, financial, scientific, educational, religious, philanthropic and professional activities except the practice of law." A similar limitation is contained in the treaty with Greece¹⁶⁹ which excepts not only the practice of law but also dentistry and pharmacy.

Commercial travellers are granted, under some treaties, special privileges with respect to customs as well as taxation.¹⁷⁰

Some of the recent treaties have granted important privileges in regard to engaging in business, particularly to organize and conduct corporations;¹⁷¹ others cover a wide field of economic activities.¹⁷²

PUBLIC SERVICES

Public property is equally available for use to citizens and aliens. This rule applies to "all fish, sponges, oysters, clams and crustacea found within the rivers, creeks, canals, lakes . . . and other bodies of water within the

164. CONFLICT LAW 64, note 187. *Terrace v. Thompson*, 263 U.S. 197 (1923); *Asakura v. Seattle*, 265 U.S. 332 (1924); *Jordan v. Tashiro*, 278 U.S. 123 (1928).

The interamerican convention relating to practice of the liberal professions adopted in Mexico (1902) has been signed but not ratified by the United States.

165. Treaty with Greece, Aug. 31, 1951, art. II, 5 U.S.T. 1829, T.I.A.S. No. 3057.

166. Treaty with Israel, Aug. 23, 1951, art. VIII § 2, 5 U.S.T. 550, T.I.A.S. No. 2948.

167. Treaty with Japan, Apr. 2, 1953, art. VIII § 2, 4 U.S.T. 2063, T.I.A.S. No. 2863.

168. Treaty with Italy, Feb. 24, 1948, art. I § 2, 63 STAT. (2) 2255, T.I.A.S. No. 1965.

169. See note 165 *supra*.

170. Special treaties with Guatemala, Dec. 3, 1918, 41 STAT. 1669, T. S. No. 642; El Salvador, Jan. 28, 1919, 41 STAT. 1725, T. S. No. 651; Panama, Feb. 8, 1919, 41 STAT. 1696, T. S. No. 646; Venezuela, July 3, 1919, 41 STAT. 1719, T. S. No. 648; or included in treaties of friendship and commerce, e.g., Nicaragua, (1956, art. XIII).

171. Walker, *Provisions on Companies in United States Commercial Treaties*, 50 AM. J. INT'L L. 373, 385 (1956).

172. According to Article VII of the treaty with Nicaragua (1956), for example, nationals and companies of either country enjoy national treatment in regard to all types of commercial, industrial, financial and other activities for gain; they are permitted to establish and maintain branches, organize companies "under the company laws of such other Party" and control and manage their enterprises, all this on equal footing with nationals, except in regard to activities which may be reserved, as, for example, ship-building, air transportation, banking, exploitation of natural resources. However, either country may prescribe special formalities to be complied with by such alien controlled enterprises.

jurisdiction of the state,¹⁷³ and within the gulf of Mexico and the Atlantic, within the jurisdiction of the state;"¹⁷⁴ these are considered by statute¹⁷⁵ to be the "property of the state and may be taken and used by citizens and persons not citizens, subject to the reservations and restrictions imposed by these statutes."¹⁷⁶

Restrictions prevail, however, in regard to some types of public services. Old age assistance is available only to citizens of the United States residing five years of the preceding nine in the state.¹⁷⁷ Similar limitations are in force in regard to admission to public hospitals.¹⁷⁸ Attendance at schools is required by "all children" of the respective age regardless of nationality;¹⁷⁹ limitations are in force only with regard to the admission to some professional schools.¹⁸⁰

SUCCESSION

No discriminatory provisions against aliens regarding succession are in force in Florida. Section 18 of the Declaration of Rights provides that "Foreigners . . . shall have the same right as to the . . . inheritance and disposition of property in the State as citizens of the State . . ."¹⁸¹ The same rule is repeated in the statutes,¹⁸² namely that an alien may "devise, bequeath, inherit and transmit inheritance in real and personal property as if he were a citizen of the United States; and in making title by descent it shall be no bar to a party that the intestate or any ancestor through whom he derives his descent from the intestate is or has been an alien."¹⁸³

173. FLA. CONST. art I.

174. FLA. STAT. § 370.10(1) (1957).

175. *Contra* as to property concept, *Toomer v. Witsell*, 334 U.S. 385 (1948). *Cf. Re Powell*, 70 Fla. 363, 70 So. 392 (1915).

