

**OFFICE OF STATE ADMINISTRATIVE HEARINGS  
STATE OF GEORGIA**

**AMICUS BRIEF and  
APPENDIX**

by:Leo C. Donofrio, Esq.,  
Amicus Curia, Jan. 23, 2012

DAVID FARRAR,  
LEAH LAX, CODY  
JUDY, THOMAS  
MALAREN, LAURIE  
ROTH, Plaintiffs,

v.

BARACK OBAMA,  
  
Defendant.

: Docket Number: OSAH-SECSTATE-CE-

:1215136-60-MALIHI Counsel for Plaintiffs:

Orly Taitz Counsel for Defendant: Michael

Jablonski

DAVID P. WELDEN,  
  
Plaintiff,

v.

BARACK OBAMA,  
  
Defendant.

: Docket Number: OSAH-SECSTATE-CE-

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Jablonski

CARL SWENSSON,  
  
Plaintiff,

v. BARACK

OBAMA, Defendant.

: Docket Number: OSAH-SECSTATE-CE-

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Jablonski

KEVIN RICHARD POWELL,  
  
Plaintiff,

v. BARACK

OBAMA,  
Defendant.

: Docket Number: OSAH-SECSTATE-CE:

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Statement of compliance with Georgia Rule of Administrative Procedure, 616-1-2-.04.

Every legal authority cited in this brief, not issued by the State of Georgia or the Federal Government, has been attached in an appendix. This brief also contains the requested signature, contact information and a certification that the brief has not been filed for any improper purpose, as well as a proof of service.

## **STATEMENT OF FACTS**

This brief assumes President Obama was born in the State of Hawaii, on August 4, 1961.

The President's mother, Stanley Ann Dunham, a natural-born citizen of the United States, was eighteen years old when the President was born.

The President's father, Barrack Hussein Obama, was a British subject admitted into the United States on a temporary student visa, with the express condition that he was a "nonimmigrant student". (App. Pg. 55.) The President's father never became a U.S. citizen; never applied for U.S. citizenship; never declared an intention to become a U.S. citizen; never became a resident alien; and was never domiciled in the United States.

## **PROCEDURAL HISTORY**

On November 1, 2011, the Democratic Party of Georgia notified the Georgia Secretary of State that the only candidate that should appear on the Democratic Presidential primary ballot would be Barack Obama. Pursuant to O.C.G.A. section 21-2-5 the several Plaintiffs filed timely challenges with the Secretary of State. Said challenges alleged, generally, that defendant Obama is not Constitutionally qualified to hold the office of President. Those challenges were referred, by the Secretary of State, to this Court. Defendant Obama responded with a motion to dismiss, filed on December 15, 2011. That motion was denied by this Court on January 3, 2011. On December 20, 2011, this Court consolidated the challenges filed against Defendant Obama. A motion for separate hearings was granted. The several challenges are now set for hearings on January 26, 2011.

## **QUESTION PRESENTED**

### **I. WHETHER PRESIDENT OBAMA IS A NATURAL BORN CITIZEN ACCORDING TO THE REQUIREMENTS OF ARTICLE 2, SECTION 1, OF THE UNITED STATES CONSTITUTION?**

## **SUMMARY OF ARGUMENT**

President Obama is not a natural-born citizen of the United States, as defined by the United States Supreme Court in *Minor v. Happersett*, 88 U.S. 162 (1874), wherein the

Court identified, as natural-born citizens, only those who are born in the United States of citizen parents. That the holding in *Minor v. Happersett* was applicable only to persons born in the country of two citizen parents was confirmed in *U.S. v. Wong Kim Ark*, 169 U.S. 649 (1898), where the Court approvingly reiterated the exact passage from *Minor* that defined the natural-born citizen class, not modifying it, or questioning it all.

Since the Supreme Court, in *Minor v. Happersett*, directly construed the Article 2, Section 1, natural-born citizen clause, to determine the citizenship status of the petitioner, the Court's definition of the natural-born citizen class is precedent.

