the foreign state."[15] It was declared that in either situation the decree of the foreign state is recognized as passing title because jurisdiction is held to exist. Accordingly, it was concluded that "when the Spanish decree became effective as to the *Navemar* she was on the high seas and recognition of it involved no conflict with our laws."[16] For these reasons the decree of the court below was reversed, the libel dismissed, and the *Navemar* ordered released from arrest and attachment and delivered to the Acting Consul General of Spain at New York pursuant to the prayer of the Spanish Ambassador.[17] The writer offers no criticism of the foregoing conclusions of the Circuit Court of Appeals as set forth in Judge Augustus N. Hand's opinion.

It should be observed, however, that with the success of the Franco Government in Spain and its recognition by the United States as the government of that country, the new régime in control thereof, not seeking to benefit by the expropriatory law of its predecessor, the Azaña régime, and seemingly not desiring "continuation of the action," made possible the release of the ship on April 22, 1939.[18]

CHARLES CHENEY HYDE

CITIZENSHIP BY BIRTH IN THE UNITED STATES NOT LOST THROUGH NATURALIZATION ABROAD OF MINOR'S FATHER

The United States Supreme Court has recently decided an important question of the law of citizenship [1] which has troubled the Departments of State, Labor, and Justice for several years and caused uncertainty in the courts.[2] The question was whether an American-born minor who is taken abroad by his parent who then himself becomes naturalized abroad, thereby loses his American citizenship, either under the Act of 1907 or under a naturalization treaty of the United States with the parent's new State or otherwise. Down to 1929 there seems to have been no doubt in the Department of State that such a minor child, taken abroad at an early age, did not lose his American citizenship unless, by some voluntary act of his own after reaching majority, he manifested his election not to claim his American citizenship, an election most commonly evidenced by a failure to return to the United States for permanent residence.[3] No statute establishes this right of election of native-born citizens; but as election is possible to the foreign-born children of American citizens under Section 1993 of the Revised Statutes and Section 6

[15] 102 F. 2d 449. [16] *Id.*, 450. [17] *Id.* [18] New York Times, April 23, 1939, p. 22.

[1] Perkins, Secretary of Labor, *v.* Elg; Elg *v.* Perkins, Nos. 454, 455, decided May 29, 1939, 59 Sup. Ct. 884.

[2] *Cf.* opinions of Judge Fee in *In re* Reid, United States District Court, 6 Fed. Supp. 800 (1934), and of Judge Wilber in the C. C. A., 73 F. (2d) 153 (1934). See also editorial in this JOURNAL, Vol. 30 (1936), p. 694.

[3] The practice of the Department of State is summarized in the circular instruction of Secretary of State Hughes, Nov. 24, 1923, Compilation of Certain Departmental Circulars, relating to citizenship, registration of American citizens, issuance of passports, etc., 1925, pp. 118–121.

of the Act of March 2, 1907,[4] it would have been anomalous to deny that privilege to the native-born. The Department's attitude was apparently influenced by the traditional aversion to the doctrine of dual nationality after reaching majority, and by the view that the minor is incapable of a binding choice, that he is helpless in the matter of his migration, and that the parent should not be permitted to make an election for the minor which the latter cannot himself legally effect.[5]

All this long-continued practice was discredited by an opinion of the Attorney General in 1932 in the case of Ingrid Therese Tobiassen,[6] holding that the repatriation in Norway of a father who had previously been naturalized in the United States expatriated his American-born minor daughter, although she was in the United States as a permanent resident at the time of her application for a permit to return to the United States after a visit to her parents. The opinion even held that she was to be deemed domiciled in Norway.[7] The theory of the opinion was that Miss Tobiassen had lost her American citizenship by the naturalization of her father in Norway, and that the naturalization treaty with Norway required the United States to recognize her expatriation. It is these postulates which the Supreme Court now discountenances. No special weight was attributed by the Attorney General to the fact that Miss Tobiassen became an American citizen by birth; she was evidently deemed in no different case from a foreign-born alien minor naturalized in the United States through the naturalization of her father. It was thought that inasmuch as Norwegian law prescribed Norwegian citizenship for the minor children of a person naturalized in Norway, just as American law ascribed American citizenship to the resident minor child of a naturalized American, logic required the United States to recognize her

[4] Where only one parent is a citizen, the child must, in order to claim American citizenship, return to the United States before reaching the age of 13, reside here continuously for five years, and within six months after reaching majority take the oath of allegiance. Act of May 24, 1934, 48 Stat. 797. In view of the presumably continued existence of Sec. 6 of the Act of March 2, 1907 (34 Stat. 1229), providing that, in order to receive diplomatic protection the child born abroad under Sec. 1993 must, on reaching the age of 18, record his intent to become a resident and remain a citizen of the United States, and to take the oath of allegiance on attaining majority, it may be that the original unamended Sec. 1993 may still be deemed to apply to children both of whose parents are American citizens. The amended section evidently contemplates different treatment in such case. Although Sec. 6 of the Act of 1907 looks only to protection, it has been construed, probably inaccurately, as limiting citizenship. *Cf.* Proposed Code of Nationality Laws, Sec. 201 (c), Pt. 1, p. 9.

