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NATURALIZATION AND EXPATRIATION*

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As we have seen, the executive branch of our Government took the lead in establishing the principle of the right of expatriation and its corollary, the principle that naturalized citizens in general are entitled to the same protection abroad that native citizens are entitled to. But there was another side to the question, which was brought home to the Department of State in case after case, and which could not be ignored. The principles to which we have referred assumed that naturalization was not only obtained, but maintained, in entire good faith. However, many cases were brought to the Department's attention in which persons calling upon this Government for protection were found to have procured naturalization fraudulently, without having resided in the United States for the required period of five years, or to have abandoned the United States immediately or very shortly after naturalization and resumed residence of a permanent nature in their native lands. In the majority of these cases the facts and circumstances clearly showed that the persons concerned had procured American naturalization certificates merely to enable them to escape the performance of military services in their native lands. In effect they had perpetrated frauds upon the countries of origin as well as upon this country. While in most cases these persons had established themselves in their native lands, in some instances they had taken up their abode in other foreign countries. As we have observed, the possibility of such cases had been foreseen by Madison and others when the first naturalization bill was under discussion in Congress. Gradually more or less definite rules for disposing of these cases were worked out by the Department of State. As early as January 13, 1818, John Quincy Adams, Secretary of State, in an instruction to Mr. Shaler, American Consul General at Algiers, in declining to extend the protection of this Government to one Filippi, a native of Italy, who had established himself in Tunis immediately or shortly after procuring naturalization in this country, said:

"Without recurring to the litigious question, how far his rights as a citizen might be affected in the judicial tribunals of this country, by such a long and continued absence following almost immediately after his naturalization, it must be obvious that the obligations of the United States to protect and defend the interests of such a person, in controversies originating in foreign countries, and against the rights of their jurisdiction, can not be supposed to bind them to the same extent at

* Continued from the May number, 31 Yale Law Journal, 702-719.
* 3 Moore, International Law Digest (1906) 733-735.
which it might be proper to interpose in behalf of our resident or native citizens."

In several later instances the Department of State observed, with reference to the effect of protracted foreign residence, that it raised a "presumption of expatriation" or furnished "prima facie" proof of abandonment of nationality, or used language of a similar purport. It is impossible within the limits of this article to discuss these cases individually, but, as showing the attitude of the Department of State, I quote the following passage from a letter written by Secretary Seward on August 25, 1868, to a Doctor Chernbuck, a native of Roumania:

"You complain of the action of Mr. Czopkay, U. S. Consul at Bucharest, in taking away the passport of yourself and son. The true intent of our naturalization laws is that the rights and duties of naturalized citizens should be reciprocal. This Government can not continue its protection to those who have sought naturalization in the United States for the purpose, by an immediate return after naturalization to their native country, of evading their obligations both to this Government and that of their former allegiance. While conferring its protection, the Government should not be deprived of the services and industry of its citizens, and it would be unjust to the Government under which such citizens have taken up a permanent residence to deprive it of the same. A long continued and permanent residence abroad, especially of naturalized citizens in the land of their nativity, is prima facie evidence of an intention on their part to relinquish the rights as well as the obligations of American citizens."

As the system of enforced military service became more and more extensive in Europe cases of the kind under discussion increased, until they constituted a problem of serious proportions. On the one hand it was the desire of this Government to extend all possible protection to its naturalized citizens sojourning abroad; on the other hand it desired to avoid pushing the matter to unreasonable lengths by demanding recognition as American citizens of persons who were not justly entitled thereto. In particular it desired to avoid constantly making demands which it would be not only unable to press but unjustified in pressing, when all of the facts and circumstances should be taken into account. So serious had the matter become in the administration of President Grant that on August 6, 1873, he addressed a circular letter to all of the members of his Cabinet, in which he requested their advice upon eight distinct questions relating to citizenship, protection, and expatriation.

* Numerous excerpts from instructions issued by the Department of State to diplomatic and consular officers concerning cases of the kind mentioned may be found in 3 Moore, op. cit. chs. 10 and 12 (see especially secs. 470, 471, 473, 517, and 518).

** Moore, op. cit. 947.

* This letter and the several replies may be found in a Foreign Relations of the United States for 1873, 1185-1223. The replies of the Secretary of State, Mr. Fish, the Secretary of the Treasury, Mr. Richardson, and the Attorney-General, Mr. Williams, were prepared with especial care.
The third question read as follows:

"Can an election of expatriation be shown or presumed by an acquisition of domicile in another country with an avowed purpose not to return?"

Secretary Fish, in the course of his reply, said:52

"If government assume the duty of protection, the citizen must be ready to support the government with his services, his fortune, and his life even, should the public exigencies be such as to require them.

"He may reside abroad for purposes of health, of education, of amusement, of business, for an indefinite period; he may acquire a commercial or a civil domicile there; but if he do so sincerely and bona fide animo revertendi, and do nothing inconsistent with his pre-existing allegiance, he will not thereby have taken any step towards self-expatriation.

"But if, instead of this, he permanently withdraws himself and his property, and places both where neither can be made to contribute to the national necessities, acquires a political domicile in a foreign country, and avows his purpose not to return, he has placed himself in the position where his country has the right to presume that he has made his election of expatriation."

President Grant's sixth question read as follows:

"When a naturalized citizen of the United States returns to his native country and resides there for a series of years, with no apparent purpose of returning, shall he be deemed to have expatriated himself, where the case is not regulated by treaty?"

In his reply Secretary Fish said:53

"The adoption in numerous treaties of this period of two years as that when the intent not to return to the United States may be held to exist on the part of the naturalized citizen who has returned to his native country, indicates that while the principle on which rests the right of protection while in foreign countries of the naturalized is the same with that of the native-born citizen, there is an appreciation of the strong proclivity to resume his original citizenship on the part of him who, having wandered from home, returns to find the attractions of early associations and of family ties enticing him at a period, perhaps, when the restlessness and spirit of adventure of the fresher years of life have passed, to rest and to end his days amid the scenes of his childhood or youth and among those who claim the strong ties of common blood.

