QUESTION OF CITIZENSHIP.

How it Was Considered by Judges Norval and Cobb.

NATURALIZATION IN THE TERRITORY.

Conclusions Reached in the Celebrated Thayer-Boyd Gubernatorial Case in the Supreme Court.

When the state supreme court early in May handed down its decision in the celebrated Thayer-Boyd case, THE BEE published a synopsis of the opinion of the court and also outlined the dissenting opinion of Judge Maxwell. The case attracted attention throughout the west as well as the east. Many lawyers, who are greatly interested in the law points involved, requested THE BEE to publish the full text of the Maxwell opinion. This was done in a recent issue.

Requests have also been made upon THE BEE to publish the full text of the opinion of the court, written by Judge Norval. Chief Justice Cobb concurring. It is presented below in full:

The Opinion.

We are met at the outset of our investigation with the proposition that this court has no jurisdiction to hear and determine the right of the respondent to hold the office of governor.

Section 2 of article 6 of the constitution confers upon the supreme court original jurisdiction in mandamus, quo warranto and habeas corpus.

Section 701 of the code of civil procedure provides that: "An information may be filed against any person unlawfully holding or exercising any public office or franchise within this state, or any office in any corporation created by the laws of this state, or when any public officer has done or suffered any act which works a forfeiture of his office," etc.

Section 710 provides that: "When the defendant is holding an office to which another is claiming the right, the information should set forth the name of such claimant, and the trial must, if practicable, determine the rights of contesting parties."

Section 717 provides that: "When an information is upon the relation of a private individual, it shall be so stated in the petition and proceedings, and such individual shall be responsible for costs, in case they are not adjudged against the defendant," etc.

THIS COURT HAS JURISDICTION.

These, as well as other statutory provisions not quoted, give a party who claims a public office the power to institute in the supreme court, quo warranto proceedings in his own name, to test the right of the incumbent to discharge the duties of such office. Authority is likewise conferred upon the attorney general to bring such an action.

It is claimed that an information in the nature of a quo warranto will not lie against one holding the office of governor.

MANDAMUS WILL LIE.

In the State vs Thayer, 47 N. W. Rep., 704, we held that mandamus will lie against the governor to compel the performance of an official duty, which is purely ministerial. And at the present term, in State vs Elder, 47 N. W. Rep., 710, it was decided that it was the duty of the speaker of the house of representatives immediately upon the organization of the house, and before proceeding to other business to open and publish the returns of the election for officers of the executive department, and that the duty thus enjoined upon the speaker by the constitution was a ministerial duty, which would be enforced by mandamus.

While it is true the executive and judicial departments of the state government are equal, co-ordinate and independent branches of the state government, and the officers of one department are prohibited by the constitution from exercising any powers or duties properly belonging to the other, yet it does not logically follow that the judiciary is powerless to hear and determine whether the person discharging the duties of the office of governor is disqualified by the constitution from holding the office. This court, by entertaining a proceeding brought to test the right of the relator and the respondent to the office of governor, does not exercise, or assume to exercise, any power belonging to the executive department. The sole object and

PURPOSE OF THIS PROCEEDING

is to ascertain who, under the constitution and laws, is entitled to perform the duties of that office.

Mr. High, in his book on Extraordinary Legal Remedies, section 654, says: "The office of governor of a state is regarded as a civil office of such a nature as to be amenable to the exercise of the jurisdiction under discussion. And where, by the constitution and laws of a state, its highest judicial tribunal is vested with jurisdiction by information in the nature of a quo warranto to prevent the citizens of the state from usurping its offices and franchises, an unlawful intrusion into the chief executive office of the state may be tried by this proceeding to judgment of ouster. In such case a plain distinction is recognized between a department of the government and the person assuming to exercise its duties, and the judicial branch of the government is in no manner interferes with, or attempts to control the legitimate functions of the executive department, but only seeks to protect the people from an unlawful usurpation of a high public office or franchise." The text of the learned author is fully sustained by the able opinions of the court in the case of the attorney general vs. Bartow 4 Wis., 750.

But it is contended that the constitution having provided that the contested elections for all officers of the executive department shall be determined by the legislature, that remedy is exclusive of all others.

The authorities cited in the brief of the respondent sus ain the proposition. But the holdings of this and other courts are the other way, that the remedy by contest is not the sole remedy.

In Kane vs. People, 4 Nebraska, 509 was a proceeding by quo warranto, brought in the district court of Cheyenne county by Henry Snyder to test the right of Thomas Kane to hold the office of county treasurer of that county. On error to this court, objection was made that the court had no jurisdiction. In the opinion prepared by the then Chief Justice Lake, it was held that the remedy by contest is merely cumulative and that quo warranto is a concurrent remedy.

