

In re GIOVANNA, et al.

(District Court, S. D. New York. March 31, 1899.)

1. ALIENS—EXCLUSION—UNITED STATES DISTRICT COURT—JURISDICTION TO REVIEW.

Under Appropriation Act Aug. 18, 1894 (28 Stat. 390, c. 301), providing for the exclusion of aliens, the United States district court has no jurisdiction to review the action of the secretary of the treasury, confirming the decision of the executive officers excluding aliens domiciled here, on their return from a temporary visit abroad.

2. SAME—CHILDREN OF ALIENS.

Children of aliens born in the United States are citizens, and not aliens, and hence are not subject to exclusion, under the immigration laws, on their return with their alien parents from a temporary visit abroad.

Habeas Corpus. Immigrants.

John Palmieri, for petitioners.

Ullo, Ruebsamen & Higginbotham, for commissioner of immigration.

BROWN, District Judge. Upon the return and traverse of the writ of habeas corpus in this case, it appears on the agreed statement of facts that Anzelmo Giovanna and her husband and their two children Emma and Salvatore, aged respectively 6 and 8 years, and Providenza Conti, arrived at this port from Italy on February 2, 1899, and after special examination, were determined to be alien immigrants likely to become a public charge, and on that ground were refused permission to land and were detained for the purpose of being sent back to Italy, and on appeal this ruling was affirmed by the secretary of the treasury. It further appears that the parents came to this port about 10 years ago where they then established their home and have been domiciled ever since, but they have never become citizens. The two children above named were born in this country and have always resided here until about two months ago, when in December, 1898, the parents leaving their older children at their home in this port, went to Italy for a temporary purpose, taking with them the two children above named and returning in February last, as above stated.

Upon the above statement of facts some doubt may exist whether the decision of the supreme court in the case of *Lem Moon Sing v. United States*, 158 U. S. 538, 547, 15 Sup. Ct. 967, intended to hold that the exclusion by executive officers alone of aliens domiciled here on their return from a temporary visit abroad should be extended beyond Chinese aliens under the provision of the appropriation act of August 18, 1894 (28 Stat. 390, c. 301). The paragraph containing that provision in the appropriation act comes under the heading: "Enforcement of the Chinese Exclusion Act." Neither this heading nor the context is given in the clause relating to the exclusion of aliens in 2 Supp. Rev. St. p. 253; but the heading in the appropriation act may qualify the whole provision. For the purpose of a review, which it is understood will be taken, I shall, however, treat that provision as general and including all aliens without limitation; and the effect of this ruling must be that I have no jurisdiction to review the

action of the secretary of the treasury as respects the mother or Providenza Conti.

As respects the two children who were born in this country while their parents were resident and permanently domiciled here, the decision of the supreme court in the case of *United States v. Wong Kim Ark*, 169 U. S. 649, 693, 704, 18 Sup. Ct. 456, seems to me not distinguishable from the present; and I must therefore hold that these children, being citizens of the United States and not aliens, were not subject to the jurisdiction of the immigration officers under the statute upon which they have been excluded. This decision, though necessary from the rulings in the cases above cited, involves the unfortunate result of separating the mother from her children of tender years. It is understood that both sides desire to take an appeal upon the decision here made. It is to be hoped that during the pendency of proceedings, at least, the commissioner of immigration will find some means to avoid such a separation.

The infants are discharged from custody, and the mother and Providenza Conti are remitted to the custody of the commissioner of immigration.

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BATCHELLER v. THOMSON (two cases).

THOMSON v. BATCHELLER.

(Circuit Court of Appeals, Second Circuit. April 4, 1899.)

Nos. 92-94.

1. TRADE-MARK—USE BY FIRM—ASSETS.

A manufacturer of corsets in England adopted a trade-mark before its use in this country; and its application to the goods before their importation, and its distinct ownership, were known and acted upon by a firm in New York, of which the manufacturer was a member. The goods so manufactured and stamped in England were sold to the New York firm, and the trade-mark was subsequently permitted by the owner to be used by the firm on corsets manufactured by it in the United States. *Held*, that this licensed use in the business of the firm of the trade-mark owned by one partner did not place the trade-mark in the firm, as a part of its assets, nor make it partnership property.

2. SAME—LICENSE TO USE.

On the dissolution of the partnership, and the transfer by the owner of the trade-mark of his interest in the factory property, such owner could continue in the purchaser the right to use the trade-mark which he had previously permitted the firm to use in their factory.

3. SAME—RELINQUISHMENT OF LICENSE.

Where the owner of a trade-mark had been continuously, and still was, both the owner of the trade-mark, and a manufacturer of the goods on which it was affixed, the relinquishment of a license which he had granted to another to use the trade-mark was not void on the ground that a trade-mark, distinct from the articles manufactured, was not the subject of sale, as such transaction was simply a relinquishment to the owner of the license to use his property.

4. SAME—CONTRACT AS TO LICENSE.

An agreement between the owner of a trade-mark and another, a member of a firm to whom he had granted a license to use it, that, when such member retired from the firm, all the rights and privileges granted to him should revert to the owner of the trade-mark, was an agreement that on such retirement the use of the trade-mark should cease.