[5] These rulings of Secretaries of State and Attorneys General, beginning with the well-known opinion in Steinkauler's case, 15 Op. Attys. Gen. 15 (1875), are to be found in Moore's Digest, III, 532 *et seq.* Several of them are quoted by the Supreme Court in the Elg case. While the non-returning foreign-born American citizen may of course be deprived of diplomatic protection, the deprivation of citizenship under the Act of May 24, 1934, only extends to foreign-born children one of whose parents is an alien. [6] 36 Op. Atty. Gen. 535 (1932).

[7] This opinion, like that of the Commissioner of Immigration in the Elg case and of the Bureau of Naturalization and of the Circuit Court of Appeals in the Reid case, to be discussed presently, was criticized in this JOURNAL, Vol. 30 (1936), pp. 694–701.

Norwegian nationality. This opinion adopted the view then lately expressed by the Department of State, which, in contradiction of its earlier views, had declined to issue Miss Tobiassen a passport, and rejected the contrary view of the Solicitor of the Department of Labor.

The Attorney General's opinion, which did not even allow the father, and *a fortiori* the daughter, to rebut the presumption of expatriation under the Act of 1907, was followed in Mrs. Reid's case [8] both by the Bureau of Naturalization and by the Circuit Court of Appeals, although the opinion was attacked as unsound by District Judge Fee.[9] It was again followed by the Departments of State and Labor in the case of Miss Elg, who was born in the United States in 1907 and taken to Sweden, her father's native country, by her naturalized American mother in 1911. In 1922 her father also returned to Sweden, where he has since resided. In 1924 the father was apparently readmitted to Swedish nationality. In 1929, just after reaching the age of 21, Miss Elg returned to the United States for permanent residence under an American passport. In 1935 she was served with notice of deportation as an alien who had not been legally admitted to the United States. Her new application for a passport was now denied by the Department of State on the ground that she had ceased to be an American citizen. Thereupon she sued both the Secretary of Labor and the Secretary of State for a declaratory judgment that she was an American citizen, who hence could not be deported and was entitled to a passport. The District Judge, Bailey, granted the declaration against the Secretary of Labor, but dismissed the petition as against the Secretary of State, a decision which was affirmed by the Circuit Court of Appeals.[10] Cross-appeals on *certiorari* carried the case to the United States Supreme Court, where Miss Elg won out on all counts.

In a lengthy opinion reminiscent of the Wong Kim Ark case,[11] Chief Justice Hughes for a unanimous court holds that the issue is to be determined by United States and not Swedish law, and that regardless of whether she acquired Swedish nationality through the repatriation there of her father, the question is whether she had lost her American native citizenship by any operative fact—treaty, statute, or voluntary act. After reaffirming the validity of the earlier departmental practice which had regarded as an American citizen the minor native-born child with a right of election, when taken abroad, to resume the duties of citizenship by returning to the United States on attaining majority, the court holds that Miss Elg had not expatriated herself by remaining in Sweden from the age of 4 to 21, but that she retained and had exercised the right of electing American citizenship by returning to the United States, a right which had not been destroyed either by treaty or statute. Contrary to recent views of the Department of State and of the Attorney General in the Tobiassen case, the treaty with Sweden of 1869 was held to require the recognition only of a *voluntary* expatriation,

[8] This case is described in this JOURNAL, *ibid.*, p. 695 *et seq.*

[9] *Supra*, note 2. [10] 99 F. (2d) 408 (1938). [11] 169 U. S. 649 (1898).

hence not to extend to minors born in the United States who are taken abroad by their parents; moreover, Article III of the treaty, which permitted each country to receive back its original citizens who had been naturalized in the other and then returned to their native country and applied for readmission, was deemed to cover the return to the United States of Miss Elg, even assuming that she had acquired Swedish citizenship through the alleged renaturalization there of her father in 1924. Thus, there was nothing in the treaty to prevent the United States from treating Miss Elg as having elected United States citizenship, which indeed she had never lost. Even if the "intent not to return" to America could under the treaty be inferred from a two-year residence in Sweden, this provision was applicable to the parent only, and could not in any event be attributed to a minor; and if it could be, it was a presumption rebutted by her actual return to the United States.

