The Elg Case: Election of Citizenship at Majority by Minors

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One of the most significant citizenship decisions ever rendered by the Supreme Court of the United States is that handed down by it recently in the case of *Perkins, Secretary of Labor, et al. v. Elg.*[1] In this case the Court was called upon to decide the very important question of the effect upon the citizenship of minor children of the naturalization of their parents in foreign countries. Mr. Chief Justice Hughes speaking for a unanimous Court overruled the long standing rule applied by both the Department of State and the Department of Labor that a child in such circumstances loses its American Citizenship.[2] It also specifically overruled the conclusion to the same effect reached by the Attorney General in the case of *Ingrid Therese Tobiassen*[3] and of the Circuit Court of Appeals in the Eighth Circuit in the case of *United States v. Reid.*[4] In its place the Chief Justice laid down the rule that a minor child who acquires the citizenship of the parent upon the latter's naturalization in a foreign country has the right on attaining majority to elect to retain his American citizenship.

The decision is not only of great practical importance because of the large number of children who will be enabled to assert a right to American citizenship under it, but it also announces legal principles of vital potential influence in the law of American citizenship. The opinion of the Court merits the close scrutiny of all persons interested in the status of the American citizenship law.

From the opinion of the Court[5] it appears that Marie Elizabeth Elg was born in Brooklyn, New York, on October 2, 1907, of a naturalized American father of Swedish origin. Her mother had taken her to Sweden in 1911 where she continued to reside until September 7, 1929, her father going to Sweden in 1922, never thereafter returning to the United States. In November, 1934, he stated before an American consular officer in Sweden that he had voluntarily expatriated himself, that he did not desire to retain the status of an American citizen, and that he wished to preserve his allegiance to Sweden. In 1929, within eight months after attaining majority, Miss Elg returned to the United States using an American passport issued by an American consular officer in Sweden under authorization from the Department of State.[6] Having been notified by the Department of Labor in 1935, that she was in the country illegally and threatened with deportation, and having been denied a passport in July 1936, by the Secretary of State upon the sole ground that he was without authority to issue it because she was not a citizen of the United States, Miss Elg instituted suit against the Secretary of Labor, the Acting

Commissioner of Immigration and Naturalization and the Secretary of State to obtain "(1) a declaratory judgment that she is a citizen of the United States and entitled to all the rights and privileges of citizenship, and (2) an injunction against the Secretary of Labor and the Commissioner of Immigration restraining them from prosecuting proceedings for her deportation, and (3) an injunction against the Secretary of State from refusing to issue to her a passport upon the ground that she is not a citizen."

The District Court of the United States for the District of Columbia "overruled the motion as to the Secretary of Labor and the Commissioner of Immigration and entered a decree declaring that the plaintiff is a native citizen of the United States but directing that the complaint be dismissed as to the Secretary of State because of his official discretion in the issue of passports."[7] On cross appeals the Court of Appeals affirmed the decree.[8]

On this state of facts the Court asserted the question for decision to be "whether the plaintiff, Marie Elizabeth Elg, who was born in the United States of Swedish parents then naturalized here, has lost her citizenship and is subject to deportation because of her removal during minority to Sweden, it appearing that her parents resumed their citizenship in that country but that she returned here on attaining majority with intention to remain and to maintain her citizenship in the United States." It concluded "that respondent has not lost her citizenship in the United States and is entitled to all the rights and privileges of that citizenship."

Four grounds, each elaborately documented, were set forth as the basis for this conclusion[9]:

"*First*.—On her birth in New York, the plaintiff became a citizen of the United States….As at birth she became a citizen of the United States, that citizenship must be deemed to continue unless she has been deprived of it through the operation of a treaty or congressional enactment or by her voluntary action in conformity with applicable legal principles.

"*Second.*---It has long been a recognized principle in this country that if a child born here is taken during minority to the country of his parents' origin, where his parents resume their former allegiance, he does not thereby lose citizenship in the United States provided that on attaining majority he elects to retain that citizenship and to return to the United States to assume its duties….[10]

"The question then is whether this well recognized right of election has been destroyed by treaty or statute.

"*Third*.---Petitioners invoke our treaty with Sweden of 1869….[11]

"We think that this provision [Art. I] in its direct application clearly implies a voluntary residence and it would thus apply in the instant case to the father of respondent. There is no specific mention of minor children who have obtained citizenship by birth in the country which their parents have left. And if it be assumed that a child born in the United States would be deemed to acquire the Swedish citizenship of his parents through their return to Sweden and resumption of citizenship there, still nothing is said in the treaty which in such a case would destroy the right of election which appropriately belongs to the child on attaining majority. If the abrogation of that right had been in contemplation, it would naturally have been the subject of a provision suitably explicit.