176. Conservation measures imposed over the Tortugas shrimp bed reaching beyond the territorial waters of the state are not binding upon "foreign vessels or any vessel not flying the American flag," FLA. STAT. 370.151(10) (1957). Measures apply to Florida residents, *Skiriotes v. Florida*, 313 U.S. 69 (1941), within and without Florida territorial waters, whenever they as masters and owners of a vessel would be found fishing in the closed area. However, it seems to be doubtful whether residents of other states fishing in the closed area but beyond territorial waters are subject to this act. *Cf. Bayside Fish Co. v. Gentry*, 297 U.S. 422 (1936).

177. FLA. STAT. § 409.16(6) (1957). County institutions for persons disabled because of age, infirmity or misfortune are limited in grants by FLA. CONST., art. XIII, § 3. REP. ATT'Y GEN. 1939-40, 427, 428 (1940).

178. FLA. STAT. §§ 401.02(1), 401.14 (1957). Assistance to the blind requires five years residence, FLA. STAT. § 409.17 (1957); assistance to dependent children one year residence, FLA. STAT. § 409.18 (1957). Aid available to poor mothers is conditioned upon bona fide and continuous residence, FLA. STAT. § 392.07 (1957). Rehabilitation of alcoholics is limited to residents, FLA. STAT. § 396.061 (1957). REP. ATT'Y GEN. 1945-46, 531 (1946), also 1947-48, 422, 424 (1948).

179. FLA. STAT. § 232.01 (1957).

180. State university medical school is limited in regard to alien students, FLA. STAT. § 242.62 (1957).

181. See note 122 *supra*.

182. FLA. STAT. § 731.28 (1957).

183. *Ibid.* See REDFEARN, A PRACTICAL TREATISE ON THE LAW OF WILLS AND ADMINISTRATION OF ESTATES IN FLORIDA (1957).

Consequently, provisions contained in treaties¹⁸⁴ designed to eliminate or mitigate discriminatory provisions imposed upon aliens by local law are of no importance to Florida.

Intestate succession. In this regard aliens are treated, insofar as the application of Florida law is concerned, like citizens. They inherit *ab intestato* under the same rules as are applicable to citizens; they also may transmit inheritance under the same conditions.

Succession by will. The first question shall be discussed as to what rules apply to wills executed by aliens. Here, Florida does not distinguish between citizens and aliens but only between residents and nonresidents. Therefore, the rule applicable to nonresident nationals also applies to nonresident aliens. A will executed by a nonresident is valid in regard to real property situated in Florida only if it is "executed in accordance with the laws of this state in force at the time of its execution."¹⁸⁵ In regard to movables the will is valid in Florida provided it complies with the "laws of the . . . country in which the testator is domiciled at the time of his death."¹⁸⁶

Probate. In regard to probate proceedings Florida makes no distinctions between citizens and aliens but only between residents and nonresidents. In all cases the decisive contact is the death of the *de cuius* within the state. The will of a testator who died a resident of Florida has to be submitted to probate in this state for various reasons. It must be kept in mind that without probate here a will cannot transfer title or right to possession of real and personal property,¹⁸⁷ regardless of the fact that "probate or administration proceedings have been had in some other . . . country." Nevertheless, the will of a Florida resident may be admitted to probate in this state

184. Boyd, *Treaties Governing the Succession to Real Property by Aliens*, 51 MICH. L. REV. 1001 (1953); Meekinson, *Treaty Provisions for the Inheritance of Personal Property*, 45 AM. J. INT'L L. 313 (1950); also CONFLICT LAW 82.

185. FLA. STAT. § 731.07(3) (1957).

186. Note 185 *supra*. See also FLA. STAT. § 732.34 (1957) on wills written in a foreign language; on foreign notarial instruments, FLA. STAT. § 695.03(3) (1957).

Foreign consuls have, under applicable treaties, the power to execute notarial documents, including wills of their nationals. Such instruments "shall be received as evidence in the territories of the High Contracting Parties as original documents . . . and shall have the same force and effect as if drawn by and executed before a notary public or other public officer duly authorized therefor" in the sending country, provided such documents have been "drawn and executed in conformity to the laws and regulations of the country where they are designed to take effect." Treaty with Cuba on Consuls, Apr. 22, 1926, art. XI, § 2, 44 STAT. 2471, T. S. No. 750. Similar provisions are contained in the Treaty with Mexico on Consuls, Aug. 12, 1942, art. VII, § 2, 57 STAT. 800, T. S. No. 985. CONFLICT LAW 38. There is no reciprocity required in Florida in regard to the right to inherit. CONFLICT LAW 82, note 240.

