WHO ARE CITIZENS OF THE UNITED STATES? WONG KIM ARK CASE—INTERPRETATION OF CITIZENSHIP CLAUSE OF FOURTEENTH AMENDMENT.

The Wong Kim Ark case, decided by the United States Supreme Court on March 28, 1898,[1] decides, for the first time in that tribunal, the question whether a person born in the United States of foreign parents is a citizen of the United States under the citizenship clause of the Fourteenth Amendment. The decision holds, substantially, that the language used in the Fourteenth Amendment to the constitution is declaratory of the common-law doctrine, and not of the international law doctrine, and that, therefore, a person born in the United States is a citizen thereof, irrespective of the nationality or political status of his parents. While the question has arisen before and has been referred to in some of the decisions of the Supreme Court, still it cannot be said to have been directly involved and squarely decided until the present decision in the Wong Kim Ark case. This case settles, once for all, the question of the citizenship of children born within the United States, whose parents are foreign subjects or citizens. While it is the commonly accepted notion, and that generally entertained by the profession, that all persons born within the United States, whether of foreign parents or not, are citizens, still popular impressions may be common errors, and are not always to be regarded as the safest tests of what the law is. Whatever of doubt and misapprehension exists on the question is because of the existence of two general doctrines or tests of citizenship by birth; one, the common-law doctrine, which makes birth in a country sufficient to confer citizenship; the other, the doctrine of the law of nations, by which the political status of children is fixed by that of the

[1] 18 Sup. Ct. Rep. 456; 169 U. S. 649.

parents, irrespective of the place of birth. While the question before the Supreme Court was, what constitutes citizenship of the United States under the Fourteenth Amendment, still the peculiar phraseology of the citizenship clause of that Amendment necessarily involved the further and controlling proposition as to what that clause was declaratory of; whether it was intended to be declaratory of the common-law or of the international doctrine. The Fourteenth Amendment reads as follows: "All persons born or naturalized in the United States, *and subject to the jurisdiction thereof*, are citizens of the United States and of the States wherein they reside." The question around which the chief arguments have centered, both by counsel in the Wong Kim Ark case and by general writers on the subject, is as to the meaning of the qualifying phrase, "*and subject to the jurisdiction thereof.*" This phrase was seized upon by the advocates of the international law doctrine as meaning subject to the "political jurisdiction" of the United States, and therefore as being declaratory of that doctrine. Such were the views very plausibly maintained by Mr. Geo. D. Collins, who appeared in the Wong Kim Ark case as *amicus curiae*.[1] The exponents of the common-law doctrine, on the other hand, contended, and, it must be admitted, with superior logic, that the Fourteenth Amendment was declaratory, in effect, of the common law doctrine.[2] The latter contended that the expression: "Subject to the jurisdiction thereof," meant nothing more than being subject to the "laws" of the United States, comprehending such obedience as every alien owes while within the territorial limits of a foreign country. While at this late day, the question as to which of these two doctrines obtains in the United States may savor of scholastic disquisition into what should be well-settled law, still the Supreme Court considered the question of sufficient importance and perplexity to grant two arguments, and the elaborate and lengthy opinions, both prevailing and dissenting, indicate the labor,

[1] See also article in the AM. LAW REV., Vol. 29, 385, by Mr. Collins, to the same effect.

[2] See articles of Henry C. Ide, ex-Chief Justice of the Court at Apia, Samoa, 30 AM. LAW REVIEW, 241, and of Marshall B. Woodworth, of the San Francisco Bar, 30 AM. LAW REVIEW, 535.

research and care given to the consideration of the question. The fact that the decision of the court was not unanimous indicates that the question is at least debatable. Mr. Justice Gray wrote the prevailing opinion, which was concurred in by all the justices excepting Mr. Chief Justice Fuller and Mr. Justice Harlan, both of whom dissented. Mr. Justice McKenna, not having been a member of the court when the arguments took place, did not participate in the decision.