"*Fourth*.---We think that petitioners' contention under Section 2 of the Act of March 2, 1907, is equally untenable.[12]

"We think that the statute was aimed at a voluntary expatriation and we find no evidence in its terms that it was intended to destroy the right of a native citizen, removed from this country during minority, to elect to retain the citizenship acquired by birth and to return here for that purpose. If by virtue of derivation from the citizenship of one's parents a child in that situation can be deemed to have been naturalized under the foreign law, still we think in the absence of any provision to the contrary that such naturalization would not destroy the right of election."

In discussing the first ground for its decision the Court says that, "As municipal law determines how citizenship may be acquired, it follows that persons may have a dual nationality."[13] This is a fact that has been long recognized, but the term "dual nationality" or "double allegiance" has generally been used to designate a nationality status acquired at birth.[14] The Court, however, apparently conceives the term as including nationality created by naturalization, at least in case of the "involuntary" expatriation of minors, for it says, "And the mere fact that the plaintiff may have acquired Swedish citizenship by virtue of the operation of Swedish law, on the resumption of that citizenship by her parents, does not compel the conclusion that she has lost her own citizenship acquired under our law."[15]

Citizenship acquired by birth in the United States must be deemed to continue, the Court declares, unless a person "has been deprived of it through the operation of a treaty or Congressional enactment or by…voluntary action in conformity with applicable legal principles."[16] The meaning of this statement is not altogether clear. As the methods are stated in the alternative apparently it is contemplated

that citizenship may be lost by a method independent of treaty or statute, namely, "by …voluntary action in conformity with applicable legal principles." The source or identity of those principles, outside of treaty or statute, is not stated. It seems probable that the Court has reference to the principle of election, stated as the second ground of its decision and for which there is no treaty or statutory basis.[17] Nor is there any basis for it in common or international law.[18] As will be seen the Court apparently considers it to derive from the Fourteenth Amendment to the Constitution.

In support of the principle of election, which constitutes the heart of the decision, the Court sets forth in some detail the opinion of the Attorney General in *Steinkauler's* case,[19] and four instructions by Secretaries of State.[20] It may be noted that of these the latest in date is 1906, and that none is given for the period since the date of the Act of March 2, 1907.[21] For a long time the Department of State has not applied the principle of election except in cases of dual nationality acquired at birth, and even in these cases the rulings have related to loss of right to protection and not to loss of citizenship.[22]

The ruling cited, concludes the Court, "leave no doubt of the controlling principle long recognized by this Government," and adds:

"That principle, while administratively applied, cannot properly be regarded as a departmental creation independently of the law. It was deemed to be a necessary consequence of the constitutional provision by which persons born within the United States and subject to its jurisdiction become citizens of the United States…."[23]

There seems to be a clear intimation here that the Court considers the principle of election to derive from the Fourteenth Amendment to the Constitution.[24] It is not clear whether the Court intends to suggest any limitation upon the power of Congress or the Executive to provide for involuntary loss of nationality by a minor child through naturalization of its parents in a foreign state.

While it seems likely that the Court would not carry the principle enunciated so far, it must be noted that it proceeds to define expatriation as "the voluntary renunciation or abandonment of nationality and allegiance," and to say that "it has no application to the removal from this country of a native citizen during minority." To this it adds:

"In such a case the voluntary action which is of the essence of the right of expatriation is lacking. That right is fittingly recognized where a child born here,

who may be, or may become, subject to a dual nationality, elects on attaining majority, citizenship in the country to which he has been removed. But there is no basis for invoking the doctrine of expatriation where a native citizen who is removed to his parents' country of origin during minority returns here on his majority and elects to remain and to maintain his American citizenship. Instead of being inconsistent with the right of expatriation, the principle which permits that election conserves and applies it."[25]

This is positive language, and the principle that there must be voluntary action by an individual for loss of his citizenship to result, at least in the absence of treaty or statutes, is clearly a part of the *ratio decidendi* of the decision. And this must be taken with the additional assertion that "such action cannot be attributed to an infant whose removal to another country is beyond his control and who during his minority is incapable of a binding choice."

In support of its holding that the provisions of the treaty of 1869 with Sweden do not apply to minor children whose parents have been naturalized or resumed allegiance, the Court sets forth two other instructions by Secretaries of State in addition to those cited in relation to the principle of election.[26] The latest in date of the precedents cited relative to the treaty is 1906.