187. FLA. STAT. § 732.26 (1) (1957). The statute does not expressly exempt real property situated outside of the state; however, in regard to personal property the same statute provides that such property "wheresoever situate . . . shall not pass under his will . . . until after such personal property has been administered upon and distributed by the domiciliary personal representative of his estate." Cf. Stem, *Conflict of Laws*, 10 MIAMI L. Q. 257, 265 (1956).

in spite of a previous probate in a foreign country . . . such probate was obtained "through inadvertence, error or omission;"¹⁸⁸ in this case the will may be probated only in accordance with provisions applicable to lost or destroyed wills.¹⁸⁹ Finally, the statute provides that the procuring, aiding, abetting or assisting the probate of a will in a foreign country of a decedent—resident of Florida constitutes a misdemeanor and is punishable with a fine, provided the act was done "knowingly and intentionally."¹⁹⁰

Special provisions apply in cases of notarial wills "in the possession of a notary entitled to the custody thereof, in a foreign . . . country the laws of which . . . country require that such will remain in the custody of such notary."¹⁹¹ In these cases a copy may be admitted to probate in this state provided it is duly authenticated by the notary and by the American consul within whose district the notary resides. Then the copy will be "prima facie evidence of the purported execution and of the facts stated in the certificate."¹⁹²

After probate by the "proper court of any other . . . country," a foreign will, *i.e.*, a will executed by a nonresident devising real property in this state, may be recorded within three years from the death of the testator if the will was not probated in this state provided it "conforms to the laws of this state as to form and manners of execution."¹⁹³ "When so admitted to record, such will and any codicil . . . shall be as valid and effectual to pass title to real property, and any right, title or interest therein, as if such will had been duly proved and admitted to probate in the proper court in this state."¹⁹⁴

Administration. In all cases where the estate is subject to probate in Florida, an administrator is appointed. To qualify as an administrator (also called personal representative) it is necessary that he be a United States citizen and a *bona fide*¹⁹⁵ resident of Florida at the time of the death of the *de cuius*.¹⁹⁶ A nonresident has to meet additional qualifications. There is no express provision as to whether or not an alien may qualify for this function. A proper interpretation of the statutory provisions would indicate that aliens are not qualified except where treaties prevail.

The administrator takes possession of personal property belonging to the estate "wheresoever situate,"¹⁹⁷ provided the deceased died a resident of Florida, and of real property "within the state." Nevertheless, adminis-

188. FLA. STAT. § 732.35 (1957).

189. FLA. STAT. § 732.27 (1957).

190. FLA. STAT. § 732.36 (1957).

191. FLA. STAT. § 732.37 (1957).

192. FLA. STAT. § 732.37(2) (1957).

193. FLA. STAT. § 736.06 (1957).

194. FLA. STAT. § 736.06(4) (1957). REP. ATT'Y GEN. 1949-50, 564 (1950).

195. FLA. STAT. § 732.47 (1957).

196. FLA. STAT. § 732.45 (1957).

197. FLA. STAT. § 733.01 (1957).

trators appointed "in any other . . . country" may be sued in this state "with reference to property, real or personal, in this state and may defend any suit, action or proceeding in any county of the state."¹⁹⁸ It may be added that in case a nonresident dies in this state leaving assets here, the administrator appointed by the decedent's home country may "have ancillary letters issued to him, if qualified to act."¹⁹⁹

Under treaties important privileges bearing on the administration of decedents' estates are granted to consular officers.²⁰⁰ Under some treaties they are entitled to assume a provisional custody of the estate; in others they are granted the right to be appointed administrators provided local law permits such appointment.²⁰¹ Since recent treaties go even further,²⁰² it is imperative to check the controlling treaty in each case.²⁰³

Dower. It has been shown that no discriminatory provisions are in force in Florida against aliens taking property through succession under will or *ab intestato*. This indicates the solution of the question whether or not there are limitations imposed on an alien widow in regard to her dower rights. The controlling statute²⁰⁴ being all inclusive ("Whenever the widow of any decedent shall not be satisfied . . ."), no arguments can be made to deny such widow her claim under this statute, particularly because denial of dower rights in realty is tied in with the prohibition against aliens to take land by inheritance. Since this is not the case in Florida, it may be con-

198. FLA. STAT. § 734.30(2) (1957).

199. FLA. STAT. § 734.31 (1957).

200. 2 HYDE, INTERNATIONAL LAW 1346 (1947); Condert, *Right of Consular Officers to Letters of Administration under Treaties with Foreign Nations*, 13 COLUM. L. REV. 181 (1913); Puente, *Consular Protection of Estates of Deceased Nationals*, 23 ILL. L. REV. 635 (1939); Lee, *Some New Features of the Consular Institution*, 44 GEO. L. J. 406, 410 (1956).