"Hence, probably, even when not regulated by treaty, the evidence would be more readily obtained to determine that a naturalized citizen who had returned to the country of his nativity should be deemed to have expatriated himself—or, perhaps it would be more proper to say, to have rehabilitated himself with his original citizenship—than to show that a native-born citizen had expatriated himself by the same period of foreign residence."

Attorney-General Williams, in replying to the President's sixth question, said:54

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52 Ibid. 1188, 1189.
53 Ibid. 1190-1191.
54 Ibid. 1218.
“Naturalization effected in the United States without an intent to reside permanently therein, but with a view of residing in another country, and using such naturalization to evade duties and responsibilities that would otherwise attach to the naturalized person, ought to be treated by the Government of the United States as fraudulent, and as imposing upon it no obligation to protect such person; and as to this the Executive must judge from all the circumstances of the case. Section 2 of the act of July 27, 1867, (supra), as to protection in foreign countries, puts naturalized and native-born citizens upon the same ground.”

In his annual message to Congress of December 1, 1873, President Grant urged the passage of a statute prescribing definitely “what acts are deemed to work expatriation,” and with his message he enclosed copies of the replies of the members of his Cabinet to the inquiries just mentioned. He repeated this recommendation in his annual message of December 7, 1874. However, Congress, which is usually more interested in domestic than it is in foreign affairs, took no action, and for many years the Department of State was obliged to wrestle with these exceedingly difficult and vexatious questions to the best of its ability, without legislative assistance.

The Department of State has frequently declined to grant passports to persons claiming citizenship through naturalization, where it appeared that their naturalization certificates had been fraudulently procured, the holders not having resided in the United States during the period required by law. In the exercise of his lawful discretion in the issuance of passports the Secretary of State clearly has authority to refuse in these cases to issue them. In numbers of cases the naturalization certificates have been referred to the Department of Justice and cancelled through the proper proceedings.

While a foreign government has no jurisdiction to decide that an American naturalization certificate is invalid, it has a right to call the attention of this government to facts which make it appear to be invalid and to ask for an investigation.

The question whether naturalization certificates may properly be impeached in proceedings before international arbitral commissions has been considered in a number of cases, and it has been held that, before these tribunals, such certificates are merely prima facie evidence of citizenship and may be impeached upon the production of positive evidence that they were procured fraudulently and contrary to the requirements of law. In the case of Medina, before the United States—

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53 Moore, op. cit. 712-713. President Cleveland also recommended to Congress a revision of the citizenship laws. See also Annual Messages, Foreign Relations of the United States for 1885 and 1886.

56 Several cases involving this question are mentioned in 3 Moore, International Arbitrations (1898) 2583-2655. See in particular the following cases: Medina, p. 2583; Lizardi, p. 2589; Ortega, p. 2592; Buzzi, p. 2613; Angarica, p. 2613; Criado, p. 2621; and Govin, p. 2629. See also Borchard, Diplomatic Protection of Citizens Abroad (1915) sec. 226; Hyde, International Law (1922) sec. 371.
Costa Rica Commission of 1860—Commander Bertinatti, the umpire, in rendering his opinion, said:57

"The certificates exhibited by them being made in due form, have for themselves the presumption of truth; but when it becomes evident that the statements therein contained are incorrect, the presumption of truth must yield to truth itself."

In the case of Leopold A. Price, before the Spanish Commission of 1871, Bartholdi, the umpire, ruled that a native of Cuba, who had left the United States immediately after obtaining naturalization and established a residence of a permanent nature in Cuba, had "no right to appear before the commission" as an American citizen.58

In section 15 of the Naturalization Act of June 29, 1906,59 Congress prescribed a method of disposing of the most flagrant cases of abuse of naturalization. The second and fourth paragraphs of section 15 read as follows:

"If any alien who shall have secured a certificate under the provisions of this act shall, within five years after the issuance of such certificate, return to the country of his nativity, or go to any foreign country, and take permanent residence therein, it shall be considered prima facie evidence of a lack of intention on the part of such alien to become a permanent citizen of the United States at the time of filing his application for citizenship, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the cancellation of his certificate of citizenship as fraudulent, and the diplomatic and consular officers of the United States in foreign countries shall from time to time, through the Department of State, furnish the Department of Justice with the names of those within their respective jurisdictions who have such certificates of citizenship and who have taken permanent residence in the country of their nativity, or in any other foreign country, and such statements, duly certified, shall be admissible in evidence in all courts in proceedings to cancel certificates of citizenship."

* * * * *

"The provisions of this section shall apply not only to certificates of citizenship issued under the provisions of this act, but to all certificates of citizenship which may have been issued heretofore by any court exercising jurisdiction in naturalization proceedings under prior laws."

Under this excellent provision of law many naturalizations fraudulently procured have been canceled, and, as a result, not only have the Department of State and our diplomatic and consular officers been relieved of many troublesome and embarrassing cases, but vexatious controversies with foreign governments have been avoided and the reputation abroad of American naturalization has been greatly enhanced.

This statutory provision was construed by the Supreme Court of the United States in the case of Luria v. United States60 in which a decree

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57 Ibid. 2587.
58 Ibid. 2565.
59 34 Stat. at L. 596, 601.
60 (1913) 231 U. S. 9, 34 Sup. Ct. 10.
of the District Court of the United States for the Southern District of New York canceling the naturalization of one George A. Luria by the Court of Common Pleas of the City and County of New York was affirmed. It appears that Luria, a native of Russia, came to the United States in 1888 and entered a medical school, graduated in 1893, obtained naturalization in July, 1894, and in the following month went to the Transvaal, where he settled down in the practice of his profession. In the trial of the case before the Supreme Court Luria's attorneys argued (1) that the Constitution allowed of no discrimination between native and naturalized citizens, except with regard to eligibility to the office of President, so that any statute making a discrimination was unconstitutional; (2) that the naturalization law in effect when the appellant obtained naturalization did not require that the applicant should intend to reside in the United States; (3) that the application of the second paragraph of section 15 of the Act of June 29, 1906, to the case of a person naturalized prior to its passage made the statute in effect an *ex post facto* law; and (4) that the appellant had been improperly denied trial by jury.