In fact, as pointed out in the Brief for the Petitioners, the Department of State had for some time prior to 1906, and consistently in the years since, held that the provisions of the naturalization treaties, such as the one with Sweden, did cover the minor children of parents affected by the treaties.[27] It is observed in the Brief:

"It is true that in all these instances the minor involved becomes a citizen of the United States, and that the treaty was being invoked in support of the claim that there had been an expatriation from the foreign country. But unless there are constitutional limitations…this does not constitute a true distinction. The naturalization treaties, 'contracts between independent nations' (*Santovincenzo v. Eagan,* 284 U. S. 30, 40), were obviously intended to be reciprocal, and should be so construed."[28]

The Court's conclusion on its fourth point that Section 2 of the Act of March 2, 1907, is not applicable to a case such as Miss Elg's seems to have been based upon its view "that the statute was aimed at a voluntary expatriation." The Court said that it found "no evidence in its terms that it was intended to destroy the right of a native citizen, removed from this country during minority, to elect to retain the citizenship acquired by birth and to return here for that purpose."[29]

A circular instruction of November 24, 1923, is cited by the Court to show that "as late as 1925 when the Department [of State] issued its 'Compilation'"[30] it held the view "that the Act of March 2, 1907, had not taken away the right of a native citizen on attaining majority to retain his American citizenship, where he was born in the United States of foreign parents." It should be noted that this instruction was limited in application to the cases of persons born with dual nationality and continuing to retain that status and that it purported only to define the conditions under which such persons could retain their right to the protection of the United States. With regard to this instruction the Court observed:

"…We do not think that it would be a proper construction of the Act to hold that while it leaves untouched the right of election on the part of a child born in the United States, in case his parents were foreign nationals at the time of his birth and have never lost their foreign nationality, still the statute should be treated as destroying that right of election if his parents became foreign nationals through naturalization. That would not seem to be a sensible distinction…."[31]

Finally, the decision of the Court that the action was properly brought under the Declaratory Judgment Act of June 24, 1934, as amended, is of fundamental importance.[32] It is especially important to note that the Court modified the decree of the court below so as to strike out the portion dismissing the bill of complaint as to the Secretary of State. The Court said that the judgment declaring Miss Elg "to be a natural born citizen of the United States" would in no way interfere with the exercise of the Secretary's discretion with respect to the issuance of a passport but would simply preclude the denial of a passport on the sole ground that Miss Elg had lost her American citizenship. Hereafter a person who is denied a passport on the ground that he is not a citizen will have a means of testing his claim to citizenship in the courts. Prior to this decision such a person had virtually no judicial remedy.

It would be difficult to overstate the importance of this decision. It will enable numerous persons heretofore treated as aliens to assert their claim to citizenship of the United States. It will assure to many more the right in the future to elect to retain citizenship upon attaining majority. Judging from past experience among these will be many who have taken in infancy to the native country of their parents where they have continued to reside with little or no contact with the United States or its institutions. On the other hand it will preserve the right to elect American citizenship at majority to others who have been abroad with their parents but for a short time or who have maintained close contacts with the United States and who understand its language and are familiar with its institutions. In the case of persons who have acquired dual nationality at birth their election of American

citizenship by the method laid down by the Supreme Court will not in most cases terminate their foreign nationality, since the laws of most states which provide a method for the termination of such nationality require the election of the foreign nationality by a formal petition or application.

Difficult problems of administration confront the Department of Labor and the Department of State in applying the rule established by the Court. The opinion of the Chief Justice sets out no test or standard as a guide for determining when the right of election must be exercised. Miss Elg returned within eight months after attaining majority. How much longer than that a person may wait to exercise his right of election without losing it is not indicated in the opinion. Consequently it will be difficult in many cases to determine when a person loses or has lost his citizenship through failure to make an effectual election. In practice it seems likely that no case will be definitively determined until it has been passed upon by the court.

The Departments which have to administer the rule can find little to guide them outside the opinion. There have never been any statutory or treaty provisions in the United States relative to election of citizenship by minors. The laws of foreign countries on the subject have reference almost, if not, entirely to persons who acquire dual nationality at birth, and show a great lack of uniformity.[33] There was no right of election at common law and there is no rule of international law on the subject. If the principle of election is to be maintained, it requires precise statutory definition.[34]

Footnotes:

1. 307 U. S. 325 (1939)
2. "The state department has consistently adhered to this view [that the naturalization of a parent effects the naturalization of a minor child residing with the parent] in dealing with foreign governments concerning the rights of minors naturalized in this country by the naturalization of the father, and *vice versa*. We quote from appellant's brief a letter from the Secretary of State dated October 7, 1931, as follows:

   "'This Department has for many years uniformly held that former citizens of the United States who have been naturalized during minority in foreign states through the naturalization of their parents must be regarded as having lost their American nationality under the provisions of section 2 of the Act of Congress March 2, 1907 (34 Stat. 1228 [8 U. S. C. § 17])...also that the provisions contained in the naturalization treaties between the United States and other

countries, including the naturalization treaty of May 26, 1869, with Norway and the protocol of the same date, are applicable to the cases of persons naturalized during minority through the naturalization of their parents, as well as to the cases of persons naturalized after attainment of majority upon their own application.'" United States v. Reid, 73 F. (2d) 153, 156 C. C. A. 9th, 1934). The Attorney General had this letter before him at the time he was considering the case of Ingrid Therese Tobiassen. 36 Ops. Att'y. Gen. 535 (1932).

