

Opinion No. 63-120

September 20, 1963

BY: OPINION of EARL E. HARTLEY, Attorney General

TO: Mr. E. S. (Johnny) Walker Commissioner of Public Lands State Land Office
Building Santa Fe, New Mexico

QUESTION

FACTS

Article 11, Section 22 of our State constitution provides that "Until otherwise provided by law no alien, ineligible to citizenship under the laws of the United States, or corporation, copartnership or association, a majority of the stock or interest in which is owned or held by such aliens, shall acquire title, leasehold or other interest in or to real estate in New Mexico."

QUESTIONS

What is the proper interpretation of the phrase "ineligible to citizenship" as used in Article II, Section 22?

CONCLUSION

Stating the answer in a positive manner, "eligible to citizenship" means a person belonging to a class which is eligible and who is capable of becoming a citizen upon due compliance with the naturalization laws.

OPINION

{*273} ANALYSIS

Prior to stating the rationale for {*274} the conclusion expressed above, we think it not amiss to mention that the constitutionality of alien land laws, such as Article II, Section 22 of our State constitution, is open to certain doubts.

A California statute provided that an alien ineligible for citizenship (the same phraseology used in our constitution) may not acquire land save to the extent provided by treaty; and that any land acquired in violation of the statute shall immediately escheat to the state. Cal. Gen. Laws, Act 261, §§ 1, 2, 7 (1944). When the constitutionality of this statute was challenged, it was held by the California Supreme Court to be unconstitutional as in conflict with the Equal Protection Clause of the Fourteenth Amendment. **Sei Fujii v. State**, 242 P. 2d 617 (1952).

Despite earlier United States Supreme Court decisions upholding the validity of alien land laws, the California court followed the lead of the Oregon court in finding its alien land law unconstitutional. **Kenji Namba v. McCourt**, 185 Ore. 579, 204 P. 2d 569 (1949).

Since it is settled that the equal protection clause applies to aliens as well as to citizens (**Yick Wo. v. Hopkins**, 118 U.S. 56; **Traux v. Raich**, 239 U.S. 33), the California court apparently felt that the early United States Supreme Court decisions on alien land laws had in effect been overruled by the following 1948 decisions: **Oyama v. California**, 332 U.S. 633 and **Takahashi v. Fish and Game Commission**, 334 U.S. 410.

Our State Supreme Court has not been called upon to determine the constitutionality of Article II, Section 22, and we certainly do not presume to do so. We give this background simply because the court decisions indicate a trend toward holding that alien land laws, such as ours, do violate the equal protection clause of the United States Constitution. See **The California Alien Land Law and the Fourteenth Amendment**, 35 Cal. L. Rev. 61 (1947).

Turning to your specific question, while our constitutional provision is phrased in the negative, i.e., "**ineligible** to citizenship," the pertinent question is nonetheless the meaning to be attributed to the phrase "**eligible** to citizenship." It is our opinion that the phrase means a person belonging to a class which is eligible and who is capable of becoming a citizen upon due compliance with naturalization laws. Arizona Attorney General Opinion No. 63-95-L.

The Kansas Supreme Court reached this same conclusion in the 1953 case of **Hughes v. Kerfoot**, 263 P. 2d 206. That Court noted that any interpretation of the phrase which indicated that no alien is eligible to citizenship until he has proved that he possesses certain racial, residence, moral and political qualifications required by Federal law for naturalization is far too narrow -- since "eligible to citizenship" is not synonymous with "eligible to naturalization."

Said the Court:

". . . There is a distinction between 'eligible to citizenship' and 'eligible to naturalization'. The former refers to a broad class of aliens who are capable of becoming citizens upon full compliance with federal naturalization laws and regulations. The latter refer to those aliens who not only are eligible to citizenship, but who have already established their eligibility to naturalization by compliance with federal rules and regulations pertaining to the question. As a practical matter, an alien might be {*275} **eligible to citizenship**, and at the same time be **ineligible to naturalization -- due** to his moral background or political beliefs." (Emphasis the Court's).

By: Oliver E. Payne

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