In state vs. Stein, 13 Nebraska, 529, was a proceeding by quo warranto to try the right of the respondent Robert P. Stein to the office of county treasurer of Kearney county. It was ruled that the supreme court had jurisdiction.

To the same effect are attorney-general vs. Barstow, 4 Wisconsin, 750; state vs. Hessmore, 14 Wisconsin, 115, and people vs. Holden, 38 California, 123.

While the constitution declares that contests of the election of officers of the executive department are to be tried by the legislature, the same instrument, as already stated, confers jurisdiction in quo warranto proceedings upon the supreme court.

It was not the intention of the framers of the constitution that the remedy by contest should impair the right of the judiciary to inquire into the authority by which any person assumes to exercise the duties of an office of the executive department, and to remove him therefrom, if he is constitutionally ineligible to be elected to or hold such office. We have no doubt that this court has jurisdiction of the case.

WHO IS ELIGIBLE?

It appears from the pleadings that the respondent received a plurality of the votes cast for the office of governor at the general election held in November, 1890. It is claimed by the relator that the defendant did not become a citizen of the United States until after such election, and therefore he was not eligible to nor legally elected to such office.

Section 3 of article 5 of the constitution reads: "No person shall be eligible to the office of governor, or lieutenant governor, who shall not have attained the age of thirty years, and been for two years next preceding his election a citizen of the United States and of this state. None of the officers of the executive department shall be eligible to any other state office during the period for which they shall have been elected."

THE WORD "ELIGIBLE"

is defined in the Century dictionary to be "qualified to be chosen; legally qualified for election or appointment." Substantially the same definition of the word is given in Webster's dictionary. In this sense the word "eligible" is used in the constitution.

The above constitutional provision was intended as a restriction upon the electors in choosing their governor and lieutenant governor. The people are prohibited from selecting any person to fill either of these offices who has not been a citizen of the state and of the United States for at least two years next preceding the election at which such officers are to be chosen, or who is under the age of thirty years.

WHEN ELECTION IS VOID.

Section 97 of chapter 26, compiled statutes provides that "when the person whose election is contested is found to have received the highest number of legal votes, but the election is declared null by reason of legal disqualification on his part, or for other causes, the person receiving the next highest number of votes shall not be declared elected, but the election shall be declared void."

It is plain, whether we construe this section and the quoted provision of the constitution together or separate, that the effect of a person receiving a plurality of votes for the office of chief executive of the state, who does not possess the constitutional qualifications to be chosen is to avoid the election and not to elect the person receiving

THE NEXT HIGHEST NUMBER OF VOTES

for that office. State vs McMillen, 23 Neb., 395; in re Corliss, 11 R. I., 638; Deyden vs Swinburne, 20 W. Va., 134; State vs Sullivan, 47 N. W. Rep., 892; Saunders vs Haynes, 13 Cal., 154; Commonwealth vs Cluley, 56 Pa. St., 270; Com. Hanley, 9 Id., 513; State vs Jenkins, 43 Mo., 261; Gulielcvs New, 14 Ind., 95; State vs Swearingen, 12 Ga., 23; State vs Smith, 14 Wis., 497; State vs Gastinel, 20 La. An. 114; People vs Clute, 50 N. Y., 451.

The question is so fully considered in these cases that further discussion is entirely unnecessary.

The record shows that the respondent, James E. Boyd, was born in Ireland of alien parents in the year 1854, and that he was brought to this country when ten years of age by his father, Joseph Boyd, who since the year 1844 has resided in the state of Ohio. Joseph Boyd on March 5, 1849, at Zanesville, Muskingum county, Ohio, before the common pleas court of that county, declared his intention to become a citizen of the United States, and in October, 1850, the said Joseph Boyd duly made application to the common pleas court of said Muskingum county, to be admitted to become a citizen of the United States, and he was thereupon by the order of said court duly naturalized.

On December 26, 1890, the respondent before the district court of the United States for this district declared his intention to become a citizen of the United States, and at the same time made application to be admitted to become a naturalized citizen. By the order of the court he was on said last named date admitted to citizenship.

Did the naturalization of Joseph Boyd in 1850 make the son a citizen?

Section 4 of the act of congress, entitled "An act to establish a uniform rule of naturalization," etc., approved April 14, 1802, the same being section 2172 of the revised statutes of the United States, reads as follows:

"Sec. 4. The children of persons who have been duly naturalized under any law of the United States, or who, previous to the passing of any law on that subject by the government of the United States, may have become citizens of any one of the states, under the laws thereof, being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof; and the children of persons who now are, or have been citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof; but no person heretofore prescribed by any state, or who has been legally convicted of having joined the army of Great Britain during the revolutionary war, shall be admitted to become a citizen without the consent of the legislature of the state in which such person was prescribed."