The Department of Labor had at one time taken a different view, but since the opinion of the Attorney General in the case of Ingrid Therese Tobiassen, it had applied the same rule as that followed by the Department of State. *Ibid*.

3.After summarizing the opinion of the Attorney General in the Tobiassen case the court said:

"The opinion does not discuss the right of election of a native citizen of the United States when he becomes of age to retain American citizenship and does not refer to the repeated rulings of the Department of State in recognition of that right, the exercise of which, as we have pointed out, should not be deemed to be inconsistent with either treaty or statute. We are reluctant to disagree with the opinion of the Attorney General, and we are fully conscious of the problems incident to dual nationality and of the departmental desire to limit them, but we are compelled to agree with the Court of Appeals in the instant case that the conclusions of that opinion are not adequately supported and are opposed to the established principles which should govern the disposition of this case." 307 U. S. 348-349 (1939).

In his opinion of June 16, 1932, the Attorney General said in part:

"The right of expatriation, of which there has been statutory recognition by this country from an early period, was carried into section 1999 of the Revised Statutes. The last legislative expression upon the subject is the provision in section 2 of the Act of March 2, 1907,….

"There has also been for many years statutory provision whereby foreign-born minor children become citizens of the United States through the naturalization of their parents. The last enactment upon this subject is section 5 of the above-mentioned Act of 1907 (U. S. C. A. Title 8, sec. 8), by the terms of which minor children do not acquire citizenship until they have taken up a permanent residence in the United States. Citizenship acquired by minor children in this manner is deemed equivalent to formal

naturalization under Acts of Congress. United States v. Kellar, 13 Fed. (C. C.) 82, 85; United States v. Tod, 297 Fed. (C. C. A.) 385, 392.

"It is to be noted that the claim that Miss Tobiassen has ceased to be an American citizen does not rest upon the terms of the Naturalization Treaty with Norway, but upon a law of that country, as the result of the renunciation by her father, a native of Norway, of his American citizenship, and the resumption of his Norwegian nationality in pursuance of the terms of that treaty. The law of Norway, under which Miss Tobiassen is said to have forfeited her American citizenship and to have acquired that of her father, is analogous to our statutes, to which attention has just been directed, by virtue of which foreign-born minor children of persons naturalized in the United States are declared to be citizens of this country.

"Inasmuch as under our laws a foreign-born minor child obtains a citizenship status through the naturalization of the father, it seems to me inconsistent, to say the least, to deny a like effect to similar laws of Norway. For this reason and the other considerations herein mentioned, the conclusion of the State Department that Miss Tobiassen acquired Norwegian nationality, and consequently has ceased to be an American citizen, is, in my opinion, correct."36 Ops. Att'y Gen. 535, 539-540 (1932).

4.The Court said (in a footnote) that its observations on the Tobiassen opinion were equally applicable to the decision in the Reid case "so far as it is urged by petitioners as applicable to the facts of the instant case." 307 U. S. 349. In that case the Circuit Court of Appeals had before it the case of Mrs. Arla Marjorie Reid who had been born in the United States and who subsequently during her minority acquired Canadian citizenship through her father's naturalization in Canada. The Treaty of Naturalization of May 13, 1870, between the United States and Great Britain was substantially similar to the one with Sweden. In the course of its opinion holding that Mrs. Reid had lost her citizenship the Circuit Court said:

"For the courts of the United States to treat the petitioner as an American citizen instead of a British subject after the naturalization of her father in 1907, would be to expressly violate the terms of the treaty of 1870 with Great Britain, which required her to be treated by the United States 'in all respects and for all purposes as a British subject' from and after that date.

"The treaty is a law of the United States entitled to be enforced in the courts of the United States….

"The United States has consistently adhered to the principle that the naturalization of a parent effects the naturalization of a minor child residing with the parent…." 73 F. (2d) 153, 155 (1934). For cases in accord see Ostby V. Salmon, 177 Minn. 289, 225 N. W. 158 (1929); Koppe v. Pfefferle, 188 Minn. 619, 248 N. W. 41 (1933).