As to the first point, Judge Van Devanter, who delivered the opinion of the court, said:61

"The section makes no discrimination between the rights of naturalized and native citizens, and does not in anywise affect or disturb rights acquired through lawful naturalization, but only provides for the orderly cancellation, after full notice and hearing, of certificates of naturalization which have been procured fraudulently or illegally. It does not make any act fraudulent or illegal that was honest and legal when done, imposes no penalties, and at most provides for the annulment, by appropriate judicial proceedings, of merely colorable letters of citizenship, to which their possessors never were lawfully entitled. *Johannesen v. United States*, 225 U. S. 227. See also *Wallace v. Adams*, 204 U. S. 415."

Judge Van Devanter's observations concerning the second point are well worth quoting at some length. After reciting the requirements of the Naturalization Law, he said:62

"These requirements plainly contemplated that the applicant, if admitted, should be a citizen in fact as well as in name—that he should assume and bear the obligations and duties of that status as well as enjoy its right and privileges. In other words, it was contemplated that his admission should be mutually beneficial to the Government and himself, the proof in respect of his established residence, moral character, and attachment to the principles of the Constitution being exacted because of what they promised for the future, rather than for what they told of the past.

"By the clearest implication those laws show that it was not intended that naturalization could be secured thereunder by an alien whose purpose was to escape the duties of his native allegiance without taking"

upon himself those of citizenship here, or by one whose purpose was to reside permanently in a foreign country and to use his naturalization as a shield against the imposition of duties there, while by his absence he was avoiding his duties here. Naturalization secured with such a purpose was wanting in one of its most essential elements—good faith on the part of the applicant. It involved a wrongful use of a beneficent law. True, it was not expressly forbidden; neither was it authorized. But, being contrary to the plain implication of the statute, it was unlawful, for what is clearly implied is as much a part of a law as what is expressed. United States v. Babbit, 1 Black, 55, 61; McHenry v. Alford, 168 U. S. 651, 672; South Carolina v. United States, 199 U. S. 437, 451."

With regard to the third point Judge Van Devanter said:

"It will be observed that this provision prescribes a rule of evidence, not of substantive right. It goes further than to establish a rebuttable presumption which the possessor of the certificate is free to overcome. If, in truth, it was his intention at the time of his application to reside permanently in the United States, and his subsequent residence in a foreign country was prompted by considerations which were consistent with that intention, he is at liberty to show it. Not only so, but these are matters of which he possesses full, if not special, knowledge. The controlling rule respecting the power of the legislature in establishing such presumptions is comprehensively stated in Mobile &c. Railroad Co. v. Turnipseed, 219 U. S. 35, 42, 43, as follows:

"'Legislation providing that proof of one fact shall constitute prima facie evidence of the main fact in issue, is but to enact a rule of evidence, and quite within the general power of government. Statutes, national and state, dealing with such methods of proof in both civil and criminal cases abound, and the decisions upholding them are numerous...  

"That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed.

"If a legislative provision not unreasonable in itself prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him.  


Judge Van Devanter disposed of the last point made by Luria's attorneys by declaring that the suit in the lower court was a suit in equity.

similar to a suit to cancel a patent for public land or letters patent for an
invention, and was not a "suit at common law," within the meaning
of the Seventh Amendment to the Constitution.

The provision of the fifteenth section of the Naturalization Act of
June 29, 1906, useful as it was, did not meet fully the need of new
legislation concerning citizenship and expatriation. In particular it
did not cover the numerous cases of naturalized citizens who, after
obtaining naturalization lawfully and continuing their residence in the
United States for more than five years thereafter, abandoned the United
States and established a residence in their native lands or in other
foreign countries. On July 3, 1906, Acting Secretary of State Bacon,
upon the recommendation of the Committee on Foreign Affairs of the
House of Representatives, appointed a board of three members to
"inquire into the laws and practice regarding citizenship of the United
States, expatriation and protection abroad, and to report recommendations
for legislation to be laid before the Congress at the next session."
The board, which was composed of Mr. James Brown Scott, Solicitor
for the Department of State, Mr. David Jayne Hill, Minister to the
Netherlands, and Mr. Gaillard Hunt, Chief of the Passport Bureau, set
to work assiduously, and on December 15 of the same year submitted a
very carefully prepared and comprehensive report, in which the citizen-
ship laws of foreign countries as well as those of the United States were
reviewed and definite recommendations for new legislation were made.
This report, which fills a printed volume of 538 pages, was a very
valuable contribution to the literature on the subject to which it relates,
and has been exceedingly useful as a book of reference in the Depart-
ment. The report was transmitted to the Speaker of the House of
Representatives by Secretary Root, with a letter of December 18, 1906.
Using the recommendations in the report as a basis, although not
following them in all respects, Congress passed the Act of March 2,
1907, entitled: "An Act in Reference to the Expatriation of Citizens
and their Protection Abroad." I call special attention to section 2 of
the Act, which reads as follows:

"That any American citizen shall be deemed to have expatriated him-
self when he has been naturalized in any foreign state in conformity
with its laws, or when he has taken an oath of allegiance to any foreign
state.

When any naturalized citizen shall have resided for two years in
the foreign state from which he came, or for five years in any other
foreign state, it shall be presumed that he has ceased to be an American
citizen, and the place of his general abode shall be deemed his place of
residence during said years: Provided, however, That such presumption
may be overcome on the presentation of satisfactory evidence to a
diplomatic or consular officer of the United States, under such rules
and regulations as the Department of State may prescribe: And pro-

"House Doc. 326, 59th Cong., 2d Sess.
"34 Stat. at L. 1228.
vided also, That no American citizen shall be allowed to expatriate himself when this country is at war."

