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CITIZENSHIP AND DEPORTATION

By ARNOLD LEVANDOSKI

The question of citizenship, the nature and attributes thereof, and the rights thereunder, has for many decades provided a fertile field for the exercise of judicial functions. It is perhaps a matter of common knowledge that there has always been a public demand for the removal of "undesirables" from the confines of our United States. However the advent of "racketeering" and the "crime wave" of recent years which is so emphatically claimed to have hit our country has caused somewhat of a revival of public interest in the ever present desire to deport and forbid the reentrance of undesirables. To the desire of the Pacific coast to control the encroaching Chinese population is now added the nation-wide interest in the removal of the habitual criminal. Hence a subject which was at one time more or less localized and sectional has now become one of national interest because of recently developed conditions. It is unmistakable, therefore, that the question of citizenship and deportation is one of current national interest.

In determining the nature of citizenship, and its qualifications first resort is had to the Constitution of the United States. The Constitution contemplates two sources of citizenship. The fourteenth article of Amendment declares that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." Other provisions of the Constitution guarantee certain rights to "citizens" but only in the above quoted provision, the Fourteenth Amendment, is there to be found any definition of the term "citizenship."

By necessary resort to the common law it is found that the fundamental principle of nationality is "birth within allegiance" of the king. This principle embraced persons born within the allegiance of the king and subject to his protection. Allegiance and protection should be mutual and hence it may be said that a person born within the allegiance of a given sovereign and entitled to his protection is a citizen thereof. This principle is undoubtedly the basis for Mr. Justice Story's statement that "two

things concur to create citizenship: birth within the dominions of the sovereign and, within the protection of and obedience to the sovereign."¹ That this principle is affirmed by the Constitution of the United States is held in the leading case of *United States V Wong Kim Ark*. (42 L. Ed. 890)

The words "subject to the jurisdiction of the United States" are held in *Elk V Wilkins* (112 U. S. 494) to mean completely subject to the political jurisdiction of the United States, and owing them direct and immediate allegiance. Hence a person born in the United States under conditions where the sovereign power is understood to cede part of its territorial jurisdiction (as children born of a foreign ambassador) is not a citizen of the United States by virtue of birth therein.

The alternative method of securing citizenship as contemplated by the Constitution is by "naturalization." The Constitution confers upon Congress the power to pass a uniform law governing this method of acquiring citizenship. Until recently a third method of securing citizenship, a method independent of the constitution, was in force by virtue of the familiar principle that the citizenship of a married woman is that of her husband. This principle is now abrogated by an act of Congress which provides that "any woman who marries a citizen of the United States after September 22, 1922, or any woman whose husband is naturalized after that date, shall not become a citizen by reason of such marriage or naturalization; but if eligible to citizenship she may become naturalized."² Further provision declares that "the right of any woman to become a naturalized citizen of the United States shall not be abridged because of her sex or because she is a married woman."³ (Prior to 1922 the alien wife of an alien husband could not become a naturalized citizen of the United States.)

Citizens by virtue of being such are guaranteed certain rights, privileges and immunities by the Constitution. A question within the purview of this article which presents itself at the outset is, Is a citizen of the United States subject to deportation by the United States? Although there is no express provision in so many words that citizens are not subject to deporta-

¹ *Inglis v Sailors' Snug Harbor* 7 L. Ed. 617.

² Section 368, Title 8, U. S. Code Ann.

³ Section 367, Title 8, U. S. Code Ann.

tion, yet such a conclusion can reasonably be reached. Operative facts that lead to such a conclusion are as follows:

All acts of Congress providing for deportation are directed toward aliens only, and there is apparently not one single instance in which Congress has attempted to provide for the deportation of a citizen. With regard to the power of Congress to lawfully pass an act providing for the deportation of a citizen the Supreme Court of the United States has declared that "if the Exclusion act of 1888 is intended to apply to citizens of the United States of Chinese descent it so far beyond the power of Congress to enact and is therefore unconstitutional and void."⁴ In another case it is held that "where one establishes his birth by uncontradicted testimony, deportation is unwarranted."⁵ Another decision holds that "the authorities are clear that the defendant being the wife of an American citizen, her citizenship is that of her husband and she cannot be deported."⁶ It is, therefore, quite conclusive, to use the words of a United States Supreme Court, that "a citizen by birth is not subject to deportation at all,"⁷ and generally speaking a citizen by naturalization is on a par in every respect with a citizen by birth. Citizens of the United States are by Constitutional provision guaranteed all the "privileges and immunities" of a citizen of the United States. Can it not be argued that one of these privileges is the right to remain in the United States? Does not the approved definition of the word "citizen" contain as an element the right to the protection of the sovereign power within whose confines he was born? Further, according to the Declaration of Independence everyone has the right to life, liberty, and the pursuit of happiness. Can it not be said that citizenship is the sum total of all the natural rights plus the right to exercise them in the United States?