Under the provisions of this section the minor children of an alien, born out of the United States, if residing in the United States at the date of the naturalization of their parents, become ipso facto citizens by such naturalization. But it does not have the effect to make the children citizens if they are more than twenty-one years of age at the time the parent is admitted to citizenship. As the respondent was about fifty-six years old when his father was naturalized it is obvious that such naturalization did not make the son a citizen. Dryden vs Swinburne, 20 West Va., 89; State vs Andriano, 92 Mo. 70, Gunn vs Habbard, 97 Mo., 311; State vs Penny, 10 Ark., 521; O'Connor vs the State, 9 Fla., 215; U. S. vs Keilar, 13 Fed. 82; Campbell vs. Gordon, 6 Cranch, 176.

We have found no case and none has been cited by counsel, which holds that the naturalization of a parent makes his children, who are at the time over the age of twenty-one years, citizens.

The respondent in his answer, alleges upon information and belief, that, prior to October, 1854, his father completed his naturalization in strict accordance with the laws of congress on that subject. This allegation is insufficient to show that Joseph Boyd was a citizen of the United States. It is nowhere averred that any court admitted him to become a citizen prior to October, 1890. The name of the court should be averred, so as to show that the proceedings were before a tribunal having jurisdiction of the matter. The order of a court admitting an alien to citizenship is a judicial act in the nature of a judgment. Such proceedings are required to be a matter of record. The record must be pleaded and proved the same as any other judicial record. Naturalization cannot be established by parol. Exparte Knowles, 5 Cal. 300; Rump vs The Commonwealth, 30 Pa. st. 475; In re Clark, 13 hard, 444; Morgan vs Dudley, 18 B. Mon. 693; Green vs Sales, 31 Fed. 106; Dryden vs Swinburne, supra, State vs Penny, 10 Ark. 621; Spratt vs Spratt, 4 Peters, 1393; Bode vs Trimmer, 23 Pac. Rep. 187.

The fact that Joseph Boyd for more than forty years voted at elections and held public offices in the state of Ohio falls far short of raising a presumption that he was admitted to citizenship prior to October, 1890. It is clear that voting and holding office do not make an alien a citizen of the United States, nor raise a presumption of such.

The fact that Joseph Boyd was admitted and declared a citizen in October, 1890, in the county where he had lived for forty years, and in the same court in which he declared his intention of becoming a citizen on March 5, 1849, strengthens the conclusion that he was not naturalized until October last. Nor does the fact that James E. Boyd had at each election in this state exercised the elective franchise, and has frequently been elected to hold important public offices, make him a citizen of the United States. This proposition is sustained by the following authorities: Dryden vs Swinburne, supra; Laing vs Randall, 4 Dillon, 485; Maloy vs Dudon, 25 Fed. Rep., 623.

It is evident that the numerous oaths taken by the respondent to support the constitution of the United States and of this state did not make him a citizen of the United States. In order that

AN ALIEN MAY BE ADMITTED

to citizenship, he must prove to the satisfaction of some court having jurisdiction of the matter, the facts required by the act of congress on that subject, and at the same time declare on oath before such court, "that he will support the constitution of the United States, and that he absolutely and entirely renounces and abjures all allegiance and fidelity to every foreign prince, potentate, state or sovereignty, and particularly by name to the prince, potentate, state or sovereignty of which he was before a citizen or subject." United States revised statutes, section 2,165.

Congress has established a uniform rule of naturalization and an alien cannot be admitted to citizenship thereunder unless he follows the mode prescribed by the naturalization laws. The oaths taken by the respondent to uphold the federal constitution do not appear to have been administered by a court having jurisdiction, nor is it averred that he declared in any of the oaths that he absolutely renounced all allegiance to the queen of Great Britain and Ireland, of whom he was a subject.

It is insisted that Joseph Boyd having declared his intention to become a citizen while James E. Boyd was a minor, the son took the status of the father, and the naturalization of the respondent in December, 1890, relates back to and makes him a citizen from the time his declaration of intention. This position is untenable. The provision of the constitution elsewere quoted makes a person ineligible to the office of governor who is not a citizen of the United States for two years prior to the election. The respondent being not naunified to be elected, when the votes were cast, his election was a nullity. His subsequent naturalization could not give validity to that which was void. Naturalization is not retroactive, and the doctrine of relation has no application to the case at bar. Dryden vs Swinburne, 20 W. Va., 134; Henry vs Brooklyn Benevolent Society, 39 N. Y., 35; Priest vs Cummings, 20 Wend., 342.