Rules under which the presumption arising under the Act might be overcome were prescribed by Secretary Root in a circular instruction to diplomatic and consular officers of the United States, dated April 19, 1907. They provided that a naturalized citizen could overcome the presumption by showing (a) that he was residing abroad "solely as a representative of American trade and commerce"; or (b) that he was residing abroad "for health or education"; or (c) that "some unforeseen and controlling exigency, beyond his power to foresee" had prevented his return to the United States. In each case the applicant was also required to show that he intended to return to the United States to reside. In a circular instruction of May 14, 1908, rule (a) was amended by the insertion of the words "or principally" after the word, "solely." In a circular instruction of April 19, 1922, an additional rule was prescribed, under which the statutory presumption may be overcome by the naturalized citizen's showing that he is residing abroad as a missionary of a recognized American church organization.

The second paragraph of section 2 of the Act of March 2, 1907, represented no new principle, but merely crystallized into definite statutory form principles which, as we have seen, had for many years been recognized and applied by the Department of State. The board appointed by the Acting Secretary of State had, in its report, recommended that the presumption of expatriation should be held to exist in

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66. It has been contended that the last proviso involved a retrogression on the part of the United States and an abandonment of the doctrine of the right of expatriation declared in the Joint Resolution of Congress of July 27, 1868 (15 Stat. at L. 223). This is not believed to be the case. The situation of a country in time of war and the obligations of its citizens are quite different from what they are in time of peace. The fact that a man may freely leave his country and join himself to another country in time of peace does not mean that he can do the same thing when his country is in the peril of war. This distinction has always been recognized, even by the strongest advocates of the right of expatriation. See opinion of Attorney-General Black in the case of Julius Amther (1857) 9 Op. Att'y. Gen. 62; opinion of Justice Clifford in The William Bagaley (1886, U. S.) 5 Wall. 377, 408; Halleck, International Law, 133; Report of Citizenship Board of 1906, p. 28. As to the constitutional power of Congress to prescribe a rule of expatriation, as related to naturalization power, see Ludlam v. Ludlam (1866, N. Y.) 31 Barb. 486; Murray v. McCarty (1811, Va.) 2 Munf. 393.

67. It is an interesting fact that in the original bill, upon which the Joint Resolution of Congress of July 27, 1868, was based, there was included a provision concerning the expatriation of naturalized Americans residing abroad very similar to this statute. See Report of Citizenship Board of 1906, p. 24.

68. The statute was spoken of in the decision of the court in the case of In re Wildberger (1914, E. D. Pa.) 214 Fed. 508, as "highly penal." This is not believed to be correct. The statute does not assume that protracted foreign residence is an offence. It merely prescribes a rule for determining when such foreign residence shall result in expatriation.
all cases after a naturalized citizen had resided in a foreign country for five years, but in the statute the period was reduced to two years in case of residence in the native land, and in this respect the statute was made to coincide with the provisions in the Bancroft Treaties and other treaties of naturalization concerning the effect of resumption of residence in the country of origin.

It is also true that the rules under which the statutory presumption may be overcome were not new. They too were based upon numerous precedents. While these rules seem simple enough, their application is not always easy. It is often a difficult matter to determine whether a naturalized citizen engaged in business in a foreign country is residing abroad "principally as a representative of American trade and commerce." It is, perhaps, even more difficult to determine whether a person who gives ill health as the cause of his protracted foreign residence is really residing abroad to benefit his health. Unfortunately most human beings are afflicted with physical ailments more or less serious, and doctors' certificates are notoriously easy to procure. The rule concerning education also is sometimes difficult to apply properly. Many naturalized citizens have endeavored to overcome the statutory presumption by showing that they were residing abroad in order to educate their children in the schools of their own native countries. It is obvious that this strengthens, rather than overcomes, the presumption of expatriation, and in a circular instruction of February 28, 1917, the Department informed diplomatic and consular officers that this rule applied only to special branches of education which could not be pursued as well in the United States as abroad. The rule concerning an "unforeseen and controlling exigency" may, if loosely applied, be made to cover a multitude of sins and it is, perhaps, the most difficult of all of the rules to apply properly. With reference to this rule may be mentioned cases of persons who allege that it has become necessary for them to take care of aged and infirm parents in their native lands. Some of these cases are not only appealing but undoubtedly worthy of special consideration, while, perhaps, in others the real object of the return is to obtain the inheritance and continue the foreign residence indefinitely. Whatever difficulties may arise in the application of these rules, however, it is certainly a great advantage to have definite rules, rather than to be obliged to resort to general principles in each case which arises.

Perfection can hardly be claimed for the statute in question, and it has not cleared away all difficulties concerning the status of naturalized citizens residing abroad. No statute, however wisely conceived and carefully formulated, will ever clear away these difficulties altogether. They will continue to arise as long as the world continues to be divided up between independent, sovereign states, and as long as the spirit of adventure or the desire of gain leads men to leave their native lands and

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*See supra 31 Yale Law Journal, 714-716.*
settle in foreign countries. When men have once become wanderers they are apt to continue to be wanderers, or else to be drawn back by ties of blood or early associations to their native lands. Decisions concerning status and the right to protection in these cases will always be difficult. Notwithstanding imperfections the statute has been exceedingly useful, especially during the period of the World War, when it was of such great importance to decide fairly the status of the thousands of naturalized Americans residing or traveling abroad. These cases were difficult enough with the statute, but without it they would have been vastly more difficult.

I cannot undertake in this article to discuss fully the provisions of the first paragraph of section 2 of the Expatriation Act. It may be observed, however, that, under it, many Americans lost their citizenship by taking foreign oaths of allegiance upon entering the armies of the belligerent countries before the entry of the United States into the war. As the mere taking of the oath of allegiance in these cases was not equivalent to naturalization, these persons became men without a country, or "stateless" persons. Persons in this situation were likened by a judge, in a case which arose many years ago, to balloons floating in the air. Oppenheim has compared them to "vessels in the Open Sea not sailing under the flag of a State." However we may regard them, their position is certainly unfortunate. Congress, however, came to the rescue of these expatriates, and by an Act of May 9, 1918, provided an easy method by which they could recover American nationality, that is, by taking the oath of allegiance to the United States before a naturalization court in this country or before an American consul abroad.