No citizen of the United States who has absented himself is denied the right to reenter.⁸ This statement may be challenged on the grounds that a citizen of the United States was

⁴ In re Yung Sing Hee 36 Fed. 437.

⁵ Moy Suey v U. S. 147 Fed. 697, U. S. v Hom Lim 214 Fed. 456.

⁶ Sprung v Martin 182 Fed. 330 NOTE: This case was decided before the Act of 1922 supra, giving separate citizenship to married women.

⁷ U. S. ex rel. Huber v Sibray 178 Fed. 150

In re Nicola

⁸ U. S. v Wong Kim Ark (supra) In re Yung Sing Hee (supra)

actually denied the right to reenter the United States. Section 3959 Compiled Statutes provides that when any naturalized citizen shall reside for two years in the state from which he came it will be presumed that he has ceased to be an American citizen, provided however that such may be overcome by presentation of satisfactory evidence———. In the cases in which the right of reentrance was denied., it was so done because of the inability to overcome the presumption that the party was not a citizen of the United States. Further it must be remembered that these cases dealt only with naturalized citizens. It is quite apparent that unless there is a positive and affirmative act on the part of the citizen to give up his or her citizenship, the right of reentry cannot be denied.⁹ Conceding the fact that a citizen cannot be denied the right to reenter can it not be likewise said that a citizen cannot be deported?

To support the conclusion that a citizen cannot be deported or denied the right to reenter, the language of the United States Supreme Court in the case of *In re Yung Sing Hee* (supra) may be appropriately quoted. It is there said "if the Exclusion Acts purport to exclude from the United States descendants of Chinese born within the United States and such legislative act attempts to banish a citizen of the United States for any cause or no cause at all because of race or color, it is a bill of attainder within the constitutional prohibition." A bill of attainder is a legislative act which inflicts punishment without judicial trial. Laws imposing civil disabilities or punishment for past acts are held to be *ex pos. facto*.

It does not necessarily follow from the fact that a citizen cannot be deported, or denied the right of reentry, that he or she cannot be deprived of the status as such and hence be subject to deportation on grounds of not being a citizen of the United States. Thus we are brought to the question of how citizenship may be lost. In *II Corpus Juris* at page 785 it is said that a direct loss of citizenship is effected by either expatriation or by marriage of a woman to an alien. With regard to the latter a federal statute of 1907 provides, in substance, that at the termination of such marital relationship, such a woman has an option to reacquire

⁹ *In re Wildeberger* 214 Fed. 508 *Ex rel. Anderson V Howe* 231 Fed. 546.

her American citizenship, but in 1922 Congress declared that "a woman citizen of the United States shall not lose her citizenship by marriage to an alien unless she makes a formal renunciation before a competent tribunal, provided that any woman marrying an alien ineligible to citizenship shall cease to be a citizen, or if during the continuance of such marital relationship she resides continually for two years in a foreign state of which her husband is a citizen, or for five years outside the United States she shall be subject to the presumption that she had expatriated herself as provided in the statute of 1907. Further, in *Corpus Juris* it is said that loss of citizenship may be provided as punishment of a crime after due conviction thereof, citing *Gotcheus v Matheson*, 52, Barb. 152. This case involves a federal statute which in substance declares that as an additional punishment for desertion from military service forfeiture of citizenship shall be declared. The act unquestionably was designed to prevent desertion and induce the return of those who had already deserted the service. Although the United States Supreme Court has never been called upon to decide the constitutionality of the act, the question arose in a state court in somewhat of an indirect manner.