The Wong Kim Ark case arose upon a writ of habeas corpus in the United States District Court for the Northern District of California. The facts of the case were, briefly, that Wong Kim Ark was born in 1873 in the city of San Francisco, State of California and United States of America; that his father and mother were persons of Chinese descent, and subjects of the Emperor of China; that they were at the time of his birth domiciled residents of the United States; that they continued to reside in the United States until 1890, when they departed for China; that about 1894, Wong Kim Ark made a voyage to China and returned to the United States in August, 1895; that he applied to the collector of the port at San Francisco for permission to land, and was denied such permission upon the sole ground that he was not a citizen of the United States, but that he was a Chinese subject, and, being a laborer, was excluded by the Chinese Exclusion Laws. From this refusal to permit him to land, a writ of habeas corpus was sued out in the United States District Court presided over by Hon. Wm. W. Morrow. Upon a hearing duly had, that court discharged Wong Kim Ark on the ground that he was a citizen of the United States by virtue of his birth in this country, and that the Chinese Exclusion Acts were therefore inapplicable to him.[1] The case was thereupon carried to the United States Supreme Court, which has affirmed the decision of the lower court.[2]

Mr. Justice Gray thus stated the question submitted for the consideration of the Supreme Court: "Whether a child born in the United States, of parents of Chinese descent,

[1] See opinion, 71 Fed. R. 382.

[2] For a more detailed statement of the facts, and the contentions pro and con as they arose in the court below, see the review of that case, 30 AM. LAW REVIEW, 535.

who, at the time of his birth, are subjects of the Emperor of China, but have a permanent domicile and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States, by virtue of the first clause of the Fourteenth Amendment of the constitution, 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.'" Then follows a most elaborate, exhaustive and able consideration of the question of citizenship of the United States. The opinion contains an exceedingly interesting, able and erudite review of the entire question, and may well be said to exhaust all the learning on the subject. The opinion will undoubtedly go down to posterity as the leading and pioneer authority in the United States on the question of what constitutes citizenship under the Fourteenth Amendment to the constitution of the United States. It is too lengthy to give a detailed résumé of it. The syllabus to the opinion published in the Supreme Court Reporter indicates very clearly the rationale of the decision. It is as follows:—

"(1) In construing any act of legislation, whether a statute or a constitution, regard is to be had, not only to all parts of the act itself, and of any former act of the same law-making power of which the act is an amendment, but also to the condition and the history of the law as previously existing, and in the light of which the new act must be read and interpreted.

"(2) As the constitution nowhere defines the meaning of the words 'citizen of the United States,' except by the declaration in the Fourteenth Amendment that 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States,' resort must be had to the common law, the principles of which were familiar to the framers of the constitution.

"(3) Under the common law, every child born in England of alien parents, except the child of an ambassador or diplomatic agent or of an alien enemy in hostile occupation of the place where the child was born, was a natural-born subject.

"(4) The Fourteenth Amendment to the constitution, which declares that 'all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the States wherein they reside,' is affirmative and declaratory, intended to allay doubts and settle controversies, and is not intended to impose any new restrictions upon citizenship.

"(5) It affirms the ancient rule of citizenship by birth within the territory in the allegiance and under the protection of the country, including all children here born of resident aliens, except the children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies during a hostile occupation, and children of Indian tribes owing direct tribal allegiance. It includes the children of all other persons, of whatever race or color, domiciled within the United States.

"(6) The Fourteenth Amendment to the constitution, in the declaration above cited, contemplates two sources of citizenship, and two only, birth and naturalization. Every person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen thereof, and needs no naturalization. A person born out of the jurisdiction can only become a citizen by being naturalized, either by treaty or by authority of Congress, in declaring certain classes of persons to be citizens, or by enabling foreigners individually to become citizens by proceedings by judicial tribunals.

"(7) At the time of the adoption of the Fourteenth Amendment of the constitution, there was no settled rule of international law, generally recognized by civilized nations, inconsistent with the ancient rule of citizenship by birth within the dominion.

"(8) The laws conferring citizenship on foreign-born children of citizens do not supersede or restrict, in any respect, the established rule of citizenship by birth.

"(9) Before the Civil Rights Act,[1] or the Fourteenth Amendment to the constitution, all white persons born within the sovereignty of the United States, whether children of citizens or of foreigners, excepting only children of ambassadors or

[1] April 9, 1866, c. 31, Sec. 1 (14 Stat. 27).

public ministers of a foreign government, were natural-born citizens of the United States.

