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THE IMMIGRATION ACT AND RETURNING RESIDENT ALIENS.

Prior to the Act of March 3rd, 1903, the right of aliens, who had taken up their residence in the United States, to return from a visit abroad without being subjected to the operation of the immigration acts in force, although on several occasions seriously challenged by the immigration authorities, had been almost uniformly affirmed by the United States courts before whom the question had been brought for adjudication. Changes of phraseology in the Act of March 3rd, 1903, followed in corresponding sections of the present Act of February 20th, 1907, caused the question to be again presented for judicial determination, with the result that the decisions rendered since 1903 have been far from uniform.

Before proceeding to an analysis of the general result of judicial opinion on this point, both before and after the Act of March 3rd, 1903, or of the immigration acts in force before and after that date, attention is drawn to the well known and generally accepted principle of international law which provides that, in the absence of municipal legislation restricting or denying the application of the principle in question, aliens who are permitted by a sovereign State to acquire a domicile within its territorial jurisdiction are, generally speaking, entitled to all the rights and subject to all the obligations which the citizens of the State, in their residential capacity, enjoy or assume.

The foreigner coming to the United States with the purpose of settling in this country—of making it his home—in other words, the alien immigrant, whether he comes as a steerage passenger or as the occupant of a *suite de luxe* on one of the great Transatlantic liners—would stand, therefore, were this international principle the sole criterion by which his rights as a resident are to be determined, in the position of any resident citizen of the United States, except in so far as rights or obligations arising from the citizenship status are concerned. It is, however, an equally well settled maxim of the law of nations that the rights and obligations of resident aliens flowing from the mere fact of domicile as such, exist subject to any condition or restriction which the municipal law of the sovereign may impose.

Congress has the undoubted right to prohibit the entrance into this country of any and all aliens; or, having admitted them, to expel those already admitted, or to prohibit or conditionally permit the re-entrance into the United States of aliens who have already acquired a domicile here. This power is as necessary an attribute of national sovereignty as that of exercising any other act tending toward national self-preservation. Needless to say, the exigency calling for the exercise of this power of general exclusion has never yet arisen, and, in any case would, to say the least, be of doubtful vindication; for, as Hall says, for a State to exclude all foreigners would be to withdraw from the brotherhood of civilized peoples.[1] On the contrary, the avowed policy of this country has been, from the time it became a sovereign State, to stand with its ports open to social and commercial intercourse between its citizens and the nationals of its sister powers. The very act of assuming such a position constitutes in itself an implied guarantee that those aliens who avail themselves of the opportunity to enter shall have the right to claim the privileges and advantages which the law of this country affords its residents, except of course such as flow directly from the fact of citizenship itself.

"Foreigners," says Sir Robert Phillimore, "whom a State has once admitted unconditionally into its territories," (or, it may

[1] Hall, International Law, 4th Ed., page 223.

be added, who have faithfully fulfilled the conditions precedent to admission) "are entitled not only to freedom from injury, but to the execution of justice in respect to their transactions *with subjects of that State.* No country has a right to set, as it were, a snare for foreigners; therefore conditions hostile to their interests, or different from general usage, must be specified beforehand."[2]

"By general international law" says the late Chief Justice of the Supreme Court, "foreigners who have become domiciled in a country other than their own acquire rights and must discharge duties in many respects the same as those possessed by and imposed upon the citizens of that country, and no restriction on the footing upon which such persons stand by reason of their domicile of choice is to be presumed."[3]

Nevertheless, rights claimed by resident aliens based on this principle alone may be seriously modified by provisions of municipal law which the country of domicile may deem it necessary to adopt and enforce; and, up to a certain point, it must be the only judge of its own necessities. If, to again cite Hall, "a country decides that certain classes of foreigners are dangerous to its tranquillity, or are inconvenient to it socially or economically or morally, and if it passes general laws forbidding the access of such persons, its conduct affords no ground for complaint. Its fears may be idle; its legislation may be harsh; but its action is equal."[4] But it is only just that the municipal laws, providing the conditions of entry, should so state them, either directly or by plain implication, that those on whom they are designed to operate shall at least have the opportunity of being cognizant of the conditions under which they may enter into and reside in the country of their prospective domicile.