To revert to the second paragraph of section 2 of the Act, there is one very important question which is still unsettled, that is, the question whether the presumption raised by protracted foreign residence ever becomes final and results in an actual loss of citizenship, or whether this statutory provision is in effect merely a rule to enable the Secretary of State to determine when protection should be withdrawn from naturalized citizens residing abroad. If the latter construction is correct it would seem that the statutory presumption is canceled when the person concerned resumes his residence in this country, even though he may have failed to overcome the presumption while residing abroad. This construction was given to the statute by Attorney-General Wickesham in an opinion of December 1, 1910, concerning the case of Nazara Gossin. It appears that Nazara Gossin was a native of Syria and was the wife of one Jehran Gossin, also a native of

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9 For a discussion of this paragraph see the opinion of the court in Ex parte Griffin (1916, N. D. N. Y.) 237 Fed. 445.
10 *International Law* (3d ed. 1920) sec. 312.
11 40 Stat. at L. 542, 546.
Syria, who had obtained naturalization as a citizen of the United States in 1905 and had returned in 1907 to Syria, where he had married the woman in question and had remained until his return to this country with her in November, 1910. The man was admitted, but his wife was detained, because of trachoma, pending a determination of the question whether she was entitled to enter as a citizen of the United States. The Attorney-General held that Jebran Gossin, in view of his return to this country to reside, should be considered a citizen of the United States, and that his wife, upon the assumption that she was naturalized through her marriage, under section 1994 of the Revised Statutes, was also entitled to recognition as a citizen of this country. The point involved was of such great importance and the opinion so well considered that it is worth while to quote from it. Mr. Wickersham said:73

"The purpose of the act is, I think, simply to relieve the Government of the obligation to protect such citizens residing abroad after the limit of two or five years, as the case may be, when their residence there is not shown to be of such a character as to warrant the presumption that they intend to return and reside in the United States and thus bear the burdens as well as enjoy the rights and privileges incident to citizenship. Until the time limit has expired the presumption is that they intend to return; after that time it is presumed that they do not intend to return, and it becomes necessary, in order that they may continue to have this Government's protection, to show affirmatively, in accordance with the regulations of the State Department made in pursuance of the act, that it is their bona fide intention to return to the United States to live. Obviously, therefore, the essential thing under the act is the intention to return and reside in the United States. The highest proof of such an intention is the actual return and residence of such a person, amounting as it does to a demonstration."

For the purpose of showing the object of the statute the Attorney-General quoted the statement made by the Committee of Foreign Affairs in reporting the bill to the House, in which appeared the following passage:74

"The citizenship of the United States should not be sought or possessed for commercial or dishonest ends. To guard against this evil, this bill provides that a naturalized citizen who leaves this country and dwells elsewhere continuously for five years shall be presumed to have abandoned his citizenship. This presumption can be overcome, but such a provision as this would be a great assistance to the Department of State, would avoid possibilities of international complications, and will prevent those who are not entitled to its protection from dishonestly hiding under the American flag."

The Attorney-General also quoted the following very pertinent statement of Representative Perkins, who reported the bill from the committee and had charge of it in the House:75

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73 Ibid. 507-508. (Italics ours.)
74 Ibid. 509.
75 Ibid. 509-510. (Italics ours.)
"The statute provides that, having remained there five years continuously, there shall be a presumption which, unless he satisfies the officers of the State Department, their consuls, or ministers to the contrary, would authorize the State Department to refuse to extend him protection. It can not affect any other rights, which, of course, he can present in court. No presumption is conclusive on a court. It is a mere presumption, but the presumption would protect the State Department. That is the object of the bill and the result of the bill and the only result of it."

The Attorney-General went on to say:

"The fact that the act only authorizes the submission of proof for the purpose of overcoming the presumption as to noncitizenship raised thereby to diplomatic and consular officers of the United States, who necessarily reside abroad, and makes no provision in respect to naturalized citizens coming within the purview of the act who return to the United States, is a further evidence that Congress did not intend the act to apply to a case of this kind. To hold that it did, would produce the absurdity of a naturalized citizen seeking to reenter the United States being held to have ceased to be such, and possibly denied admission, because he had failed to make proof before the proper diplomatic or consular officer abroad of his intention to return to the United States.

"As above shown, the presumption as to noncitizenship raised by the act is created for the purpose of relieving the State Department of protecting naturalized citizens abroad when the conditions are apparently such as to indicate that they have no bona fide intention to return to and reside in the United States. When a citizen returns to the United States, the necessity for such protection no longer exists, and it is fair to assume that with the cessation of the necessity the presumption created by the act also ceases."

The opinion of Attorney-General Wickersham seemed so convincing that the question appeared to be settled, when, on March 31, 1916, Judge Hough of the District Court of the United States for the Southern District of New York, in the case of United States, ex rel. Anderson, v. Howe, rendered a decision in which he took a view of the statute precisely contrary to that taken by the Attorney-General.

Anderson, a native of Sweden, came to the United States in 1891, obtained naturalization as a citizen of this country in 1905, returned to Sweden in 1906 and settled down with his family on a farm, which he held under a 20-year lease and on which he owned a dwelling house. He failed to apply to a consular officer of the United States for registration or to present evidence of any kind to overcome the presumption of expatriation which arose against him in 1908, two years after his return to Sweden. In 1915 he returned to this country, but was denied admission by the immigration authorities, as an insane alien. He said that he was "scared by the war," and it appeared that he had left his family in charge of his farm in Sweden. The case was brought before the court in habeas corpus proceedings, but Judge Hough discharged the writ upon the ground that Anderson had failed to rebut the statutory

\[\text{Ibid. 510.}\]
\[\text{231 Fed. 546.}\]
presumption that he had ceased to be an American citizen. Judge Hough undertook to buttress his decision by the following statement:

"While the statute is sufficient to dispose of this case, the treaty obligations between Sweden and the United States are likewise worthy of consideration. By the Naturalization Convention of 1869, supra, it was agreed that:

"If a Swede or Norwegian who has become a naturalized citizen of the United States renews his residence in Sweden or Norway without the intent to return to America, he shall be held by the government of the United States to have renounced his American citizenship. The intent not to return to America may be held to exist when a person so naturalized resides more than two years in Sweden or Norway."