Judge Green in his opinion in Dryden vs. Swinburne, supra, says: "Another position taken is that the naturalization of Ralph Swinburne in 1870 related back to 1852, when he made his declaration, and he is therefore now to be considered as a citizen from that date. No authority is cited to sustain this novel position except a number of cases on entirely distinct subjects, in which for reason applicable to such cases the law permits in certain cases a relation back. Thus an office found when returned relates back and rests title in the commonwealth from the finding. So the appointment of an administrator for certain cases relates back to the death of the testator. A patent when issued relates back to the entry. A sale when confirmed by a court of equity relates back to the time of the sale.

THE ASTUTE COUNSEL

could have found no doubt many other cases, where the law allows such relation back, sometimes for all purposes and other times for certain purposes only. On the other hand innumerable cases might be cited where there is no such relation back. Each case of this character is based on reasons applicable to it specially. But what possible bearing they or the reasons on which they are based have upon the present case I confess I am unable to perceive. The only matter referred to in this connection, which has any reference to naturalization is not a judicial case but the action of the federal government many years since in demanding the release of an Austrian, Martin Coster, who had declared the intention of becoming a citizen of the United States, and who was afterward unjustly imprisoned by the Austrian government. This shows that a person who has declared his intention to become a citizen of the United States has certain rights which our government will protect, doubtless he has many rights which the courts will protect, but this certainly does not show that he has all the rights of a citizen. If it shows anything which has any relation to the matter before us it shows too much. If Martin Coster had the rights of a citizen he had them before he was naturalized, for when he was arrested he had not been naturalized."

In the New York case, Woodruff J., in speaking for the court, says: "It is clear, I think, that we are to seek for the legal effect of naturalization in the statutes by which it is authorized and in such legislation as has been been had in our own state on the subject. It is not to be determined upon a mere definition of the term 'naturalization.' But if it were, it might be most logical and more consistent with sound principles to say that the subject when naturalized began to have capacities pertaining to citizenship available for the future. If it were conceded that the congress of the United States have power to declare the effect of naturalization, so as to give to the subject thereof all the rights retroactively, as well as prospectively, which he would have or would have had of native born, of which, in respect to real estate, the transfer, transmission and descent of which is peculiarly matter of state policy, there is great room for doubt; I think it is clear that the naturalization laws of the United States admit no such construction.

"Under those laws the applicant is admitted to citizenship upon complying with certain prescribed conditions. He becomes a citizen. He is put in a condition or acquires a character in which he can have and enjoy all the rights and privileges which by law pertain to citizenship, and that is all. But all this is according to the plain reading of the laws prospective. His capacity then begins to be useful or efficient to enable him to enjoy whatever pertains to his new character."

We therefore reach the conclusion that the naturalization of the respondent by the order of the United States court last December has no retroactive effect, and in reaching this conclusion we have not overlooked the authorities cited by counsel for respondent upon this branch of the case. They are not analagous to the case before us.

There is another good reason for holding that the naturalization of James E. Boyd does not relate back to the time his father took out his first papers. Such papers were of

NO AVAIL TO THE SON

when he made application to be admitted to citizenship. James E. Boyd was committed, before he was naturalized, to declare his intention to become a citizen. Under the acts of congress, James E Boyd, being under the age of twenty-one years when he came to the United States, was authorized to do this, at the same time he applied for citizen papers. It was all one transaction, on the same day. The doctrine of relation could not therefore apply in this case.

It is urged that the respondent became a citizen of the United States by the admission of the territory of Nebraska as a state into the union. We will now examine the questions thus presented. The enabling act, approved April 19, 1864, provides that whenever constitution shall be formed by the people of the territory of Nebraska, in compliance with the provisions of the act, "it shall be the duty of the president of the United States to issue his proclamation, declaring the state admitted into the union on an equal footing with the original states, without any further action whatever on the part of congress." Afterward on March 1, 1867, the president of the United States issued his proclamation, wherein he declared and proclaimed the fact "that the fundamental conditions imposed by congress on the state of Nebraska, to entitle that state to admission to the union, have been fulfilled and accepted, and the admission of said state into the union is now complete."

The question for consideration is whether the admission of Nebraska as a state into the union on an equal footing with the original states, as provided by the enabling act, and the proclamation of the president, made all the inhabitants therein, ipso facto citizens of the United States. Similar language is found in the enabling acts by which various territories were authorized to form state governments in order to be admitted to the union as states. It will be observed that the enabling act of Nebraska contains no provision limiting the right of suffrage to any class of the inhabitants, upon the state coming into the union. The inhabitants of the territory at the time the state government was formed, were subject to the jurisdiction of the United States, and were already citizens of the United States excepting such as were aliens. These inhabitants who were citizens of the United States, were none the less citizens, by reason of the fact that they were inhabitants of the territory. Citizens of the United States do not lose their citizenship by changing their residence from a state to a territory. Citizens of the United States residing in the District of Columbia, and in the territories are such citizens to the same extent that they would be if residing in one of the states. Prentis vs. Brennan, 2 Black., 134; Picquit vs. Swan, 5 Mason 54.