201. In cases of the death of a national without will, the consular officer "may take charge of the protection or conservation of the property left by the decedent, pending the appointment of an administrator who may be the consular officer himself, in the discretion of the court . . . provided the laws of the place . . . permit such appointment" (Cuba, 1926, art. XIII, 2 note 186 *supra*). See also CONFLICT LAW 87, note 259.

202. E.g., treaty with Costa Rica, Jan. 12, 1948, art. IX, 1, U. S. T. 247, T. I. A. S. No. 2045. The consular officer steps in regard to his claim to administer the estate of his co-national into the position of the claimant he represents, unless "other persons, having superior interests, have taken the necessary steps to assume possession (of the estate)" (art. IX, 2 a and d).

203. In relation to Latin American countries, the following treaties control: Argentina on Commerce and Navigation, July 27, 1853, art. IX, 10 STAT. 1005, T. S. No. 4; Bolivia on Friendship and Commerce, May 13, 1858, art. XXX, 12 STAT. 1003; Columbia on Consuls, May 4, 1850, art. XXX, 10 STAT. 900, T. S. No. 55; Costa Rica, see note 202, *supra*; Cuba, see note 186 *supra*; El Salvador on Commerce and Consular Rights, Feb. 22, 1926, art. XXII and XXIII, 46 STAT. 2817, T. S. No. 827; Guatemala on Real Property, Aug. 27, 1901, art. III, 32 STAT. 1944, T. S. No. 412; Honduras on Trade and Commerce, Dec. 7, 1927, art. XXIII and XXIV, 45 STAT. 2618, T. S. No. 764; Mexico on Consuls, Aug. 12, 1942, art. VIII and IX, 57 STAT. 800, T. S. No. 985; Paraguay on Trade and Commerce, Feb. 4, 1859, art. XII, 12 STAT. 1091. For other countries, consult U. S. TREATY DEVELOPMENTS, App. III (c) (3) and TREATIES IN FORCE, A LIST OF TREATIES . . . as of October 31, 1956 (1957).

204. FLA. STAT. § 731.24 (1957).

cluded that there can be no discrimination, in this respect, against a widow national of a foreign country.²⁰⁵

TAXATION

According to generally accepted rules of international law, aliens are subject to the taxing power of the country where they reside or engage in business or other activities,²⁰⁶ except they enjoy certain privileges granted by treaties or immunities because of their diplomatic or consular position.

In Florida aliens are subject to federal²⁰⁷ and state taxation as well as to the taxing power of counties and municipal corporations. Usually local taxes do not discriminate on the basis of alienage but rather on the basis of nonresidence. Except in situations where such discriminatory provisions apply, aliens are on equal footing with citizens, resident or nonresident.²⁰⁸

Such equal treatment is granted aliens in Florida in regard to the homestead tax exemption.²⁰⁹ The rule that "every person who has the legal title or beneficial title in equity to real property in this State and who resides thereon and in good faith makes the same his or her permanent home . . ." shall have an exemption of \$5,000.00, applies also to aliens.

205. Under some treaties consular officers also have the right to represent non-resident nationals claiming interests in the estate. (Treaty with Mexico, art. IX, *supra* note 203; Costa Rica, *supra* note 202, art. IX, 2, a). In some treaties they are given the authority to "collect and receive sums due under the Workmen's Compensation Laws" (e.g., Mexico, art. IX, 2).

206. *Mager v. Grima*, 49 U.S. (8 How. 49) (1850); *Witherspoon v. Duncan*, 4 Wall. 210 (1866); *Thomas v. Gay*, 169 U.S. 264 (1897). GIBSON, ALIENS AND THE LAW 86, 107 (1940); 1 HYDE, INTERNATIONAL LAW 663 (1947); STIMSON, JURISDICTION AND POWER TO TAXATION (1933). Albrecht, *The Taxation of Aliens under International Law*, 29 BRIT. Y. B. INT'L L. 145 (1952); Beale, *Jurisdiction to Tax*, 32 HARV. L. REV. 587 (1919).