Thus the treaty raises the same kind of presumption as does the statute. It is, however, further urged that, upon the construction of the statute contended for by the relator and justified by the opinion of the Attorney General, the act of Congress overrides the treaty. As above set forth, I cannot agree with this interpretation of the act; but, even if it were otherwise, the admission of aliens and the regulation of citizenship as distinct from alienage is peculiarly a matter of national concern. As to such matters there can be no doubt that treaties are the supreme law of the land, a subject treated of with great force in the address of Hon. F. B. Kellogg before the American Bar Association in 1913 (A. B. A. Reports, vol. 38).

Judge Hough's decision concerning the statute was based largely upon the decision of the Supreme Court of the United States in the case of Mackenzie v. Hare in which it was held that a native American woman lost her American citizenship, under the provision of section 3 of the Act of March 2, 1907, by marriage to a British subject, although she had not left her residence in California. Considering the language of section 3, there seems to be no room to doubt that it relates, not merely, to protection abroad, but to citizenship itself. It does not seem to follow that the very dissimilar provision of section 2 should receive a similar construction merely because it happens to be found in the same statute. The decision in this case is also unsatisfactory because of its facts and circumstances. An unrebutted presumption of expatriation rested upon Anderson when he left Sweden, and the fact that he had left his family on his farm in Sweden was prima facie evidence that he had not come to this country to reside. Moreover, when he arrived at the port of New York he was insane and hardly capable of performing an act which would change his legal status.

The meaning of the second paragraph of section 2 of the Act of March 2, 1907, and the Naturalization Treaty of 1871 with Austria-Hungary were discussed by Judge Learned Hand in rendering the decision of the United States District Court for the Southern District of New York in the case of Stein v. Fleischmann Co. This case is

\[\text{At p. 549.}\]

\[\text{(1915) 239 U. S. 299, 36 Sup. Ct. 106.}\]

\[\text{(1916) 237 Fed. 679.}\]
peculiar and it is difficult to understand what point was established by the decision. Stein, a native of Austria, who, after obtaining naturalization in this country, had resided for five years in Germany, attempted to show that he was entitled to bring suit in the District Court as an alien, as being "no longer a citizen of the United States, because he has resided more than five years abroad." The judge seems to have assumed that, in order to bring suit in the District Court as an alien Stein was obliged to show that he had reverted to his original status of an Austrian subject. After dismissing the second paragraph of section 2 of the Expatriation Act by observing that it merely raised a presumption of loss of citizenship, which could be "met by satisfactory evidence given to a diplomatic or consular officer of the United States," he said in effect that the decision in Anderson v. Howe\(^8\) was really based, not upon the ground that Anderson had lost his American citizenship under the statute, but upon the ground that he had been repatriated as a Swede under the provision of the Naturalization Treaty between the United States and Sweden concerning naturalized citizens who return to their native land to reside. After quoting the provision of Article 4 of the Naturalization Treaty with Austria-Hungary, that a naturalized citizen of either country "shall not, on his return to his original country, be constrained to resume his former citizenship," Judge Hand proceeds as follows:\(^82\)

"This treaty secures to a naturalized American of Austrian birth the right to return to Austria without resuming his Austrian citizenship, which he can resume only by 'reacquiring' it under the laws of Austria. It is true that, if he wishes the protection of the United States after two years in Austria or five years elsewhere, he must satisfy the diplomatic or consular officer of the United States before whom he goes that he has not reacquired his citizenship; but the provision of 1907, so construed, would not affect his status itself. The plaintiff goes further, and insists that for all purposes he must be taken to have renounced his American citizenship unless he satisfies a diplomatic or consular officer that he has not. Since the proviso only refers to such officers, it is quite clear that no court could under that construction examine the facts, and the necessary result would be to repatriate all such citizens unless they obtain a decision from such an officer. Of course, that may have been the intention of the statute; but it seems to me that one should not assume so when the result is to modify existing treaties."

While the meaning of the statement is not entirely clear, the learned judge seems to assume that American citizenship cannot be lost without acquisition of some other citizenship, and that the provision of the Act of 1907 in question is in effect merely a rule for determining when protection should be withdrawn. The rest of the decision, in which he divides naturalization treaties into two classes, one class, including the treaty with Sweden, providing for repatriation in cases of returned natives, and the other class, including the treaty with Austria-Hungary, having a different effect, is based upon a false hypothesis. The fact is

\(^8\) Supra note 77.  
\(^82\) 237 Fed. at p. 681.
that none of the naturalization treaties provides for repatriation through the mere resumption of permanent residence in the native land, although most of them (not including the treaties with Austria-Hungary and Great Britain) provide that resumption of a permanent residence in the native land works a renunciation of naturalization, and that a residence of two years in the native land may be deemed to be permanent. Count Hatzfeldt, the German Foreign Minister, informed Mr. Kasson, American Minister to Germany, in a note of December 31, 1884, that naturalized American citizens of German origin, who returned to their native land to reside permanently, were "reckoned neither as American citizens nor as subjects of the Empire, but as individuals without nationality." 8

I know of no case except Anderson v. Howe in which it has been held that the provision in a naturalization treaty concerning resumption of permanent residence by a naturalized citizen in his native land has caused an actual loss of American citizenship. The question was considered in Ex parte Gilroy. 9 In that case it appears that one Walter Alexander was born in Berlin Oct. 23, 1893, of a father who was also born in Germany, was naturalized in the United States Nov. 17, 1879, and returned to Germany to reside in 1888. The court held that Alexander was born a citizen of the United States, under section 1993 of the Revised Statutes, his father not having lost his American citizenship through his residence of over two years in Germany, his native land. The court said: 85

"Mere residence in the place of birth, therefore, as amply appears from the face of the treaty, as well as from its practical construction, is not enough to cause loss of citizenship by a naturalized American citizen.

"The facts in the case must satisfy the court that the intent not to return exists, and such result, according to Mr. Evarts, must be demonstrated by special circumstances, showing either an intent to remain permanently or the absence of all intent to return to the United States." 86

So far as this statement implied that the acquisition of a permanent residence in the native land would result in an actual loss of citizenship, and not merely a loss of the right to protection, it seems to have been a mere dictum.