In its opinion in this case the court below had summarized as follows the grounds upon which it reached a contrary decision:

"It is thus firmly established in the law of this country and in the law of nations that a minor born in this country who is involuntarily naturalized in a foreign country has a right to elect allegiance when he arrives at maturity, and that he cannot be deprived of that right by his own act nor by the act of his parents, nor by the municipal law of the foreign state. Any attempt by circumlocution to deprive him of the right by the treaty making power would be an arbitrary denaturalization inconsistent with the fundamental law. Before majority, Mrs. Reid thus had a dual nationality and was entitled to the benefits which might flow from either citizenship. Ludlam v. Ludlam, 26 N. Y. 356, 377; 84 Am. Dec. 193." *In re* Reid, 6 F. Supp. 800, 806 (1934).

5.307 U. S. 327-328 ("1939)

6.The Secretary of State informed the Attorney General in a letter dated January 21, 1937, that the issuance of this passport was the result of a "clerical inadvertence." Brief for the Petitioners, p. 3. Apparently the Court overlooked this fact when it drew the following inference from the issuance of the passport:

"Having regard to the plain purpose of Section 2 of the Act of 1907, to deal with voluntary expatriation, we are of the opinion that its provisions do not affect the right of election, which would otherwise exist, by reason of a wholly involuntary and merely derivative naturalization in another country during minority. And, on the facts of the instant case, this view apparently obtained when in July, 1929, on the instructions of the Secretary of State, the Department issued the passport to respondent as a citizen of the United States." 307 U. S. 347 (1939).

7.In its opinion (unreported) overruling the motion to dismiss the complaint except as to the Secretary of State, the District Court said:

"The bill alleges that she was born in the United States, was taken during her minority by her parents to Sweden. Within a year after her attaining her

majority and without having renounced her allegiance to this country, she came to this country. I do not think that the fact that her father may have become a citizen of Sweden, can deprive her of her rights as a native-born citizen of the United States, even though under the laws of Sweden she may be treated in that country as a citizen of it."

8.The Court of Appeals of the District of Columbia based its decision on the principle of election. After quoting various precedents (also invoked by the Supreme Court in support of its decision) to show that under this principle a minor retains the right at majority to elect to retain his American citizenship, the court said:

"…This result necessarily follows from the fundamental rule that a natural born citizen of the United States retains his citizenship until he changes it himself in due form and voluntarily becomes a citizen of some other country. Morse, Citizenship by Birth, etc., p. 239. The change can neither be worked by the father nor by the sovereignty into which the child involuntarily is taken, for under the English and American doctrine the child himself acquires rights and owes fealty besides that which attaches to the father. Wong Kim Ark case [169 U. S. 649], page 691, 18 Sup. Ct. 456. In the instant case neither the Act of March 2, 1907, 34 Stat. 1228, nor any other statute has taken away or diminished those rights, and it is doubtful indeed, if there is any power in Congress—in view of the provisions of the Fourteenth Amendment, U. S. C. A. Const. Amend. 14—to take them away…." 99 F. (2d) 408, 412-413.

For the expression of a contrary view by way of *dictum* by the same court, see Cummings *et al.* v. Isenberg, 89 F. (2d) 489,493-494 (1937).

9.307 U. S. 328-329, 334, 335, 337, 342, 343 (1939).

10.The following authorities are cited by way of footnote in support of this statement: Hyde, International Law Chiefly As Interpreted And Applied By The United States (1922) §§ 374, 375; Borchard, Diplomatic Protection Of Citizens Abroad (1915) § 259; Van Dyne, Citizenship Of The United States (1904) pp. 25-31; 3 Moore, A Digest Of International Law (1906) pp. 532-551.

11.Articles I and III of the treaty provide:

"Article I

"Citizens of the United States of America who have resided in Sweden or Norway for a continuous period of at least five years, and during such residence have become and are lawfully recognized as citizens of Sweden or

Norway, shall be held by the Government of the United States to be Swedish or Norwegian citizens, and shall be treated as such.

"Reciprocally, citizens of Sweden or Norway who have resided in the United States of America for a continuous period of at least five years, and during such residence have become naturalized citizens of the United States, shall be held by the Government of Sweden and Norway to be American citizens, and shall be treated as such.

"The declaration of an intention to become a citizen of one or the other country has not for either party the effect of citizenship legally acquired.

Article III

"If a citizen of the one party, who has become a recognized citizen of the other party, takes up his abode once more in his original country, and applies to be restored to his former citizenship, the Government of the last-named country is authorized to receive him again as a citizen, on such conditions as the said Government may think proper." 2 Malloy, Treaties, Conventions, International Acts, etc. (1910) p. 1759.

The Protocol of May 26, 1869, accompanying the treaty provides in paragraphs I and III:

"I. Relating to the first articles of the convention,

"It is understood that if a citizen of the United States of America has been discharged from his American citizenship, or, on the other side, if a Swede or a Norwegian has been discharged from his Swedish or Norwegian citizenship, in the manner legally prescribed by the Government of his original country, and then in the other country in a rightful and perfectly valid manner acquires citizenship, then an additional five years' residence shall no longer be required; but a person who has in that manner been recognized as a citizen of the other country shall, from the moment thereof, be held and treated as a Swedish or Norwegian citizen, and reciprocally, as a citizen of the United States.