It may be safely stated that about as large a proportion of the inhabitants of the territory of Nebraska were citizens of the United States as of the inhabitants of any of the states of the union. There was no occasion therefore for congress to intend the admission of the state into the union as an act of collective naturalization. There was no more urgency or necessity for such a collective act of

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than there would be to pass from time to time acts for the collective naturalization of aliens residing within the states. If congress had intended the admission of new states into the union, under the various enabling acts, to operate as a naturalization of all aliens residing therein, it is reasonable to suppose that it would have been so provided in the acts themselves in unmistakable terms.

The constitution of the United States has conferred upon congress the power to pass naturalization laws and congress has passed many acts on that subject. If congress intended to extend the right of naturalization of aliens by the enabling act, outside of and beyond the various acts of congress upon that subject, it would have been so provided in the enabling act in language so plain and explicit as not to require construction. Applying the accepted rules of statutory construction it cannot be held that the enabling act was intended to relate to naturalization, either individually or collectively, and in contravention of the naturalization acts of congress, without it being so specifically stated in the enabling act.

Collective naturalization is where the government by treaty or cession acquires the whole or a part of the territory of another nation, and takes to itself the inhabitants thereof. For illustration of this we refer to the treaty of Paris, by which we acquired Louisiana territory; the treaty with Spain, by which we acquired Florida; the treaty of Guadalupe Hidalgo, by which we acquired New Mexico and California; and the resolution of congress, by which the republic of Texas was annexed to the United States. The power to confer such collective naturalization was not expressly conferred upon congress by the constitution, but doubtless exists in the government as a necessary part of the treaty making power. It being granted that the power exists in congress to acquire territory by purchase, treaty or cession, then it follows that the terms of such purchase, treaty or cession may provide for the naturalization in solido of such of the inhabitants of the acquired territory or country as may elect to adhere to the new government. This is a matter of political necessity, the reasons for which are clear. These inhabitants are presumably natives of the soil; they constitute the body of the people; there are no courts of the new government established in such acquired territory to administer the uniform rule of naturalization established by congress, nor will there likely be in the near future. Without this power, then, the whole body of the inhabitants of the acquired territory must of necessity remain for a long and indefinite period without allegiance to or the rights of citizenship in any country.

This principle cannot, however, be applied to Nebraska, for the reason that the territory of Nebraska, as well as the inhabitants thereof, were already within the jurisdiction of the United States and subject to the general government. Federal and territorial courts had been established in the territory with ample power to naturalize foreigners, and were in the daily exercise of such powers. But a small per cent of the inhabitants were of foreign birth, and most of these had taken the initiatory steps to become naturalized by judgment of the courts under the general laws of congress.

This question is made more clear by reference to the language of the enabling act. It provides that the state shall be admitted into the union on an equal footing with the original states. It was the state which was admitted into the union. The land, personal property and inhabitants were already within the jurisdiction of the federal government. The state, in its municipal and sovereign capacity, was a new creation. It was the state that was newly created in its sovereign capacity that was admitted into the union. It may be said that the inhabitants make the state; nevertheless the state in its political organization is entirely different and distinct from the inhabitants who may happen to reside therein.

The words "equal footing with the original states," cannot be construed to have any reference to the status of the inhabitants. The word "footing" is defined "firm position; established place; relative condition." We must look to the constitution of the United States to find out what the "firm position," "established place," and "relative condition" of the various states are. The rights of the states thus referred to are defined in the constitution, such as having representation in the respective houses of congress, and in the electoral college, and other relative rights more particularly described in article 4, of the constitution of the United States. The position and relative rights of the states set forth and defined in the constitution, which were possessed by the original states by virtue of the adoption of the constitution of the United States, were what were intended to be secured to Nebraska by the enabling act.

If that act is to be construed as fixing the status of inhabitants, why have it relate to citizenship any more than to property rights, or personal rights? If it was intended to fix the status of the inhabitants, as was the status of the inhabitants of the original states, then we are led into interminable difficulties by reason of the fact that these rights were different in the various states. The personal rights of the inhabitants of the original states, with reference to the elective franchise are collated in Minor vs Hapersett, 21 Wall, 172, by which it will be seen that they were not alike in any two of such states.

It may be suggested, however, that the inhabitants of the original states became ipso facto citizens of the United States. The reason for that was that the people of the original states were the persons who instituted themselves together to form a nation and consequently were its original citizens. Minor vs Happersett, supra. The inhabitants of Nebraska were not creating a new and independent government and by the admission of Nebraska into the union they did not throw off their allegiance to a foreign power. The principle which fixed and determined the status of the original states can have no application to this case.