In endeavoring, then, to determine the rights of resident aliens with reference to the present Act, the question is not whether or not Congress has the power to impose conditions under which they may retain an already established domicile, but whether or not Congress has, in fact, exercised this power.

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[2] Phillimore on Inter. Law, Vol. II, chapter 2.

[3] Lau Au Bew v. United States, 144 U. S. 47.

[4] Hall, *ibid*, page 223.

The decision in the Lau Au Bew case (*supra* page 361) makes it clear that any restriction of the right of the resident alien, dwelling in the United States, to retain his domicile—and to retain means necessarily the right to return to it after a temporary absence undertaken *animo revertendi*—is not to be presumed. Unless, therefore, the present Act contains provisions from which it, expressly or by necessary implication, appears that it was the intention of Congress to restrict the resident alien in or to deprive him of his domiciliary rights, it is hard to see how the general provisions relative to the admission, exclusion or deportation of aliens can, broadly speaking, be deemed to apply to those of the special class mentioned.

As stated by the Court in the case of United States v. Nakashima, (160 Fed. 843, C. C. A., 9th Circuit,) "the act of 1891 had uniformly been held to apply solely to alien immigrants, and not to affect the rights of resident aliens." The fact that the judge, who rendered the opinions in two of the cases most frequently cited to this effect, was the first to enunciate the new doctrine which arose with the enactment of the Act of March 3rd, 1903, namely that the substitution of the word "aliens" in that act for "alien immigrants" in certain sections of prior acts included in its operation *all* aliens (Taylor v. United States, 152 Fed. 1, and *ex-parte* Hoffman 179 Fed. 839) gives his decisions under the prior acts a peculiar interest. In Martorelli's case, (63 Fed. 437) he said, in construing the act of 1891 and those preceding it: "These acts refer to aliens who are imported into or who immigrate to this country, not to persons already resident here, who temporarily depart and return;" and *in re* Maiola, (67 Fed. 114): "The entire body of statute law touching the exclusion of contract laborers conclusively shows that it is directed exclusively against alien immigrants, not against alien residents when returning after a temporary absence," etc.

In the Taylor case, *supra,* the same Court said, in construing the Act of March 3rd, 1903: "The word 'alien' is a broad one with a definition wholly unambiguous and clearly understood by all, lawyers and laymen alike, * * * 'alien immigrant' is a less comprehensive term than 'alien,' and when it is deliberately discarded for the broader term the change is highly signifi-

cant." Of what small significance the Supreme Court thought this change appears in the opinion which reversed the Taylor case on appeal, (207 U. S. 120), where the Court remarked, "We can see no reason to suppose that the omission meant to do more than to avoid the suggestion that no one was within the act who did not come here with the intent to remain," and held that the term "alien" as used in the section of the act, subject to its consideration on the issues before it, did not include alien seamen on ordinary shore leave. But to say that the act affected aliens other than immigrants is far from saying that it affected all aliens, including resident aliens returning from a temporary absence abroad. The Supreme Court's decision seems to be limited to holding first, that the word "aliens," as used in the Act of 1903, did not include all aliens; and, second, that the omission of the word "immigrants" might have this significance and no more: that it extended the operation of the Act to aliens other than those who might come to the United States for the purpose of making it their home.

Nevertheless, the Federal courts have in various instances refused to interfere in behalf of aliens held for deportation under the act, although the fact of prior residence in this country was undisputed. The doctrine originating in the Taylor case, having been demolished on appeal, could no longer serve as a safe precedent for subsequent decisions; and it is interesting to note how far the courts fall short of passing on the broad question as to whether or not the present act or that of 1903 applies to aliens resident in the United States. It may be stated in this connection that the word "immigrants" is omitted in the present act in the sections corresponding to those of the Act of 1903—the same omission which led to the Taylor doctrine; but it is to be observed that these sections deal with the obligations of shipowners or transportation companies "bringing" or "landing" aliens in the United States, and have nothing to do with the designation of what classes of aliens are to be excluded or with the instrumentalities by which such exclusion is to be effected.