"(10) The refusal of Congress to permit the naturalization of Chinese persons cannot exclude Chinese persons born in this country from the operation of the constitutional declaration that all persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States.

"(11) Chinese persons born out of the United States, remaining subjects of the Emperor of China, and not having become citizens of the United States, are entitled to the protection of and owe allegiance to the United States so long as they are permitted by the United States to reside here, and are 'subject to the jurisdiction thereof' in the same sense as all other aliens residing in the United States, and their children 'born in the United States' cannot be less 'subject to the jurisdiction thereof.''

"(12) A child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the Emperor of China, but have a permanent domicile and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes, at the time of his birth, a citizen of the United States.''

In arriving at the conclusion that Wong Kim Ark was a citizen of the United States, although born in this country of foreign parents, the court uses the following language: "The foregoing considerations and authorities irresistibly lead us to these conclusions: The Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes. The amendment, in clear words and in manifest intent, includes the children born, within the territory of the United States, of

all other persons, of whatever race or color, domiciled within the United States. Every citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States. His allegiance to the United States is direct and immediate, and, although but local and temporary, continuing only so long as he remains within our territory, is yet, in the words of Lord Coke, in *Calvin's Case*,[1] 'strong enough to make a natural subject, for if he hath issue here, that issue is a natural-born subject;' and his child, as said by Mr. Binney in his essay before quoted, 'if born in the country, is as much a citizen as the natural-born child of a citizen, and by operation of the same principle.' It can hardly be denied that an alien is completely subject to the political jurisdiction of the country in which he resides — seeing that, as said by Mr. Webster, when Secretary of State, in his report to the President on Thrasher's case in 1851, and since repeated by this court, 'independently of a residence with intention to continue such residence; independently of any domiciliation; independently of the taking of any oath of allegiance or of renouncing any former allegiance, it is well known that, by the public law, an alien, or a stranger born, for so long a time as he continues within the dominions of a foreign government, owes obedience to the laws of that government, and may be punished for treason, or other crimes, as a native-born subject might be, unless his case is varied by some treaty stipulations.'[2]

"To hold that the Fourteenth Amendment of the constitution excludes from citizenship the children, born in the United States, of citizens or subjects of other countries, would be to deny citizenship to thousands of persons of English, Scotch, Irish, German or other European parentage, who have always been considered and treated as citizens of the United States."

The dissenting opinion is elaborately drawn and, for the most part, may be said to be predicated upon the recognition of the

[1] 7 Rep. 6*a*.

[2] Ex. Doc. H. R. No. 10, 1st sess., 32d Congress, p. 4; 6 Webster's Works, 526; United States *v.* Carlisle, 16 Wall. 147, 155; Calvin's Case, 7 Rep. 6*a*; Ellesmere on Postnati, 63; 1 Hale P. C. 62; 4 Bl. Com. 74, 92.

international law doctrine. But the error the dissent apparently falls into is that it does not recognize that the United States, as a sovereign power, has the right to adopt any rule of citizenship it may see fit, and that the rule of international law does not furnish, *ex proprie vigore*, the sole and exclusive test of citizenship of the United States, however superior it may be deemed to the rule of the common law. It further does not give sufficient weight, in interpreting the Fourteenth Amendment, to the doctrine which was prevalent in this country at the time of the adoption of the constitution and of the amendment in question, which was undoubtedly that of the common law, and not of international law.

In conclusion, it may be said that the decision sets at rest whatever of doubt may have been formerly entertained on the proposition. It conclusively answers the advocates of the international law doctrine. With respect to the superiority of the international law doctrine over that of the common law, it may be conceded that while the rule of international law, that the political status of children follows that of the father, and of the mother, when the child is illegitimate, may be more logical and satisfactory than that of the common law, which makes the mere accidental place of birth the test, still if the Fourteenth Amendment is declaratory of the common law doctrine, it is difficult to see what valid objection can be raised thereto, nor how the subject of citizenship of the United States can be deemed to be governed by the rule of international law in the absence of an express adoption of that rule, any more than it could be governed by the law of France, or of China.

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