Intangible property belonging to aliens in Florida is taxable, REP. ATT'Y GEN. 1939-40, 472 (1940), relying on *Hunter v. Turner*, 54 Fla. 654, 45 So. 509 (1907) and *Atlantic National Bank v. Simpson*, Fla. citation, 188 So. 636 (1938). Also REP. ATT'Y GEN. 1941-42, 202 (1942). Trowbridge, *Domicile Problems of "Winter Residents"*, 11 MIAMI L. Q. 375 (1957).

207. LOWDNESS AND KRAMER, FEDERAL ESTATE AND GIFT TAX 541 (1956); 3 MERTENS, FEDERAL INCOME TAXATION, § 45 (1957); PHILLIPS, UNITED STATES TAXATION OF NONRESIDENT ALIENS AND FOREIGN CORPORATIONS (1952). Rowen, *Tax Alternatives of a Nonresident Alien*, 34 TAXES 465 (1956); Schneider, *Aliens and the United States Income Tax* 1856, 34 TAXES 583 (1956).

208. On taxes upon estates of alien decedents, FLA. STAT. § 198.04 (1957). Note *ad hoc* definition of residence in FLA. STAT. § 198.01 (7) (1957). Morton and Cotton, *Limitations on State Jurisdiction to Levy Death Taxes*, 5 MIAMI L. Q. 449 (1951); Trowbridge, *supra* note 206, at 376.

209. FLA. CONST. art. X, § 7; FLA. STAT. § 192.12 (1957). *Crocker v. Crocker*, 51 F. 2d 11 (5th Cir. 1931); *Smith v. Voight*, 158 Fla. 366, 28 So.2d 426 (1946); also REP. ATT'Y GEN. 1939-40, 438 (1940) and 1945-46, 285 (1946). Trowbridge, *supra* note 206, at 379. Note *ad hoc* definition in FLA. STAT. § 192.14 (1957). Prior to the 1937 amendment, citizenship and residence were required, *Steuart v. State ex rel. Dolcimascolo*, 119 Fla. 117, 161 So. 378 (1935); REP. ATT'Y GEN. 1935-36, 64, 66 (1936). and 1941-42, 202 (1942). The statutory requirement of at least one year residence held unconstitutional, *Sparkman v. State ex rel. Scott*, 58 So.2d 431 (Fla. 1952). Cf. also *Jacksonville v. Bailey*, 30 So.2d 529 (Fla. 1947). Stern, *Conflict of Laws*, 8 MIAMI L. Q. 209, 213 (1954).

The same interpretation seems justified in regard to the exemption of household goods and personal effects to the assessed value of \$1,000.00²¹⁰

Most of the discriminatory provisions appear among the different types of license fees. In regard to activities connected with the salt waters of the state,²¹¹ as defined by statute,²¹² aliens are required to pay higher licenses for boats operated for commercial purposes,²¹³ as well as for fishing;²¹⁴ the same applies for licenses for the wholesale and retail seafood business.²¹⁵ A discriminatory fee is imposed upon nonresidents for sponge fishing,²¹⁶ and dealing in furs and hide.²¹⁷ It should be added that the statute contains an ad hoc definition of residence.²¹⁸

The registration fees for motor vehicles are nondiscriminatory; the statute even honors registrations "under the laws of some . . . foreign country."²¹⁹ The same privilege applies in regard to driver's licenses held by persons who have in "their immediate possession a valid chauffeur's license issued to (them) in (their) . . . country."²²⁰ This privilege does not apply where such nonresidents "accept employment or engage in any trade, profession or occupation in this state, or shall enter their children to be educated in the public schools of the state."

In many instances the local power to tax is affected by treaty law. The first area where discriminatory taxation was eliminated by treaties is estate taxation. These provisions are usually included in treaties of friendship and commerce, and grant treaty aliens equal national treatment, a rule binding not only upon the federal but also state taxing authorities.²²¹

Since 1945 an even broader grant of nondiscriminatory treatment in matters of taxation is being incorporated as a routine provision into treaties of friendship and commerce. One of the recent treaties of this kind is an example. According to Article XI of the treaty with Nicaragua (1956) a treatment not "more burdensome than (that) borne by nationals and companies" of the other country is granted to such treaty aliens residing or treaty aliens and companies "engage in trade or other gainful pursuit

210. FLA. STAT. § 192.201 (1957).

211. *Ex parte* Giletti, 70 Fla. 442, 70 So. 446 (Fla. 1915); REP. ATT'Y GEN. 1951-52, 509 (1952) and 1953-54, 437 (1954).