In the case of United States v. Watchorn, (164 Fed. 152) decided under the present act, admission was refused an alien by the Board of Special Inquiry established thereunder on the ground

that the act of stabbing another person, of which the petitioner had been convicted while abroad, involved moral turpitude, and under section 2 constituted a justifiable ground of exclusion. The applicant petitioned for a writ of *habeas corpus* to issue, alleging as a specific ground that the act did not apply to an alien previously admitted to the United States, and relied upon rule 4 of the Immigration Rules to the effect that "the provisions of the immigration act do not apply to aliens who have once been admitted to the United States or any waters, territory or other place subject to the jurisdiction thereof, proceeding to or from the continental territory of the United States, except aliens coming from the Canal Zone and except Japanese or Korean laborers coming from Hawaii with passports limited to Hawaii, Mexico or Canada." The Court held this rule to apply to aliens proceeding either from the dependencies to the continent, or *vice versa,* and concluded that "this provision does not apply to the petitioner, who arrived from a foreign country, and not from a dependency." The ground of the petition was that the petitioner belonged to a particular class of resident aliens not subject to the provisions of the act. The Court found that the alien did not belong to such class, and accordingly dismissed the writ. Moreover, the Board of Special Inquiry had found the petitioner to be a convict and excludable on that ground. With this finding the Court did not attempt to interfere. The broad question as to whether or not prior residence in the United States by an alien relieved him from the operation of the statute does not appear to have been presented, as the extract from the petition quoted by the Court indicates that the petitioner relied, for his right to enter, on a departmental rule his version of which the Court did not accept.

In the case of *ex parte* Crawford (165 Fed. 830) the Court held that the relator's prior domicile conferred no rights on her, and denied her petition. This case is apparently that of an alien woman domiciled in the United States, who left the country temporarily intending to return, and who, on her return, was allowed to enter, but "for some months after her arrival conducted herself badly," and still later "apparently lived respectably." The inference is that after her arrival she lived for a while, at least, an immoral life. This case goes, then, no further than to decide

that under the provisions of the present act an alien woman who has returned to the United States for immoral purposes cannot claim immunity from the operation of the act on the ground of prior domicile in this country; the exact conclusion reached by the Circuit Court of Appeals in the Hoffman case. (*Supra,* page 362.)

In the case of *ex parte* Petterson (166 Fed. 536) the petitioner claimed to be entitled to her discharge on *habeas corpus* on the ground that an alien who has in good faith acquired a residence in the United States may, upon his return after a temporary absence in a foreign country, enter without molestation by our immigration officers. The Court was apparently strongly inclined to base its refusal of the writ on the Taylor doctrine, but, waiving that ground, declined to interfere for what appeared to it to be a better reason, saying: "I am strongly inclined to the opinion that the petitioner in the case at bar, even if she had acquired a domicile in the United States prior to her voluntarily leaving the country must be held to be within the prohibition of the Immigration Law of February 20th, 1907, it being conceded that she was a prostitute at the time of her reentry, and was found practising prostitution within three years after such re-entry." The Court then proceeds to show that in its opinion the petitioner never had acquired a domicile in the United States, and closes with these words: "I therefore hold that the evidence contained in the record was of such a nature as to justify the Assistant Secretary of Commerce and Labor in finding * * * that the petitioner did not belong to that class of aliens which, by reason of their having acquired a domicile in this country, should be permitted to return unaffected by our immigration laws."

The case of the United States v. Hook, (166 Fed. 1007) presents the identical question raised by the Petterson case, the Court's view being that "even a person who had been in the United States living a correct life, who then returns to the country of her nativity and citizenship, and then afterwards re-enters the United States for an immoral purpose, seems to me to be clearly within the mischief against which the provisions of the law in question" (the present act) "were directed."