The language of the enabling act has no reference to the status of the inhabitants of the original states at the time the state came into the union, any more than it can be said it has reference to the looking at the relative rights of the original states at the time when a union of states was formed. It is self-evident that no territory can now be admitted into the union as a state, with all the rights and privileges which were possessed by the original states when they came into the union. This may be illustrated by reference to the constitution of the United States which, since its adoption, forbids the states from exercising powers and privileges which the original states could exercise at the time the federal union was formed.

It is not an answer to this illustration to say that Nebraska was admitted into the union before the adoption of the fourteenth amendment, because we find substantially the same language in the enabling acts by which new states have been admitted into the union since the adoption of that amendment. We think it clear, both from the language of the enabling act and from constitutional and political history, that the provisions of the enabling act by which Nebraska was admitted into the union on an equal footing with the original states, without any further action whatever on the part of congress," "that is to say, was admitted with the same relative rights which the original states held under the constitution at the date Nebraska was admitted. In this view the words "equal footing" could not be construed as naturalizing all aliens who were then inhabitants of the state, for the reason that aliens residing at that time within the limits of the United States were not citizens of the United States.

If it be true that the admission of a state naturalizes all aliens who were inhabitants of the territory at the time, then all that need be done in order to naturalize emigrants to be transferred from allegiance into citizenship would be to take up their abode in a territory prior to its admission as a state into the union. Congress

FORESAW THE DANGER

attending the naturalization of aliens before they had acquired a knowledge of the constitution and laws of our country, and consequently required a residence for a period of five years, and in addition to that proof showing that they were of good moral character and attached to the principles of the constitution of the United States before they could be admitted to citizenship. This policy of our government was not overturned by the understanding that aliens became citizens by the mere admission of a territory as a state. This rule would admit to citizenship foreigners who do not possess the qualifications to be admitted to American citizenship and that, too, without the consent

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that there would be to pass from time to time acts for the collective naturalization of aliens residing within the states. If congress had intended the admission of new states into the union, under the various enabling acts, to operate as a naturalization of all aliens residing therein, it is reasonable to suppose that it would have been so provided in the acts themselves in unmistakable terms.

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This principle cannot, however, be applied to Nebraska, for the reason that the territory of Nebraska, as well as the inhabitants thereof, were already within the jurisdiction of the United States and subject to the general government. Federal and territorial courts had been established in the territory with ample power to naturalize foreigners, and were in the daily exercise of such powers. But a small per cent of the inhabitants were of foreign birth, and most of these had taken the initiatory steps to become naturalized by judgment of the courts under the general laws of congress.

This question is made more clear by reference to the language of the enabling act. It provides that the state shall be admitted into the union on an equal footing with the original states. It was the state which was admitted into the union. The land, personal property and inhabitants were already within the jurisdiction of the federal government. The state, in its municipal and sovereign capacity, was a new creation. It was the state that was newly created in its sovereign capacity that was admitted into the union. It may be said that the inhabitants make the state; nevertheless the state in its political organization is entirely different and distinct from the inhabitants who may happen to reside therein.

The words "equal footing with the original states," cannot be construed to have any reference to the status of the inhabitants. The word "footing" is defined "firm position; established place; relative condition." We must look to the constitution of the United States to find out what the "firm position," "established place," and "relative condition" of the various states are. The rights of the states thus referred to are defined in the constitution, such as having representation in the respective houses of congress, and in the electoral college, and other relative rights more particularly described in article 4, of the constitution of the United States. The position and relative rights of the states set forth and defined in the constitution, which were possessed by the original states by virtue of the adoption of the constitution of the United States, were what were intended to be secured to Nebraska by the enabling act.

If that act is to be construed as fixing the status of inhabitants, why have it relate to citizenship any more than to property rights, or personal rights? If it was intended to fix the status of the inhabitants, as was the status of the inhabitants of the original states, then we are led into interminable difficulties by reason of the fact that these rights were different in the various states. The personal rights of the inhabitants of the original states, with reference to the elective franchise are collated in Minor vs Hapersett, 21 Wall, 172, by which it will be seen that they were not alike in any two of such states.

It may be suggested, however, that the inhabitants of the original states became ipso facto citizens of the United States. The reason for that was that the people of the original states were the persons who instituted themselves together to form a nation and consequently were its original citizens. Minor vs Happersett, supra. The inhabitants of Nebraska were not creating a new and independent government and by the admission of Nebraska into the union they did not throw off their allegiance to a foreign power. The principle which fixed and determined the status of the original states can have no application to this case.

The language of the enabling act has no reference to the status of the inhabitants of the original states at the time the state came into the union, any more than it can be said it has reference to the looking at the relative rights of the original states at the time when a union of states was formed. It is self-evident that no territory can now be admitted into the union as a state, with all the rights and privileges which were possessed by the original states when they came into the union. This may be illustrated by reference to the constitution of the United States which, since its adoption, forbids the states from exercising powers and privileges which the original states could exercise at the time the federal union was formed.