212. FLA. STAT. § 370.01(5) (1957).

213. FLA. STAT. § 370.06(2) (1957).

214. FLA. STAT. § 370.06(6) (1957).

215. FLA. STAT. § 370.07(c) and (1) (1957).

216. FLA. STAT. § 370.17(1) (1957).

217. FLA. STAT. § 372.66(4) (1957).

218. FLA. STAT. § 370.01(1) (1957). Discrimination against non-resident held constitutional. *Haavok v. Alaska Packers*, 263 U.S. 510 (1923).

219. Except foreign corporations doing business in the state, FLA. STAT. § 320.37 (1957). Cf. *Robinson v. Fix*, 113 Fla. 151, 151 So. 512 (1933).

220. FLA. STAT. § 322.04(4) (1957).

221. *Friderickson v. Louisiana*, 23 How. 443 (1860); *Petersen v. Iowa*, 245 U.S. 170 (1917); *Duus v. Brown*, 245 U.S. 176 (1917); *Nielsen v. Johnson*, 279 U.S. 47 (1929).

or in scientific, educational, religious or philanthropic activities within the territories of the other Party" in regard to the "payment of taxes, fees or charges imposed applied to income, capital, transactions, activities or any other object or to requirements with respect to the levy and collection thereof." With regard to nonresident nationals or nationals not engaged in such activities as well as such companies "it shall be the aim . . . to apply in general" the principles just stated; in any case, this group of aliens is assured the most-favored-nation treatment (par. 3). Moreover, this group is given the right that no taxes, fees or charges shall be imposed "in excess of that reasonable or apportionable to its territories," nor deductions and exemptions granted less than those "reasonably allocable or apportionable to its territories."

It is proper to emphasize that these treaty provisions not only affect federal taxation but taxation emanating from any authority. In addition, they encompass all possible types of taxation, regardless of the taxing object and the technical classification. Unless exemptions reserved in such treaties do not prevent it,²²³ these provisions may affect, if properly invoked, any kind of discriminatory taxation based on alienage.²²⁴

On the contrary, treaties to avoid double taxation²²⁵ concluded with numerous foreign nations (among Latin American countries with Honduras)²²⁶ affect only federal taxes as specified in each of these treaties.

CONCLUSION

Compared with other states and even more, with other countries, Florida appears to be quite liberal with her 60,000 some aliens.²²⁷ It is hoped that this attitude will continue and that the open door policy, particularly toward our neighbors to the south, will remain one of the links strengthening the solidarity of the Western Hemisphere.

222. Tax privileges are contained, among others, in the following treaties: China, Nov. 4, 1946, art. X, 63 STAT. (2) 1299, T. I. A. S. No. 1871; Italy, Feb. 2, 1948, art. IX, 63 STAT. 2255, T. I. A. S. No. 1965; Ireland, Jan. 21, 1950, art. VII, 1 U. S. T. 785, T. I. A. S. No. 2155; Israel, Aug. 23, 1951, art. XI, 5 U. S. T. 550, T. I. A. S. No. 2948; Greece, Aug. 3, 1951, art. XVI, 5 U. S. T. 1829, T. I. A. S. No. 3057; Japan, Apr. 2, 1953, art. XI, 4 U. S. T. 2063, T. I. A. S. No. 2863; Germany, Oct. 29, 1954, art. XI, 7 U. S. T. 1939, T. I. A. S. No. 3593.

223. Contracting countries, as a rule, reserve the right to require reciprocity, exempt double taxation treaties, and grant nonresidents exemptions of personal nature in regard to income and inheritance taxes.

224. Foreign governments and their agents (diplomatic as well as consular) enjoy immunity from taxation under general international law and, in regard to consular officers, also under treaties. However, immunities have recently been restricted in regard to governmental enterprises of a business type. Bishop, *Immunity from Taxation of Foreign State-Owned Property*, 46 AM. J. INT'L L. 239 (1952); see also note 100 *supra*.

225. C. C. H., *TAX TREATIES* (1.1., n.d.); U. S. TREASURY DEPARTMENT, *COMPARABLE PROVISIONS OF DEATH AND GIFT TAX CONVENTIONS BETWEEN UNITED STATES AND OTHER COUNTRIES* (1.1., n.d.).

226. T. I. A. S. No. 3766.

227. ANNUAL REPORT OF THE IMMIGRATION AND NATURALIZATION SERVICE FOR . . . 1956, 100 (1957) sets the figure at 59,947.