In the case of the United States v. Villet (173 Fed. 500) the

Court held that "the result of these cases" (those above cited) "is, that at least in the case of the importation of women for immoral purposes, the fact that they have resided in this country for a certain period and have then gone abroad does not prevent the operation of the act, in the case of persons who import them back into this country for immoral purposes." The Court further cites in support of its decision the two cases of *in re* Moses (83 Fed. 995) and *in re* Kleibs (128 Fed. 656). But the Moses case did not involve the question of the right of a domiciled alien to return, but that of the wife and children of an alien domiciled in the United States without having acquired citizenship to join him in this country; whereas it appears from the brief decision in the Kleibs case that the alien seeking to return was one of those whose entry into the United States was prohibited, and who had, therefore, never acquired a lawful domicile in this country.

Finally in the case of *ex parte* Hoffman (*supra* p. 362) the question was whether or not an alien woman who, after her first entrance into the United States, had regularly engaged in the practice of prostitution was, after leaving this country and re-entering it to take up her old occupation, subject to the operation of the present act. The Court denied the petition for the writ presented on her behalf; but apparently considered that the only point before it was "the single question * * * whether the provisions of the Act of 1907 apply to an alien who, after original entry into this country, has remained here more than three years, and then, after a brief absence abroad, again seeks to enter the United States."

It is, however, to be noted that neither in the Hoffman case nor in any one of the six cases which precede it in the present discussion has the "single question" as to whether or not an alien domiciled in this country who returns thereto after a temporary absence *animo revertendi* is subject to the provisions of the immigration act been presented or decided. In the Crawford, Petterson, Hook, Villet and Hoffman cases the true question was whether or not the act is operative as to alien prostitutes with a prior residence in this country; in the Watchorn case as to whether or not it applies to alien convicts; in the Kleibs case

whether the prior act covered the case of an alien who had not acquired a lawful domicile; and in the Moses case as to whether it was applicable to aliens who had never acquired any domicile whatsoever.

The cases of Rodgers v. the United States (152 Fed. 346) and the United States v. Nakashima (160 Fed. 844) are the leading authorities in support of the view that the Act of 1903 was not applicable to returning aliens lawfully domiciled in the United States.

The Rodgers case, decided by the Circuit Court of Appeals, Third Circuit, was appealed from the Pennsylvania District Court, which held that the petitioner was not an immigrant in the sense of the Act of 1903, and that, after an alien has once become domiciled, he is entitled to the same liberty of movement enjoyed by residents and citizens alike; and until he abandons his residence he is no longer amenable to the excluding provisions of the immigration law. On appeal the Court was "clearly of the opinion that an alien who has acquired a domicile in the United States cannot thereafter, and while still retaining such domicile, be legally treated as an immigrant on his return to this country after a temporary absence for a specific purpose not involving change of domicile."

The Nakashima case, decided by the Circuit Court of Appeals of the Ninth Circuit, presents a similar state of facts, namely the case of a resident alien who, on return to the United States, was barred under the Act of 1903 on the finding by the Board of Special Inquiry that he was afflicted with a dangerous contagious disease; and, following the Rodgers case, lays stress on the fact that aliens resident in the United States acquire rights by virtue of such residence of which they are not deprived by a temporary absence from the country. On this point the Court states that "aliens have always been allowed to reside in the United States and acquire property there * * * and their right to return to the United States, after having temporarily left the same with intention to return, has always been recognized. It is not to be presumed that Congress intended to change the whole trend of its prior legislation in regard to alien residents, construed as that

legislation has been by the Courts, without expressing that intention in terms so clear as to leave no room for doubt."

In marshalling the foregoing decisions for the purpose of comparison, the opposing views taken may be summed up as follows: In the Taylor case and in those which purport to adopt its doctrine that the omission of the word "immigrants" in the acts of 1903 and 1907 necessarily means that the term "aliens" means "all aliens", including those domiciled in this country, though it must be admitted that in the Hook and Villet cases the Court shows a disposition to limit this interpretation to the case of alien prostitutes; in the Rodgers and Nakashima cases the contention first, that the omission of the term "immigrants" does not give the term "aliens" the broad meaning attributed to it by opposing decisions, and second, that the rights of domicile acquired by resident aliens cannot, under the provisions of the act, be deemed subject to restriction or abrogation by mere temporary absence.