It is not an answer to this illustration to say that Nebraska was admitted into the union before the adoption of the fourteenth amendment, because we find substantially the same language in the enabling acts by which new states have been admitted into the union since the adoption of that amendment. We think it clear, both from the language of the enabling act and from constitutional and political history, that the provisions of the enabling act by which Nebraska was admitted into the union on an equal footing with the original states, without any further action whatever on the part of congress," that is to say, was admitted with the same relative rights which the original states held under the constitution at the date Nebraska was admitted. In this view the words "equal footing" could not be construed as naturalizing all aliens who were then inhabitants of the state, for the reason that aliens residing at that time within the limits of the United States were not citizens of the United States.

If it be true that the admission of a state naturalizes all aliens who were inhabitants of the territory at the time, then all that need be done in order to naturalize emigrants to be transferred from allegiance into citizenship would be to take up their abode in a territory prior to its admission as a state into the union. Congress

FORESAW THE DANGER

attending the naturalization of aliens before they had acquired a knowledge of the constitution and laws of our country, and consequently required a residence for a period of five years, and in addition to that proof showing that they were of good moral character and attached to the principles of the constitution of the United States before they could be admitted to citizenship. This policy of our government was not overturned by the understanding that aliens became citizens by the mere admission of a territory as a state. This rule would admit to citizenship foreigners who do not possess the qualifications to be admitted to American citizenship and that, too, without the consent

QUALIFICATION OF VOTERS

and holding office at all subsequent elections shall be such as shall be prescribed by the legislative assembly; provided, that the right of suffrage and of holding office shall be exercised only by citizens of the United States, and those who shall have declared, on oath, their intention to become such and shall have taken an oath to support the constitution of the United States and the provisions of this act."

The qualifications of voters and of holding office in said territory remained substantially the same as above established by the organic act, and of the actual admission of Nebraska into the union as a state, the legislative assembly having prescribed no different rules except upon some points not material to the present inquiry.

When it is borne in mind that the sole purpose of the enabling act was to invite and enable Nebraska to form for herself a constitution and become admitted into the union as a state, it is obvious that this invitation would be addressed to those in whom the law had vested the power and the right to put the prefitted power of the territory in motion and to control its action to the accomplishment of the purpose solicited from congress. Were those in whom the elective franchise had been vested by the organic law and wisely left by the "legislative assembly?" The "people of Nebraska," them mentioned by the title, and the "inhabitants" mentioned in the first section, are the free white male inhabitants above the age of twenty-one years, actual residents of the territory, citizens of the United States and those who have declared on their intention to become such, and shall have taken an oath to support the constitution of the United States. Why should any other than these have been mentioned or intended? None other were allowed to vote for representatives to form a convention to draft a constitution for the proposed state, nor to vote upon the acceptance or rejection of such constitution as might be formed by such convention.

This is made plain by reference to provisions of section 3 of the enabling act, which provides: "That all persons qualified by law to vote for representatives to the general assembly of said territory shall be qualified to be elected, and they are hereby authorized to vote for all those representatives to the convention, under such rules and regulations as the governor of said territory may prescribe, and also to vote upon the acceptance or rejection of such constitution as may be formed by said convention."

Persons of foreign birth residing in the territory of Nebraska, who had not declared their intention to become citizens of the United States and taken an oath to support the constitution of the United States, were as powerless to make a constitution and government of the new state of Nebraska as though they had remained in the country of their birth.

But it is claimed that the invitation of the enabling act was extended to all the inhabitants of the territory, including unnaturalized foreigners, who had neither declared their intention to become citizens nor taken an oath to support the constitution of the United States, to take part in the formation of a constitution and state government, and they having done so, it is argued that they became citizens of the United States without oath of allegiance to the United States, or of adjuration to their mother country, simply by having taken part in the formation of the constitution and state government. In other words that they came in with the state. We have seen that this class of persons were not recognized as possessing any political status in the said territory, whatever. They could not legally vote at any election, nor were they entitled to hold any public office. The legislative assembly, while possessing the power to confer certain political rights upon this class of persons, never exercised it, but on the contrary at the first session enacted a criminal code, section 141 of which provides that "if any person wilfully votes who is not a citizen of the United States, or who is not duly qualified from other disability to vote at the place where and time when the vote is to be given, he shall be fined in a sum not exceeding $500, or imprisonment in the county jail not exceeding one year, or both." This law subsequently amended and at the date of admission of Nebraska into the union as a state it stood as follows:

"Sec. 58. Any person who shall vote in this territory who is not a citizen of the United States, or declared his intention to become such, as provided by law, he knowing the same, shall, on conviction thereof, be imprisoned in the penitentiary and kept at hard labor for not less than six months nor more than three years." Revised statutes of Nebraska territory (1866), p. 147.

