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CITIZENSHIP-EXPATRIATION-DISTINCTION BETWEEN NATURALIZED AND NATURAL BORN CITIZENS

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CITIZENSHIP—EXPATRIATION—DISTINCTION BETWEEN NATURALIZED AND NATURAL BORN CITIZENS—Plaintiff's father, a native of Germany, was naturalized in the United States in 1896. In 1901, he returned to Germany with his American wife, and plaintiff was born in that country in 1905. Plaintiff made occasional visits to the United States, but was at all times domiciled in Germany.

He served in the German army during World War II. In 1947, upon refusal of his application for a passport as a citizen of the United States, he came to this country on a temporary visa and brought a declaratory judgment action for adjudication that he was a citizen. The trial court refused to believe his testimony that he did not take the oath of allegiance to Germany and concluded that he expatriated himself when he took such an oath.[1] On appeal, *held,* affirmed. (1) The refusal of the trial court to believe plaintiff's testimony was justified. (2) As plaintiff's citizenship at birth was by virtue of the Act of 1855,[2] he was a naturalized citizen, and therefore subject to the expatriation provision for naturalized citizens in the Act of 1907.[3] He has failed to overcome the presumption of cessation of citizenship that arises thereunder from prolonged residence in a foreign country. *Zimmer v. Acheson,* (10th Cir. 1951) 191 F. (2d) 209.[4]

The problem presented by the principal case is whether a person born in a foreign country to American parents, thereby becoming an American citizen at birth, is to be considered a "naturalized" or a "natural born" citizen of the United States. The solution will determine whether he may become the President of this country,[5] and whether he is subject to laws providing for the expatriation of naturalized citizens. The result of the principal case is to limit the category "natural born" to those who become citizens under the doctrine of *jus soli*;[6] this makes it co-extensive with the term "native born." Of importance in this problem is whether these children took the nationality of their parents at common law, for if they are citizens by virtue of their birth and without the aid of statute, then certainly they are "natural born" and not "naturalized" citizens. In most continental European countries the doctrine of *jus sanguinis*[7] is applied.[8] England follows the same rule, both by virtue of the common law[9] and under

[1] (D.C. Kan. 1950) 91 F. Supp. 313.

[2] 10 Stat. L. 604, §1 (1855), providing that children born outside the limits of the United States, whose fathers are at the time citizens thereof, are declared to be citizens of the United States. For a complete historical development of this statute, see 3 HACKWORTH, DIGEST OF INTERNATIONAL LAW §222 (1942).

[3] 34 Stat. L. 1228, §2 (1907), providing for a rebuttable presumption of the cessation of citizenship by the residence of a naturalized citizen for two years in the foreign state from which he came, or for five years in any other foreign state. For a complete historical development of this statute, see 3 HACKWORTH, DIGEST OF INTERNATIONAL LAW §252 (1942).

[4] *Accord:* Schaufus v. Attorney General of United States, (D.C. Md. 1942) 45 F. Supp. 61.

[5] U.S. CONST., Art. II, §1.

[6] Citizenship of the place of one's birth by virtue of being born within that state.

[7] Citizenship of the place of one's descent or parentage, no matter where born.

[8] 1 WILLOUGHBY, THE CONSTITUTION §202 (1922); FLOURNOY AND HUDSON, NATIONALITY LAWS (1929); Harvard Research in International Law on Nationality, 23 AM. J. INT. L., Spec. Supp. 80 (1929).

[9] BROOKE'S ABRIDGMENT, title Denizen et alien, pl. 6 and 21; title Descent, pl. 47 (1573). See also Calvin's Case, 7 Coke 1, 77 Eng. Rep. 377 (1609); Lord Hale in Collingwood v. Pace, 1 Vent. 413, 86 Eng. Rep. 262 (1668-1685).

a declaratory statute of 1350 guaranteeing such application.[10] As a result, it is generally concluded, despite occasional dissent,[11] that *jus sanguinis* was the common law doctrine.[12] It is especially noteworthy that the earliest legislation on this subject in the United States, in 1790 when the terms of the Constitution were still fresh in the minds of the members of Congress, was a seemingly declaratory act which provided that "all the children of citizens of the United States that may be born at sea or out of the limits of the United States shall be considered as *natural born* citizens."[13] A subsequent enactment in 1802 made the problem acute by failing to provide for the children born abroad to citizens of the United States when these parents were not themselves citizens at the date of the statute.[14] In an opinion decided under this act, the New York court made an exhaustive and analytical search of the early English cases and authorities, and concluded that a person born abroad to an American father is a citizen of the United States, the doctrine of *jus sanguinis* being part of the common law, of which the English statute of 1350 was merely declaratory.[15] Since the better authority is that these persons are citizens by virtue of their birth, and not by naturalization through legislation, it appears to be error to apply to them the expatriation statute for naturalized citizens. A declaration of congressional policy in relation to this matter may be seen in the Nationality Act of 1940, where naturalization is defined to mean "the conferring of nationality upon a person *after* birth."[16] This same act also provides for the expatriation of naturalized citizens in a manner similar to that of the statute in the principal case,[17] but in an entirely different section provides for the expatriation of both nationals born

[10] 25 Edw. III, stat. 2.