It must be borne in mind that the Taylor case was decided under the Act of 1903; and the Watchorn and following cases under that of 1907; and that, in so far as the latter may be said to follow the doctrine originating in the Taylor case, the Courts seem to have taken it for granted that it is equally applicable to the present act. An examination of section 25 of the latter would seem, however, to show that in assuming that this doctrine applies to both acts the Courts have overlooked a most significant change in the Act of 1907.

Section 24 of the Act of 1903 provides for the appointment of immigration officers with power to admit aliens; but that every alien who may not appear to the examining inspector to be clearly and without a doubt entitled to land shall be detained for examination in relation thereto by a Board of Special Inquiry. Section 25 provides "that Boards of Special Inquiry shall be appointed by the commissioners of immigration at the various ports of arrival as may be necessary for the prompt determination of all cases of *aliens* detained at such ports under the provisions of law."

In the present act section 24 is repeated, and section 25 likewise, except that in the latter the term "aliens" is set aside, and the term "immigrants" is substituted therefor.

That this change was deliberate and not the result of inadvertence is shown by the history of the bill from its presentation to its passage. As introduced by Senator Dillingham to the Senate on February 14th, 1906, section 25 contains the word "immigrants." On that date it was read and referred to the Committee on Immigration. On March 29th it was reported with amendments with the word "immigrants" stricken out, and "aliens" substituted. In this shape it passed the Senate on May 23rd, 1906. On May 24th it was referred in the House to the Committee on Immigration and Naturalization, and on the 29th reported with an amendment and committed to the Committee of the whole House on the state of the Union, and ordered printed with the word "aliens" stricken out and "immigrants" again in its place. On June 30th it was again ordered printed as amended by the House, and submitted to conference. On its return from conference the word "immigrants" was retained.

It is significant that during the period of time extending from the date of the presentation of the bill until its passage the following cases, touching directly on the point as to whether or not the Act of 1903 operated on *all aliens,* were decided in the Federal courts: The Aultman case, (143 Fed. 922, Feb. 19th 1906) where the act was held not to apply to a resident alien on his return from a temporary absence in Canada; the Buchsbaum case (141 Fed. 221, Dec. 12th, 1905), to the same effect; the Rodgers case, (152 Fed. 346, Feb. 13th, 1907), sustaining the Buchsbaum decision on appeal; and the Taylor case (152 Fed. 1, Jan. 16th, 1907), which held flatly that the act applied to all aliens.

Thus the question of whether or not the Act of 1903 applied to resident aliens came squarely up for judicial determination at a date preceding that on which the bill was presented, and Congress must therefore have been cognizant of this fact; and it does not seem unreasonable to conclude that the change in the present act was the result of the intention to remove any doubt which had arisen by reason of the omission of the term "immigrants" from the act then in force, particularly in view of the long established and hitherto uniformly accepted doctrine that the immigration acts did not apply to foreigners who had acquired a domicile in this country. The least that can be said, however, with regard to

the significance of this change is that whatever ground may have been deemed sufficient to justify the view that the Act of 1903 applied to all aliens, based as it was on the sole circumstance of the absence of the term "immigrants" in that act, must necessarily have no further bearing in the face of the deliberate substitution of terms in the present act, and particularly where that substitution occurs in the section defining the jurisdiction of the only instrumentality vested with power to exclude in the first instance.

It seems, then, that, shorn of whatever significance may have been supposed to result from the absence of the term "immigrants," the present act must be classified with those antedating 1903, uniformly held by the Courts not to apply to domiciled aliens, unless it contains additional provisions which indicate clearly that prior domicile shall not be a bar to its operation.