Shortly after the passage of that act an alleged deserter was denied the right to vote at an election and he brought suit against the election of commissioners. In this case the constitutionality of the act was attacked on three grounds: First that it was an ex post facto law, secondly that it attempted to regulate suffrage within the State, thirdly that it proposes to inflict pains and penalties upon the offenders before and without a trial and conviction by due process of law, and prohibited by the Bill of rights. The court disposed of the first ground assigned by holding that the penalty inflicted by the act is not imposed for the original crime but for the persistence in the crime, i. e., for failure to return to the service, and that it is not therefore an ex post facto law. The act was held to be prospective in operation. In considering the second ground assigned the court said "Congress can deprive an individual of the opportunity to enjoy a right that belongs to him as a citizen, and this is different from the taking away of the right itself, or merely impairing it. A voter may be imprisoned for a crime against the United States but this is not impair-

ing his right of suffrage. "Then Justice Strong says, "I cannot doubt that as a penalty for a crime against the general government, Congress may impose on the criminal a forfeiture of his citizenship of the United States. Disfranchisement of a citizen of the United States as punishment for a crime is no unusual mode of punishment (*Barker v People* 20 *Johnson* 458)" The statute was held unconstitutional on the third ground assigned in that the voter was not judicially convicted of desertion, and it was expressly held that he could not be adjudged guilty of desertion by the election commissioners and denied the right to vote.¹⁰

The case, although holding that Congress may deprive a citizen of the opportunity to exercise a right as a citizen, seems likewise to hold that Congress cannot deprive the citizen of the right itself. It appears to the writer this court holds that Congress cannot deprive a citizen of his citizenship, notwithstanding the phrase "I cannot doubt the right of Congress to impose a forfeiture of citizenship as penalty for a crime" to the contrary; and this for two reasons: first, the context of the opinion shows that a strict and literal meaning of the words quoted, standing alone, was not intended, secondly, the case is cited only for the proposition that one cannot be deemed to have forfeited his citizenship without a conviction of desertion.

The federal statute involved in the case just discussed was passed in 1865. In 1866 the state of Pennsylvania by an act of its legislature, supplemental in nature to the federal act, declared in substance that no person guilty of desertion shall vote, and that a report by any provost that a certain person is a deserter was to be deemed evidence of desertion sufficient to bar the right to vote. An alleged deserter being denied the right to vote, the question came up once more before the Pennsylvania court. Although the Pennsylvania act of 1866, and not the federal act of 1865, was primarily involved in the controversy the statement of that Supreme Court serves to justify the construction placed upon the case last discussed (*Huber v Riley* 53 Penn. St. 112), as well as sustain the conclusion that Congress cannot deprive a person of his citizenship and thus make him subject to

¹⁰ *Huber v Riley* 53 Penn. St. 112.

deportation. That court in the second case says, "this act denies the rights of the electors to all who under the act of Congress have been registered as deserters from military service even though there is no conviction of desertion and so is unconstitutional. (Citing *Huber v Riley*) It attempts to disfranchise those who are enfranchised by the fundamental law of the commonwealth. It is not only a regulation of the mode of exercise, but it is a deprivation of the right itself. The legislature cannot take away from an elector his right to vote if he possesses the qualifications required by the Constitution. If such were not so the legislative power would be superior to the organic law of the state, and the legislature instead of being controlled by it would mould the Constitution at its pleasure. Such is not the law. A right conferred by the constitution is beyond reach of legislative interference. It is in the nature of a constitutional grant of powers or of privileges that cannot be taken away by any authority known to the government."¹¹

The only other case relevant to the subject under examination, which could be found by the writer, is to the effect that no mere act of state legislation can per se denationalize a citizen without his concurrence.¹² Voluntary rebellion cannot by legislative act, be made involuntary expatriation an act of legislature depriving persons adhering to the Confederacy, of their citizenship is a act of attainder. This case appears to uphold the view that it is properly within the jurisdiction of a state to provide a general law which will disfranchise its citizens, but that a state has no power to deprive a citizen of his citizenship in the United States. These cases, although not conclusive as to this question in that they were not decided by the Federal Supreme Court provide the only judicial expression on the subject.

That Congress cannot pass an act which will arbitrarily denationalize a citizen is further supported by a holding that allegiance may be dissolved by the mutual consent of the government and its citizens.¹³ In Black's Constitutional Law P. 254 it is said that "citizenship as such can never be forfeited by voluntary renunciation of the party. There is no constitutional

¹¹ *McCafferty v Guyer* 59 Penn. St. 109 *Moy Suey v U. S.* (supra)

¹² *Burkett v McCarty* 73 Ky. 758.