[11] See Horace Binney's famous article, 2 AM. L. REG. 193 (1854). This article by Mr. Binney pointed out the inadequacy of the Act of 1802, infra note 14, and was thereby instrumental in bringing about the Act of 1855, supra note 2. When introducing the latter act to the House of Representatives, Mr. Cutting said that without such a statute these children born abroad are aliens. But he also stated that his information was derived from the writings of Mr. Binney. 28 CONG. GLOBE 169 (Jan. 13, 1854).

[12] 2 KENT'S COMMENTARIES, 14th ed., 50 (1896). See also 66 ALBANY L.J. 99 (1904), where it is concluded that these children are natural born citizens of the United States within the meaning of the Constitution. It is also significant that in the excellent treatise VAN DYNE, NATURALIZATION IN THE UNITED STATES (1907), the author does not treat or mention the situation of citizenship by birth to American parents abroad, even in the section entitled "Naturalization by Special Act of Congress."

[13] 1 Stat. L. 103, ch. 3 (1790). The phrase concerning natural born citizens was omitted from subsequent acts. It has been suggested that perhaps the omission was due to a belief that the term was applicable only to persons born in this country. Flournoy, "Fundamental Principles Relating to Ascertainment of Nationality," 10 FED. B.A.J. 275, 280 (1949). However, there appears to be no official authority leading to this conclusion.

[14] 2 Stat. L. 155, §4 (1802).

[15] Ludlam v. Ludlam, 26 N.Y. 356 (1863).

[16] 54 Stat. L. 1137, §101(c) (1940), 8 U.S.C. (1946) §501. See also 3 BOUVIER, LAW DICTIONARY, Rawle's 3d rev. ed., 2300 (1914), defining naturalized citizen as "One who, being born an alien, has lawfully become a citizen of the United States"; BLACK, LAW DICTIONARY, 3d ed., 1223 (1933): "One who, being an alien by birth. . . ."

[17] 54 Stat. L. 1170, §404 (1940), 8 U.S.C. (1946) §804.

in the United States and nationals born outside the United States of an American parent.[18] In deciding that plaintiff is a naturalized citizen, the court in the principal case relied on *United States v. Wong Kim Ark*,[19] in which the Supreme Court concluded from an examination of the Fourteenth Amendment that there are only two classes of citizenship, native born and naturalized.[20] The result of such a restrictive interpretation of the Fourteenth Amendment would be to void a statute providing for the citizenship of children born to our citizens abroad, for they could not be citizens unless naturalized *in* the United States at majority.[21] This result is highly improbable. Although since 1907 these children must take certain steps at the age of eighteen and at majority if they remain abroad,[22] these acts are merely to retain the rights of citizenship which they had at birth, and are not requirements for the acquisition of citizenship.[23] Certainly the Fourteenth Amendment was not intended to take citizenship away from anyone, but rather was passed to assure citizenship to those born in this country but not considered to be citizens. In view of this purpose and of the reference in the Constitution to natural born citizens, it is probable that the declaration of citizenship in the Fourteenth Amendment was not intended to be exhaustive. Nor does its language compel such an interpretation. It is submitted, therefore, that "natural born" is not merely co-extensive with "native born," but rather that it is broader and encompasses "native born." The classes of citizenship are, then, (1) natural born, including native born citizens and those born outside the United States but who are citizens from birth, and (2) naturalized citizens, being those who became citizens by naturalization after birth.

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[18] 54 Stat. L. 1169, §402 (1940), 8 U.S.C. (1946) §802.

[19] 169 U.S. 649, 18 S.Ct. 456 (1897).

[20] Id. at 702. At 703 the majority decision, in its dicta, states that foreign born children are naturalized by congressional enactment.

[21] See dissent, supra note 19, at 705. At 714, Chief Justice Fuller states, "the children of our citizens born abroad were always natural born citizens from the standpoint of this Government."

[22] 34 Stat. L. 1229, §6 (1907); 54 Stat. L. 1138, §201 (1940), 8 U.S.C. (1946) §601.

[23] 38 Op. Atty. Gen. 10, 14-18 (1934-37). See also Weedin v. Chin Bow, 274 U.S. 657 at 667, 47 S.Ct. 772 (1927), holding that whether or not a person shall be deemed to have a right to claim United States citizenship is to be determined at time of birth.