Section 21 provides that aliens found within three years after entry to be unlawfully in the United States are subject to deportation under the act. Unlawful presence in such cases must be either the result of unlawful entry in the first place, or of acts done by the alien subsequent to a lawful entry, which make the presence of the alien in the country unlawful. The only condition imposed by the act on the right to *acquire* a lawful residence is the fact of lawful entry; and if the rights acquired by such domicile are subject to restriction or abrogation in specified cases, this must appear plainly from the provisions of the act itself.

Since section 2 provides that disqualified aliens can never enter lawfully, it follows that they can never acquire a lawful domicile on which the claim to retain the right to re-enter can be predicated. Further, the present act places a restriction on the rights ensuing from domicile even after lawful entry with regard to certain designated classes of aliens—prostitutes and persons connected with houses of prostitution—for, under section 3, as amended by the Act of March 26th, 1910, persons who become members of the objectionable classes specified therein can, at any time after entry, be deported. This amounts to a specific declaration on the part of Congress that, notwithstanding that they have obtained a lawful residence in this country, such aliens are subject to expulsion, and the plea of domicile cannot avail them—that, even after lawful entry, aliens who fall beneath the ban of

section 3 forfeit their right to retain their domicile in the United States.

In these instances only does the statute provide that rights inherent in domicile lawfully acquired are, under its provisions, subject to abrogation; and to this extent only does the municipal law curtail domiciliary rights which, in the absence of municipal enactment, international law presumes.

It seems hardly worth while to comment on the question of a supposed right to re-enter based on a former residence unlawfully acquired, and undetected by the immigration authorities except to state that, no lawful domicile ever having been acquired in such cases, there is no domicile to resume. Again, with regard to persons subject to deportation under section 3 who, after a blameless residence in this country, are found on return from abroad to have assumed the objectionable status during their absence, the claim of right to re-enter based on prior lawful residence would be equally unfounded; for the section provides that by the mere fact of assuming that status the right to further residence in this country is forfeited.

The result of section 2 may be said in this connection to prohibit the acquisition of domicile by all disqualified aliens mentioned therein; of section 3, to prohibit the retention of domicile by those aliens only who, after lawful entry, assume the objectionable pursuits specifically set out; and the result of both in all other respects, construed together with section 21, to leave all rights flowing from lawful domicile intact in the case of aliens who have fulfilled the one condition of lawful entry.

The position of the alien who, acting in good faith, has established his right to land in the United States is that he has fulfilled the one condition necessary to the acquisition of domicile imposed upon him by the immigration act. As the result of fulfilling this condition he is qualified to retain his domicile in this country, and as long as he does not forfeit his right of retention in the way or ways designated by the act, he remains in full possession of all the rights accruing to lawful domicile guaranteed him by the law of nations. His domiciliary rights might have been expressly made subject to abrogation as were those of the resident alien prostitute; but the fact remains that the act con-

tains no provisions to that effect. However physically or mentally stricken while lawfully an actual resident of this country, such a person is not liable to expulsion; and it seems no more than fair to assume that where Congress would not expel it would not exclude, particularly where, as in the Rodgers and Nakashima cases, the sufferer is a victim of a misfortune which he can neither foresee nor prevent. If it is urged that, by admitting the returning alien under such conditions, citizens of this country with whom he must necessarily come into contact are liable to incur those injurious results from which it was the very purpose of the immigration acts to shield them, it may be said, apart from the fact that the provisions of the present act do not seem to have been constructed to meet the specific case, that when the alien is allowed to enter in the first instance, he is admitted as a human being, subject to human infirmities, moral, mental or physical. The risk of contagion to which the people of the United States may be subjected as the result of his being permitted to live among them and associate with them, and exercise his domiciliary rights in the natural and proper course of his relations with them, is one which Congress, by the fact of permitting him to enter as an immigrant, voluntarily assumes; and to impute to Congress the intention or desire to exclude such a resident on returning from a trip abroad, during which he has been unfortunate enough to contract a disease, mental or physical, which would bar his admission if coming as an immigrant, would seem not less unreasonable than to suggest that he should be subject to expulsion because unlucky enough to become similarly afflicted while physically residing in the United States.

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