Can it be supposed that laws would have been kept in force for twelve years, denying to foreigners who had not declared their intention to become citizens of United States the right to vote and providing a punishment against them should they exercise such right, if it had been the law that upon the admission of Nebraska as a state all non-declaring foreigners residing in the territory were by the mere force of such admission, and whether they desired it or not, became fullfledged citizens of the United States? Most certainly no one can be imagined who had the organic act recognized as conferring or declaring foreigners who might be domiciled in the territory then being organized as voters therein, and entitled to take full part in all political affairs, or had the legislative assembly thereof, as it was probably empowered to do by the organic act, conferred the right to vote and hold office upon such foreigners, then upon the enactment by congress of a law to enable the "people," the "inhabitants" of such territory to form a constitution and state government and for its admission into the union, that those words the "people" and the "inhabitants" were meant to embrace such foreigners, but been, throughout the legislation of congress in reference to the territory and throughout the legislation of the territory itself, denied all participation in the affairs of the territory. We do not think that in the use of the terms contained in the enabling act it was ever intended by congress to invite any to participate in the formation of a constitution and state government, who had been thus excluded. But only such as could vote for delegates to a constitutional convention, without voluntarily the allegiance of the territory, and subjecting themselves to criminal prosecution.

The view which we have expressed to the effect that the inhabitants of the territory

DO NOT BECOME CITIZENS

of the United States by the division of such territory as a state is sustained by judicial decisions. In Ex parte McKay, 9 Wheaton, 125, it appears that McKay was born an alien. He was an inhabitant of Oregon at the time that territory was admitted as a state into the union, and afterwards claimed to be a citizen of the United States. The court held that he could not claim citizenship except through naturalization, and further held that the treaty of 1846 did not make him a citizen of the United States, and that there was nothing in the act admitting Oregon as a state operating as naturalization of inhabitants. We quote from the opinion: "The plaintiff being a child of an unnaturalized citizen, and unnaturalized himself, cannot claim to be an American citizen except upon the single ground that he was born upon the soil of the United States. Nothing that has happened since the treaty can add to or take away from the strength of his claim." After the birth of the plaintiff, McKay, and during his residence in Oregon, that territory had been admitted into the union as a state, without any exception in favor of persons in his situation. We cannot think that she was for that reason any the less admitted into the union upon an equal footing with the original states, or that Oregon is not today upon an equal footing in all respects with the other states, by admission of Oregon as a state. A like event which it is claimed made citizens of all aliens domiciled in Nebraska, was thus declared by the court in not adding to the rights of a person born in the United States the power to confer citizenship upon a foreigner by the mere fact of American citizenship.

The State vs Primrose, 2 Ala., 58, is exactly in point. The defendant was indicted in the circuit court of Mobile for a libel, and pleaded in abatement that one of the grand jurors by whom he was indicted was not a citizen of the United States, but an alien. The juror was born in Ireland and came to Louisiana in 1811, where he remained until after the admission of Louisiana into the union and in the year 1819 he removed to the state of Alabama, where he was a resident when he served as a grand juror. He had never been naturalized under an act of congress, but it was claimed that as he was an inhabitant of the territory of Louisiana at the time it was admitted into the union he thereby became a citizen of the United States. Mr. Justice Ormond, in delivering the opinion of the court, says: "The question to be determined is whether the fact that a foreigner was an inhabitant of the territory of Louisiana previous to its admission into the union by virtue of the act of congress of February 20, 1811, will constitute such person a citizen of the United States. This question is not to be determined by the law which we hold is supported by other sections of the enabling act. Section 13 provides that the laws of the United States, not locally inapplicable, shall have the same force and effect within the said state as elsewhere within the United States. The naturalization laws of the United States were not and are

NOT LOCALLY INAPPLICABLE

to the state of Nebraska. These laws were enforced in the state of Nebraska, and if so, there is no reasonable escape from the proposition that aliens must comply there with the order to become citizens of the United States.

Section 1 of the enabling act provides: "That the inhabitants of that portion of the territory of Nebraska, included in the boundaries hereinafter designated be and they are hereby authorized to form for themselves a constitution and state government, and when admitted as hereinafter provided, shall be entitled and admitted into the union as a state, when so formed, shall be admitted into the union as hereinafter provided." In the title, the subject of the act is designated "the people" of Nebraska, in the purview, the "inhabitants." We know that the framers of the act, when they used these terms, did not mean all of the people, nor all of the inhabitants then domiciled in Nebraska. In this connection attention is called to the act of congress of May 30, 1854, usually called the organic act. At the date of its passage there were no people nor inhabitants of Nebrassa upon