The decision of the District Court of the United States in the case of Banning v. Penrose 97 may be mentioned, although it seems to have no direct bearing upon the statute in question. The facts in the case are not very definitely set forth in the opinion. It appears, however, that Banning, a native of Germany, obtained naturalization as a citizen

8 Foreign Relations of the United States for 1885, 417; see 3 Moore International Law Digest, 749.
8 At p. 118.
86 The statement of Secretary of State Evarts, referred to, was contained in a communication of February 5, 1879, to the Committee of Foreign Relations of the House of Representatives.
87 (1919, N. D. Ga.) 255 Fed. 159.
of the United States in 1903 and subsequently returned to Berlin, to be near his aged father. It seems that “he enjoyed the life of Berlin and had rooms, as if expecting to remain there a while.” It further appears that, after residing “some time” (precisely how long is not stated, although presumably several years) he returned to the United States, and that he was arrested and detained at Fort Oglethorpe as an alien enemy.8 He sued out a writ of habeas corpus, upon the ground that he was an American citizen, and the court ordered his discharge as such. Judge Newman based his decision upon the theory that the effect upon citizenship of the protracted residence of a naturalized citizen in his native land depends entirely upon his intention. He considered that the facts of this case indicated that Banning had always intended, during his stay in Germany, to resume his residence in the United States, and therefore had not abandoned his naturalization. As the court made no mention of Article IV of the Naturalization Convention of 1868 with the North German Union or of section 2 of the Act of March 2, 1907, the decision is not of much assistance in solving the problem before us.

The latest decision of a court concerning the second paragraph of section 2 of the Act of March 2, 1907, of which I am informed, was the decision of Judge Hoehling of the Supreme Court of the District of Columbia in the case of Jacob Schmid v. Thomas Miller, as Alien Property Custodian, which was rendered on July 23, 1921. Jacob Schmid brought suit in equity to recover certain property seized by the Alien Property Custodian under the Trading with the Enemy Act upon the ground that he was an enemy within the meaning and purview of the Act. It appears that Schmid, a naturalized American citizen of German origin, returned to Germany in 1911 and was still residing there when his property was seized. The court held that Schmid was entitled to the return of his property as an American citizen. In rendering his decree Judge Hoehling said:

“...That in 1911 when the plaintiff herein went to Germany, it was his intention to return to the United States at such time as the health of his wife would permit and to make the United States his permanent and future home; and that the said intention of the plaintiff continued at all times during his sojourn in Germany and his absence from the United States; that the said intention of the plaintiff to retain his American citizenship, coupled with the other circumstances of this case, which intention existed at all times during his absence from the United States, is sufficient to rebut the presumption of expatriation raised under the Act of Congress approved March 2, 1907, by his continued sojourn in Germany, the country of his nativity, for a period of time in excess of two years.”

This decision is unique, in that the court apparently applied one of the rules prescribed by the Department of State, in pursuance of the statute, whereunder the presumption of loss of citizenship arising under the statute may be overcome. It should be observed that the statute

8 Under the provision of Rev. Sts. 1878, 784, sec. 4067 as amended by the Act of April 16, 1918 (40 Stat. at L. 532).
provides that the presumption may be overcome “by the presentation of evidence to a diplomatic or consular officer of the United States,” and makes no provision under which it may be overcome by the presentation of evidence to a court. It is to be regretted that Judge Hoehling did not discuss the question of the effect upon Schmid’s citizenship status of his resumption of residence in this country.

Although the question cannot be regarded as settled, it is believed that, considering the object as well as the phraseology of the statute, the construction given to it by Attorney-General Wickersham, to the effect that the presumption of non-citizenship arising under it never becomes final and is canceled by the return of the person concerned to this country to reside, is correct. It is true that the Citizenship Board of 1906, in its report to the Secretary of State, made the following recommendation:

“Any person who shall have accomplished expatriation in the manner set forth in the preceding paragraphs shall, in order to reacquire American citizenship, be required to comply with the laws applicable to the naturalization of aliens.”

However, the failure of Congress to insert this provision in the statute might be construed as indicating that Congress did not intend that the presumption of loss of citizenship arising from protracted foreign residence should ever become final.

Considering the great importance to this Government, as well as to naturalized citizens and their children born abroad, of having this question cleared up, it would be well to amend the statute. In such amendment it would probably be desirable to make a definite provision for the termination of citizenship in cases of naturalized citizens residing abroad. It might be advisable to make a provision somewhat similar to that contained in the second paragraph of Section 15 of the Naturalization Act of June 29, 1906, under which the naturalization of a person failing to overcome the statutory presumption of expatriation could be canceled by a court of law, although in this case the naturalization would not be declared void ab initio. In such case it would be necessary, however, to add a provision under which a naturalized citizen failing to submit to a diplomatic or consular officer within a prescribed period evidence of any kind to overcome the statutory presumption would ipso facto lose his citizenship. Otherwise naturalized citizens residing abroad would simply keep out of the way of diplomatic or consular

\[\text{This court seems to have held in effect that the two-years residence abroad raised, under the statute, a presumption of permanency, which was overcome by showing that Schmid always had the intention of returning to the United States. The illness of his wife was mentioned, as explaining rather than as excusing, Schmid’s residence in Germany.}

\[\text{House Doc. 326, 59th Cong., 2d Sess., p. 23.}

\[\text{I. e., by taking a foreign oath of allegiance, obtaining naturalization abroad, entering the service of a foreign government, or residing for five years in a foreign country without intent to return to the United States.}

\[\text{See supra p. 832.}
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The difficulty in the present statute, as construed by Attorney-General Wickersham, is that, under it, a naturalized citizen may live for many years in his native land, to all intents and purposes as a citizen thereof, and then, when he finds it to his advantage, return to the United States as a citizen of this country. Laws under which such international chameleons are tolerated are believed to need amendment. The existence of such cases in large numbers makes naturalization too cheap and uncertain. It is believed, however, that such an important thing as the cancellation of citizenship should not result from a mere administrative decision. In this relation may be recalled the observations of the court in Burkett v. McCarty." In declaring that loss of citizenship could properly be pronounced only by a court of law, in regular judicial proceedings, the court said:

"To decitizenize a free man is a tremendous blow. It deprives him of his chosen country and home, and sunders his most endearing relations, social and civil."