Additionally, the English common law term, "natural-born subject", being a uniquely spiritual designation, was only granted to members of the Christian faith, and cannot govern the definition of "natural born Citizen", because such a construction would be repugnant to the 1<sup>st</sup> Amendment of the United States Constitution.

Since President Obama does not qualify as a member of the class of persons identified as natural-born citizens by the U.S. Supreme Court, he is not eligible to be President of the United States, and his name, therefore, should not be allowed on Georgia ballots for the 2012 Presidential election.

## **LEGAL ARGUMENT.**

### **I. WHETHER PRESIDENT OBAMA IS A NATURAL BORN CITIZEN ACCORDING TO THE REQUIREMENTS OF ARTICLE 2, SECTION 1, OF THE UNITED STATES CONSTITUTION?**

#### **A. According To Precedents of Statutory Construction, The 14th Amendment Has Not Repealed Or Modified The Natural Born Citizen Clause.**

The U.S. Constitution provides the requirements for the office of President at Article 2, Section 1, Clause 5:

*"No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President;*

The 14th Amendment states:

*"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."*

The "natural born Citizen" clause pertains to the *civic status* required to be eligible for public office, whereas the 14th Amendment specifically confers the *political status* of membership in the nation.

Neither clause contradicts, nor limits the other. While 14th Amendment citizens may be eligible for the office of President, the Amendment does not automatically establish eligibility. If the 14th Amendment had been intended to repeal the natural-born citizen clause, then it would contain specific language to that extent. To imply that it does, would require a complete abandonment of long-established rules of statutory construction:

*"Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment. See, e. g., Bulova Watch Co. v. United States, 365 U.S. 753, 758 (1961); Rodgers v. United States, 185 U.S. 83, 87 -89 (1902).*

*"The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. "When there are two acts upon the same subject, the rule is to give effect to both if possible . . . The intention of the legislature to repeal `must be clear and manifest.'" United States v. Borden Co., 308 U.S. 188, 198 (1939)." Morton v. Mancari, 417 U.S. 535, 550-551 (1974).*

The 14th Amendment, and the natural-born citizen clause are very capable of co-existence. The Amendment is our *general* citizenship clause, while Article 2, Section 1, provides the *specific* requirement for Presidential eligibility. If the legislature had intended to repeal or modify the natural-born citizen clause with enactment of the 14th Amendment, then, according to Supreme Court precedents in Morton v. Mancari, et al., the Amendment's intention to do so would have been clear and manifest, containing language stating that all persons born in the country, and subject to the jurisdiction thereof, are *natural-born* citizens. Instead, the Amendment simply states that they are *citizens*.

The rule of statutory construction was reiterated in *Crawford v. Gibbons*:

*"As always, "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.' ... Morton v. Mancari, 417 U.S. 535, 550 -551 (1974). . . Any argument that a federal court is empowered to exceed the limitations [of a statute]. . . without plain evidence of congressional intent to supersede those sections ignores our longstanding practice of construing statutes in pari materia. See United States v. United Continental Tuna Corp., 425 U.S. 164, 168 -169 (1976); Train v. Colorado Public Interest Research Group, 426 U.S. 1, 24 (1976)." Crawford v. Gibbons, 482 U.S. 437, 445.*

According to the Morton line of precedent, the rule requires this Court to give effect to both clauses. And this firm tenet of statutory construction was stated even more rigidly by Chief Justice Marshall in *Marbury v. Madison*, 5 U.S. 137 (1803):

*"It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such construction is inadmissible, unless the words require it." Id. 174.*

According to Chief Justice Marshall, it's not even *admissible* to allege that the 14th Amendment establishes Presidential eligibility, as such a construction would render the natural-born citizen clause to be inoperative. The only possible exception is if the words of both clauses are not capable of co-existence, which is not the case here.