"III. Relating to the third article of the convention.

"It is further 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." 2 Malloy, *op. cit. supra.* Pp. 1760-1761.

12.The first paragraph of Section 2 of the Act of March 2, 1907 (34 Stat. 1228; 8 U. S. C. 17) provides:

> "Any American citizen shall be deemed to have expatriated himself 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."

13.307 S. 329 (1939).

14.In a note to this statement the Court cites the following authorities:

Oppenheim, International Law (5th ed. 1937) § 308; 3 Moore, *op. cit., supra* note 10, p. 518; Hyde, *op. cit., supra* note 10, § 372; Flournoy, *Dual Nationality and Election*, 30 Yale L. J. 546 (1921); Borchard, *op. cit., supra* note 10, § 253; Van Dyne, *op. cit., supra* note 10, p. 25; Fenwick, International Law (Original ed. 1924) p. 165.

> All of these authorities in the passages cited use the term "dual nationality" primarily to designate cases in which a child acquires the nationality of two states at birth. Moore observes in this connection:
> "It is sometimes stated that a double allegiance also exists where a person born in one country afterwards emigrates to and becomes a citizen of another country. That a person in such a situation may be subject to the claims of allegiance in two countries, is in point of fact no doubt true; but it is in point of principle equally true that, when writers place such a case under the head of double allegiance, they at least impliedly hold that the doctrine of voluntary expatriation, as maintained by the United States, is not well founded.
> … From the point of view of the doctrine of expatriation, as enunciated by the United States, the man who, voluntarily forsaking his original home and allegiance, acquires a new one, has thereafter but one allegiance—that of his adopted country." Vol. III, pp. 518-519.

15.307 U. S. 329 (1939). Officials of the Government of the United States have been especially cautious about using the term "dual nationality" to describe the status of a person who acquires a new nationality through naturalization in a foreign state in accordance with its laws because of its long adherence to the doctrine that such naturalization terminates prior allegiance.

16.*Ibid.*, p. 329.

17.At another point in its opinion the Court says:

"… To cause a loss of that citizenship in the absence of treaty or statute having that effect, there must be voluntary action and such action cannot be attributed to an infant whose removal to another country is beyond his control and who during minority is incapable of a binding choice." 307 U. S. 334 (1939). The "legal principles" would appear to be those concerning the power of a minor to make a "binding choice," and his right on attaining majority to make such a choice. Apparently the Court does not have in mind extending expatriation through "voluntary action in accordance with applicable legal principles" to persons other than minors.

18.See Flournoy, *Dual Nationality and Election*, 30 Yale L. J. pp. 545-564, 693-709 (1921), especially pp. 696-697. It was recognized by the Department of State in the instances in which it applied the principle of election (cited by the Court in its opinion) that there was no statutory basis for such action. See especially Mr. Bacon, Acting Secretary of State, to the German Ambassador, Nov. 20, 1906, 1906 For. Rel., pt. 1, pp. 656-657.

19.15 Ops. Att'y. Gen. 15 (1875). Steinkauler was born in the United States of a naturalized German father of Prussian origin and at four years of age was taken to Germany, where he and his father became German citizens in accordance with German law and under the terms of the Naturalization Treaty of February 22, 1868, with the North German Union. The Attorney General advised the Secretary of State that protection need not be extended to Steinkauler against induction into military service saying:

"…The son being domiciled with the father and subject to him under the law during his minority, and receiving the German protection where he has an acquired nationality, and declining to give any assurance of ever returning to the United States and claiming his American nationality by residence here, I am of the opinion that he cannot rightly invoke the aid of the Government of the United States to relieve him from military duty in Germany during his minority. But I am of opinion that when he reaches the age of twenty-one years he can then elect whether he will return and take the nationality of his birth with its duties and privileges, or retain the nationality acquired by the act of his father. This seems to me to be 'right reason' and I think it is law."

20.(1) Secretary Evarts to Mr. White, Minister to Germany, June 6, 1879, 3 Moore, *op. cit., supra* note 10, p. 543. Two Boisselier brothers born in United States of naturalized father of German origin, and resident here at time called for military service. Right of Germany to claim their allegiance denied.

(2) Secretary Evarts to Mr. Cramer, Nov. 12, 1880, *ibid.*, 544. P-----born in United States of naturalized father of Danish origin. In instructing protection to be extended to him, Secretary Evarts said: "His father's political status (whether a citizen of the United States or a Danish subject) has no legal or otherwise material effect on the younger P-----'s rights of citizenship."