¹³ *Inglis v Sailors' S. Harb* La. wEd. 617.

way in which the United States, or a state could reduce a person enjoying the character of citizen to the standing of an alien."

That a citizen is subject to involuntary expatriation would be inconsistent with the principle that the right of expatriation is a natural and inherent right in the people.¹⁴ That such is a natural and inherent right is declared by Congress expressly in the provision that "any declaration, instruction, opinion, order or decision of any officer of the United States which denies, restricts, impairs or questions the right of expatriation, is inconsistent with the fundamental principles of the Republic."¹⁵ Cases hold that expatriation can be effected by only a showing of a clear intention to relinquish American citizenship.¹⁶

To the conclusion that Congress cannot deprive a citizen of his citizenship the language of Justice Gray in the case of *United States V Wong Kim Ark* (holding that a citizen cannot be denied the right to reenter) serves as a fitting close. "The power of naturalization vested in Congress by the Constitution is a power to confer citizenship, not a power to take it away. Congress having no power to abridge the rights conferred by the constitution upon those who have become naturalized citizens, a fortiori no act or omission of Congress providing for naturalization can effect citizenship acquired as a birth right by virtue of the Constitution without any aid of legislation. The Fourteenth Amendment while it has conferred the power in Congress to regulate naturalization, it has conferred no authority upon Congress to restrict the effect of birth declared by the Constitution to constitute a sufficient and complete right to citizenship."

In spite of this positive language of Justice Gray there is reasonable ground to believe that Congress can lawfully pass an act providing that a citizen shall have forfeited his status as a citizen upon due conviction in a competent court of a certain specified crime or crimes, and such finds support in judicial expression in several instances, providing of course that such an act of Congress would be prospective and not retrospective in view. In this respect it must be noticed that all cases cited heretofore in this article were without exception cases in which there

¹⁴ *U. S. ex rel Anderson V Howe* 231 Fed. 546.

¹⁵ Revised Statutes U. S. No. 1999.

¹⁶ *Phelps V Jackson* (supra).

was no judicial conviction of any crime or statute, and hence it may be appropriately argued that the language of the respective courts in these cases holding that a citizen could not be deemed to have forfeited his citizenship referred exclusively only to instances in which there was no conviction by a proper tribunal upon which to base a forfeiture of citizenship, and that, and as such are not indicative of what the courts might say if an act as here proposed would be passed by Congress.

That Congress has the power to pass such an act can be implied from the language of Justice Robertson of the Kentucky Supreme Court: "Compulsive excission of a citizen because of his joining the Confederate army cannot be constitutionally inflicted without judicial conviction of some crime or act denounced by legislation as a forfeiture of citizenship."¹⁷

Justice Agnew in the dissenting opinion in the McCafferty case (regarding forfeiture of citizenship as penalty for desertion) says "the power of Congress to enforce military service being established the extent of the penalty is within the discretion of the law making power whether it be forfeiture life, property, or the lose of citizenship." It is there further said that deprivation of citizenship is not the deprivation of a right within Constitutional protection. Citizenship not being a natural right, it results from the government and is regulated by the rule of the country in which it is claimed."

In the Huber V Reilly case Justice Strong said "I cannot doubt that as a penalty for a crime against the General government Congress may impose a criminal forfeiture of his citizenship in the United States."

It thus appears that the question is undoubtedly an open one, and in view of the fact that there are contradictory statements made by highly respectable authorities one is at liberty to adopt either view and have sustenance of judicial opinion. In the last analysis the question seems to resolve itself down to this "Is citizenship a natural and inherent right and so secure from involuntary destruction or forfeiture as distinguished from disfranchisement?"¹⁸ That it is is so declared by the United

¹⁷ *Burkett v McCarty* (supra).

¹⁸ See "Disfranchisement" Sect. 254 *Blacks Constitutional Law*.

States Supreme Court in the following language: "Nativity gives citizenship and is a right under the Constitution. It is a right which Congress would be without the Constitutional power to curtail or give away."¹⁹

¹⁹ *Moy Suey v U. S.* (supra)