Below, this brief argues that the natural-born citizen clause requires birth in the country to parents, both of whom are citizens. A parental citizenship requirement for Presidential eligibility does not infringe upon birthright citizenship for persons born in the country to alien parents. Eligibility for public office is a civic status, whereas membership in the nation as a citizen is a political status. These are two vastly different statuses. Construing them independently, as is required by the rule of statutory construction, allows them to co-exist so that both are given a separate and unique effect.

Therefore, according to the controlling rules of statutory construction, we can deduce that the 14th Amendment does not establish Presidential eligibility for all native-born citizens. The proper construction of the natural-born citizen clause, therefore, must require *something more* than simple jus soli birthright citizenship. Based upon this analysis

alone, it is established that simply being born in the country, subject to the jurisdiction of the U.S., does not establish Presidential eligibility.

## **B. Nomenclature of the British Common Law.**

Since the Constitution does not define “natural born Citizen”, the first source to be consulted, with regard to the definition of legal terms in the Constitution, must be the English common law:

*“The constitution nowhere defines the meaning of these words, either by way of inclusion or of exclusion, . . . In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the constitution. Minor v. Happersett, 21 Wall. 162; Ex parte Wilson, 114 U.S. 417, 422 , 5 S. Sup. Ct. 935; Boyd v. U. S., 116 U.S. 616, 624 , 625 S., 6 Sup. Ct. 524; Smith v. Alabama, 124 U.S. 465 , 8 Sup. Ct. 564. The language of the constitution, as has been well said, could not be understood without reference to the common law. 1 Kent, Comm. 336; Bradley, J., in Moore v. U. S., 91 U.S. 270 , 274. In Minor v. Happersett, Chief Justice Waite, when construing, in behalf of the court, the very provision of the fourteenth amendment now in question, said: 'The constitution does not, in words, say who shall be natural-born citizens. Resort must be had elsewhere to ascertain that.' And he proceeded to resort to the common law as an aid in the construction of this provision. 21 Wall. 167. U.S. v. Wong Kim Ark, 169 U.S. 649, 654-655 (1898).*

The common law generally provides the *nomenclature* of legal terminology. But the entire common law system was never adopted as *the* federal law of the United States. The common law simply acts as a dictionary in defining legal terms of art:

*"There is no common law of the United States, in the sense of a national customary law, . . . Wheaton v. Peters, 8 Pet. 591. . . There is, however, one clear exception to the statement that there is no national common law. The interpretation of the constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history. The code of constitutional and statutory construction which, therefore, is gradually formed by the judgments of*

*this court, in the application of the constitution and the law and treaties made in pursuance thereof, has for its basis so much of the common law as may be implied in the subject, and constitutes a common law resting on national authority.*

*Moore v. U. S.*, 91 U.S. 27. ” *Smith v. Alabama*, 124 U.S. 465, 478 (1888).

The English common law should be consulted to define words and terms of legal art that originated in English jurisprudence. This approach was taken by Chief Justice Waite in *Minor v. Happersett*, 88 U.S. 162 (1874):

*"The Constitution does not, in words, say who shall be natural-born citizens. Resort must be had elsewhere to ascertain that. At common-law, with the nomenclature of which the framers of the Constitution were familiar, it was never doubted that all children born in a country of parents who were its citizens became themselves, upon their birth, citizens also. These were natives, or natural-born citizens, as distinguished from aliens or foreigners."* Id. 167. (Emphasis added.)

Nomenclature is defined as a system of naming things. And the English common law provides our general understanding of legal terms. The etymology of the ancient common law designation, "natural-born subject", must, therefore, be consulted with regard to both *jus soli*, and *jus sanguinis* concepts.

**i). Natural Allegiance - Via Jus Soli - Was A Uniquely Christian Point Of Law Repugnant To The First Amendment Of The United States Constitution.**

The common law rule of *jus soli* subjection is a complex spiritual concept, which does not simply relate to birth on British soil. Despite popular belief, the common law meaning of "natural-born" is not synonymous with "native-born". The true nomenclature of "natural-born subject" is rooted in "natural subjection" to the spiritual body of Christ, and therefore our Constitution forbids any construction of the "natural-born citizen" clause that alleges the term to be synonymous with "natural-born subject".