(3) Secretary Bayard to Mr. Weckherlin, the Dutch Minister, April 7, 1888, 1888 For. Rel., pt. 2, p. 1341. Menist born in United States of naturalized father of Dutch origin, and taken to Netherlands at nine years of age.

(4) Mr. Bacon, Acting Secretary of State, to the German Ambassador, Nov. 20, 1906, 1906 For. Rel., pt. 1, pp. 656-657. Bohn born in United States of father assumed to be German. Said to have right to elect by returning unless he had taken action "working an expatriation."

21.Four other instructions are cited by way of footnote:

(1) Secretary Bayard to Mr. McLane, Minister to France, Feb. 15, 1888, 3 Moore, *op. cit., supra* note 10, p. 548. Children born in United States of French parents said to have right of protection if electing by returning to reside.
(2) Secretary Bayard to Count Sponneck, Danish Minister, April 10, 1888, *ibid.*, 548. Similar Instructions.
(3) Secretary Olney to Mr. Materne, May 29, 1896, *ibid.* 542. Children born in United States of naturalized father of German origin. Said they would have to elect by returning to United States on attaining majority.
(4) Circular instruction to American Diplomatic and Consular Officers, Nov. 24, 1923, Compilation Of Certain Departmental Circulars Relating To Citizenship, etc., Department of State, 1925, pp. 118, 121, 122. Relates to protection of persons acquiring dual nationality at birth.
In addition the Court cited, United States *ex rel.* Schimeca v. Husband, 6 F. (2d) 957 (C. C. A. 2d, 1925); United States *ex rel.* Baglivo v. Day, 28 F. (2d) 44 (S. D. N. Y., 1928). In the Schimeca case the Court expressed approval, by way of *dictum*, of the principle of election but the decision turned on another point, namely, that the finding of fact by the Department of Labor was final. The principle of election is not mentioned in the opinion in the Baglivo case, but in holding that a minor cannot expatriate himself by taking an oath of allegiance, the Court said: "A native-born citizen, who has not attained the age of 21 years, cannot renounce allegiance to the United States."

22.See for example the circular instruction of Nov. 24, 1923, cited in the preceding note.

After reviewing at length the various rulings by the Department of State involving the question of election, including most of those cited by the Court, Mr. Flournoy, Assistant to the Legal Adviser of the Department of State, says in his article on "Dual Nationality and Election," previously cited:

"…the decisions of the Department of State in cases involving election seem to relate generally to the right to protection, rather than to nationality as a matter of strict law, for, as the Department has repeatedly stated, the technical legal status of citizenship does not necessarily carry with it the right to protection….In these cases the Department of State, as a rule, did not decide that the legal status of American citizenship was lost by an express or inferential election of the foreign nationality. It merely passed over this question as unnecessary to be decided. Whether or not the persons concerned had lost their legal title to American citizenship, the Department held they had placed themselves in a position where they were not equitably entitled to the protection of this government." 30 Yale L. J. 545, 563 (1932).

23.307 S. 334 (1939).

24.The relation of the Fourteenth Amendment to the principle of election does not appear to have been noted in any of the instructions concerning election cited by the Court.

25.*Ibid.*, p. 334.

26.(1) Mr. Wharton, Acting Secretary of State, to Count Sponneck, Danish Minister, Sept. 16, 1890, 3 Moore, *op. cit., supra* note 10, p. 715. Minor admitted to Danish citizenship on own application said to have right, on attaining majority, "to elect to become an American by immediately returning to this country to resume his allegiance here."

(2) Secretary Sherman to Mr. Grip, Swedish Minister, June 15, 1897, *ibid.* 472. Moore gives the following summary of this instruction: "That the naturalization of the parent effects, under the treaties [e.g., that with Sweden and Norway], the expatriation of minor children dwelling in the United States, if or after the latter have also resided there five years."

In answering the question, "What is the effect of a person's return to his native country on his rights as an American citizen acquired through the naturalization of his father," Secretary Sherman said:

"The acquisition of United States citizenship by an alien-born minor through the lawful naturalization of his father under the operation of Section 2172, Revised Statutes, above quoted, is in its effect upon the individual as much an

act of naturalization as is the admission of the father to citizenship by a decree of a competent court. Consequently this Government holds that a minor so naturalized is entitled to all the benefits of a naturalization treaty with the country of his origin, his case differing only from that of his father in that he may be called upon (if he have not been formally discharged from Swedish allegiance) to prove the fact of his own total residence in the United States for five years in addition to the fact and time of his father's naturalization. (Treaty of 1869, Art. I and Protocol of May 26, 1869). If such a party having thus become a recognized citizen of the United States, takes up his abode once more in his original country, and applies to be restored to his former citizenship, the government of the last named country is authorized to receive him again as a citizen, on such conditions as the said government may think proper. (Treaty of 1869, Art. III). Or he may by residence in the country of origin, without intent to return to the United States, be held to have renounced his American citizenship. (Protocol, May 26, 1869). But this presumption, like all presumptions of intent, may be rebutted by proof. Until a person so circumstanced shall be held to have voluntarily abandoned his American citizenship, or shall have acquired another citizenship upon application to that end and by due process of law, this government is entitled to claim his allegiance and constrained to protect him as a citizen so long as he shall be found *bona fide* entitled thereto."