So, contrary to the Government's view in the case, Section 2 of the Act of March 2, 1907,[12] was not deemed to bar Miss Elg's right of election, because its provisions relating to expatriation and the presumption arising from residence abroad also apply only to voluntary acts of an adult. Even in this connection, she did not become "naturalized in any foreign State" and thus lose her American citizenship; but even if she could be deemed to have been so naturalized, the Act would not, by reason of its silence on the position of minors born in the United States, destroy her right of election.

In an important paragraph the court concludes that recent private acts of Congress for the relief of native citizens who had been denied citizenship by administrative ruling are not the equivalent of an Act of Congress sustaining the Government's present view. Such private acts, as in the case of the readmission to citizenship of Mrs. Nellie Grant Sartoris, have been invoked dialectically as evidence of Congressional views as to the law.[13] This should no longer be done.

Indeed, the significant ruling that the Bancroft treaties, like the Act of 1907, look to personal voluntary expatriation and renunciation of American citizenship only and do not extend their mantle to unconsulted minor children necessarily cuts the ground from under the view that native American women who married foreigners prior to 1907 and lived abroad with their husbands, lost their American citizenship by naturalization or implication.[14] The Department's view that such marriage constituted naturalization under the treaties, which required the United States to recognize it as such, is in effect contradicted by the Elg decision.

Finally, Miss Elg's cross-appeal was directed to the refusal of the court to undertake by injunction to compel the issuance of a passport, or control by a

[12] *Supra*, note 4.

[13] Joint Resolution of May 18, 1898. This was considered by some as a Congressional admission that Miss Grant had been expatriated by her marriage to a British subject, Sartoris. This JOURNAL, Vol. 29 (1935), p. 396, at p. 411.

[14] *Cf.* "The Citizenship of Native-Born American Women Who Married Foreigners before March 2, 1907, and Acquired a Foreign Domicile," this JOURNAL, *ibid.*, p. 396.

declaratory judgment the discretion of the Secretary of State. Heretofore it had not been possible to obtain a judicial review of the Secretary's discretion, even on a question of law. While the court does not approve injunction or mandamus, it does hold that the Secretary of State should have been included in the declaratory decree, together with the Secretary of Labor, because he had refused the passport "solely on the ground that she had lost her native-born American citizenship." Thus, the Secretary's refusal of a passport solely on a question of law may now be reviewed by a petition for a declaratory judgment, leaving unaffected his discretion to refuse a passport on other grounds.[15] This is an important advance in the law, as was suggested in the editorial cited above. Native citizens, like naturalized citizens, may now be able to obtain a declaration of their disputed citizenship status, a procedure first successfully invoked in the case of Winston Guest.[16] This should be expressly provided for in the new citizenship code, which will probably have to be changed in several respects [17] to bring it into conformity with the authoritative opinion of the Supreme Court in the Elg case.

EDWIN BORCHARD

UNDECLARED WARS

The age of chivalry when men of honor refused to attack each other without fair warning would seem long past. The procedure now followed by certain nations is to strike swiftly before your opponent is aware of your intention.

This conduct is naturally abhorrent to nations that still cling to some of the traditions of chivalry. Nevertheless, the unpleasant fact must be faced that there is logical justification for the undeclared war. In fact, in most instances it would appear to be absolutely necessary. Once an international dispute has reached the stage where it seems incapable of peaceful adjustment, the aggrieved nation will resort to arms only under such conditions as offer the most favorable prospect for success. It would be absurd to expect the aggressor nation to summon politely another nation to mobilize its army, navy, and air forces for combat on a certain date, as did the ancient Romans, with elaborate ceremonial pleasing to the gods. On the other hand, it would be perfidy of the basest sort to attack without any intimation whatever of a grievance for which due redress is demanded.

[15] A declaratory decree against a responsible defendant serves all the purposes of a coercive remedy, like injunction or mandamus, while avoiding all the technical pitfalls of such a remedy. It is not conceivable that a government official would defy a declaratory judgment, but if that should happen, supplementary coercive relief is available.

[16] The final decision of Judge Jennings Bailey, United States District Court for the District of Columbia, of Jan. 25, 1937, is unreported, but the hearing of Dec. 7, 1936, on the demurrer is reported in 64 Wash. L. Rep. 1098–1100 (1936) and gives an adequate description of the disposition of the case.

[17] The Proposed Code of Nationality Laws rests on the theory that a parent's loss of American citizenship carries along with it that of a minor child who acquires the parent's nationality under the foreign law. *Cf.* Sec. 405, Pt. 1, p. 77.