There is no doubt whatsoever that hundreds of our naturalized citizens residing abroad deserve to have their citizenship terminated, but such a serious matter as final loss of citizenship should not be made to depend upon the ex parte decision of a clerk in a Government office. Moreover, while decisions of courts are, generally speaking, permanent and duly respected, decisions of administrative officers are nearly always lacking in finality and subject to endless appeals for reconsideration.

In relation to this matter there is one other consideration to which I wish to call attention, that is, the impolicy of continuing a system under which large numbers of persons may be living in various quarters of the globe who are American citizens, under the law, but not entitled to American protection. Generally speaking it would be desirable as far as possible to have citizenship terminated when the right to protection is terminated. While we can discriminate, according to our own laws and regulations, between citizens who are entitled to protection and citizens who are not, it is perhaps difficult sometimes for foreign officials to see the distinction.29

Since the preparation of this article the writer's attention has been called to a bill introduced into the Senate by Senator Shortridge, on

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28 (1874, Ky.) 10 Bush, 798, 760.
29 The author had intended to discuss the expatriation laws of certain foreign countries, under which citizenship may be lost by protracted residence abroad, but lack of space makes this impossible. Suffice it to say that the laws of the Scandinavian countries and several other countries of Continental Europe contain provisions under which citizenship may be lost by a residence abroad of ten years. A study of these laws is not of much practical assistance, however, since conditions in those countries of emigration differ widely from conditions in our own country, which is one of immigration. References to these laws may be found in the Report of the Citizenship Board of 1906, Appendix III; Lehr, La Nationalité (1909); and Hall, International Law (7th ed. 1917) pt. 2, ch. 5.
April 5 last,44 entitled, "A Bill to provide a uniform rule of naturalization and to amend and codify the laws relating to the acquisition and loss of citizenship; to equalize the citizenship status of men and women; to establish a method for the registration of aliens for their better guidance and protection; and for other purposes."

A similar bill was introduced into the House of Representatives on March 11, 1922, by Representative Johnson, of Washington.55

This bill is long in proportion to its title, covering 92 pages. The author has undertaken practically to rewrite the whole law of citizenship according to his fancy.

An official having very broad powers, to be known as the "Director of Citizenship," assisted by an army of examiners, accountants, educational assistants, aids, interpreters, clerks, and stenographers, is to preside over the destinies of foreign-born persons in the United States and to give them "guidance and information in matters relating to their personal welfare." The success of this extremely paternalistic measure would seem to depend largely upon finding a Government official big enough for the job of "Director of Citizenship" and aids and clerks, etc., wise enough to give proper guidance and information, and upon paying sufficient salaries to retain them.

Some of the provisions of the bill, particularly those relating to the registration of aliens, may be very good, provided Congress is willing to appropriate sufficient funds to carry them out properly; other provisions seem distinctly bad. Still other proposed changes in the statutes seem harmless, except in so far as any unnecessary change in a statute is undesirable.

Under title V of the bill the citizenship of married women is to be made independent of that of their husbands. Section 1994 of the Revised Statutes and sections 3 and 4 of the Citizenship Act of March 2, 1907, are to be repealed. Thus, another blow is struck at the unity of the family. If this proposal is enacted into law, conflicts will arise between the law of the United States and the laws of most foreign countries, under which the citizenship of a married woman follows that of her husband. It seems possible for one to believe in liberal principles without favoring such a provision as this. It is understood that this proposed change in the law was originated by a few native American women who could not hold real property in the states of their residence because they were married to aliens. However, the number of these women is comparatively small, and it should not be a difficult matter to have the state laws amended in such a way as to enable them to hold real property. In the main it is certainly desirable for husband and wife to be of the same nationality.

Under section 504 of the bill a child born abroad is to be considered an American citizen if either of his parents is an American citizen.

44S. 3403.
55H. R. 10860.
This would result in some cases of triple nationality. Thus a child born in England of a French father and an American mother would be French under French law, American under American law, and British under British law.

The bill creates, for its own purposes, several fictions which seem unnecessary and awkward. Thus, under section 402 an alien "not attached to the principles of the Constitution of the United States" etc., is to be deemed not of "good moral character." It is quite proper that such a person should not be granted American citizenship, but there is no apparent necessity in arbitrarily calling him immoral.

Section 704 of the bill reads as follows:

"In the case of a married woman the foreign country of nativity or present or former allegiance of her husband shall, during the continuance of the marital status, be considered, for the purposes of subdivision (a) of this Section, as the country of her nativity and former allegiance."

The most undesirable provisions of the bill are those contained in sections 703 and 704, so far as they relate to the expatriation of, or loss of protection by, naturalized citizens residing for protracted periods abroad. By section 704 (f), section 2 of the Act of March 2, 1907, is to be repealed. In its place we find section 704 (a), which reads as follows:

"Sec. 704. (a) That for the purposes of paragraphs (2) and (3) of subdivision (a) of section 703 and for the purposes of protection by this Government, the fact that any individual described in either of such paragraphs has, at any time after the passage of this Act and while over 18 years of age, resided for two years in the foreign country of his nativity or former allegiance, or for five years in foreign countries, shall be prima facie evidence of his intent to surrender United States citizenship, unless while so residing he registers as a citizen of the United States, in accordance with regulations prescribed under subdivision (d) of this section."

Paragraphs (2) and (3) of subdivision (a) of section 703 relate to proceedings in courts of law to cancel citizenship. The apparent objection to section 704 (a), and it is a serious one, is that the mere act of registering in an American consulate, without regard to the character or object of the foreign residence, is to overcome the presumption of permanency and lack of right to the protection of this Government.

The bill in question contains some good features and merits careful consideration, but it should be amended in many ways before it is enacted into law.