27.In addition to Secretary Sherman's note to the Swedish Minister cited in the preceding note, the following instructions are set out in the Brief:

(1) Secretary Hay to Mr. Harris, Minister of Austria-Hungry, Jan. 22, 1900, 1900 For. Rel. 13.
(2) Secretary Hay to Mr. White, Ambassador to Germany, July 15, 1902, 21 MS. Instructions to Germany, p. 434.
(3) Secretary Knox to Mr. Bryan, Minister to Portugal, Jan. 12, 1910, telegram, 1910 For. Rel. 832-834.

In a letter of Jan. 21, 1937, to the Attorney General the Department of State said that it had in past years repeatedly held that treaties of naturalization to which the United States is a party are applicable to cases of persons naturalized during minority through the naturalization of their parents.

28.Brief For The Petitioners, pp. 35-36.

29.307 S. 343 (1939).

30.Compilation Of Certain Departmental Circulars Relating To Citizenship, etc., Department of State (1925) pp. 118, 120-122.

31.307 S. 346-347 (1939).

32.That act as set forth in Section 400, Title 28, U. S. C., provides:

> "Section 400. (Judicial Code, section 274d.) Declaratory judgments authorized; procedure
> "(1) In cases of actual controversy except with respect to Federal taxes the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.
> "(2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith.
> "(3) When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not. (March 3, 1911, c. 231, § 274d, as added June 14, 1934, c. 512, 48 Stat. 955; as amended August 30, 1935, c. 829, § 405, 49 Stat. 1027.)"

Concerning the propriety of bringing this action under the Declaratory Judgment Act, the Court of Appeals said:

> "….There is no other proceeding at law by which appellee could obtain an adjudication that she is a United States citizen—certainly none by which she can obtain that adjudication without being subject to arrest and confinement until her case may be heard on a petition of habeas corpus. Appellants, Secretary of Labor and Commissioner of Immigration , are required by law to deport aliens illegally in this country and in accordance with law they have threatened her with arrest and deportation. The threat remains unretracted and is in abeyance only by agreement of counsel pleading the decision of the case. She has not yet been arrested, and therefore she cannot now test by habeas corpus the question raised here; but she is entitled to a declaration of her political status, for her rights as a citizen are valuable rights—certainly no less valuable than property

rights—and an actual and vital controversy exists between her and the government in relation to them. The right to be immune from threats of deportation and from the declarations of public officials that she is an alien and subject to arrest is, we think, a right within the declaratory judgment act entitling Miss Elg to prosecute this suit….

"We think the facts we have outlined present a case fairly within the intent and purpose of the act whereby appellee may test the validity of the threat and have, as she is entitled to have, a declaratory judgment of her American citizenship. For we certainly have a case 'admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged' and in these circumstances the Supreme Court has said the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages. Aetna Life Ins. Co. v. Haworth, 300 U. S. 227, 57 Sup. Ct. 461, 81 L. Ed. 617, 108 A. L. R. 1000." Perkins *et al.* v. Elg, 99 F. (2d) 408, 413-414 (1938).

33.See Flournoy, *Dual Nationality and Election*, 30 Yale L. J. 545-559, 705-709 (1921); Sandifer, *A Comparative Study of Laws Relating to Nationality at Birth and to Loss of Nationality*, 29 Am. J. Int. L. 248, 259-261 (1935).

34.There is before Congress a *Report on the Revision and Codification of the Nationality Laws*, transmitted by the President on June 13, 1938, which was prepared by the Secretary of State, the Attorney General, and the Secretary of Labor in pursuance of the President's Executive Order of April 25, 1933. The Draft Nationality Code which forms part of that *Report* contains in Sections 401 (a) and 405 provisions for the loss of nationality by a minor through the naturalization of a parent having his legal custody, and through the loss of nationality, subject to certain conditions, by a naturalized citizen by residing in the country of his origin for a specified period of years. (Sections 402, 404.) It contains no provision concerning election by persons having dual nationality. See Codification Of The Nationality Laws Of The United States, Committee on Immigration and Naturalization, House Committee Print, 76th Congress, 1st session, 3 parts, part 1 pp. 66, 69-78.