In 1608, the English common law, as to *jus soli*, was determined in the famous decision of *Calvin's Case*, 7 Coke Report 1a, 77 ER 377 (1608):

*"The fundamental principle of the common law with regard to English nationality*

*was birth within the allegiance-also called 'ligealty,' 'obedience,' 'faith,' or 'power'-of the king.*

*“This fundamental principle, with these qualifications or explanations of it, was clearly, though quaintly, stated in the leading case known as 'Calvin's Case,' or the 'Case of the Postnati,' decided in 1608, after a hearing in the exchequer chamber before the lord chancellor and all the judges of England, and reported by Lord Coke and by Lord Ellesmere. Calvin's Case, 7 Coke, 1, 4b-6a, 18a, 18b; Ellesmere, Postnati, 62-64; s. c. 2 How. St. Tr. 559, 607, 613-617, 639, 640, 659, 679. U.S. v. Wong Kim Ark, 169 U.S. 649, 655-656. (See App*

Calvin's Case established the English common law rule of subjection at birth, with its famous holding that all persons born on soil where the King's power was in force, to parents who owed *obedience* to the King, were *natural-born subjects*. The status of the parents as aliens made no difference, and the rule did not require the parents to have been domiciled in the King's dominions.

Calvin's Case was a direct result of a unifying succession, through King James, of the separate kingdoms of England and Scotland. Despite sharing the same monarch, each kingdom retained its own laws and parliaments. In England, only British subjects could inherit and be inheritable, so the question before the court was whether a person born in Scotland, after the unification of the thrones, was an English subject who could inherit lands in England. The Court of King's Chamber held that the plaintiff (Calvin) could inherit as an English subject because, despite being born in Scotland as a subject thereof, he was naturalized at birth by the law of nature which vested the *spiritual* power of God in the *physical* body of the King, so that the subjects of each of the *two separate nations* owed direct allegiance to the *one natural body* of the King, rather than to his separate body politic of each nation:

*"Wherefore to conclude this point (and to exclude all that hath been or could be objected against it) if the obedience and ligeance of the subject to his sovereign be due by the law of nature, if that law be parcel of the laws, as well of England, as of all other nations, and is immutable, and that postnati and we of England are united by birthright, in obedience and **ligeance (which is the true cause of***

*natural subjection) by the law of nature; it followeth that Calvin the plaintiff being born under one ligeance to one King, cannot be an alien born;" 7 Coke Report 14 b, 77 ER pg. 394. (Emphasis added.) (App. Pgs. 71-72.)*

The subjects of Scotland and England were naturalized, one to another, by the fact of their being born under *one* allegiance to the King. Natural allegiance was not directly owed to the laws or government of England or Scotland, nor did the soil create natural allegiance. The *natural allegiance* that creates *natural subjection* is owed to the same natural body of the King. It is this natural allegiance, born of the law of nature, which unifies the subjects:

*"That ligeance or obedience of the subject to the Sovereign is due by the law of nature: 2. That this law of nature is part of the laws of England: 3. That the law of nature was before any judicial or municipal law in the world:, 4. That the law of nature is immutable, and cannot be changed." 7 Coke Report 4 b, 77 ER pg. 382. (App. Pg. 60.)*

And the law of nature was held to be the law of God:

*"The Law of Nature is that which God at the time of creation of the nature of man infused into his heart, for his preservation and direction; and this is lex aeterna, the Moral Law, called also the Law of Nature. And by this Law, written with the finger of God in the heart of man, were the people of God a long time governed, before that Law was written by Moses, who was the first Reporter or Writer of Law in the world. . . **By this Law of Nature is the Faith, Ligeance, and Obedience of the Subject due to his Sovereign or Superiour.** . . This Law of Nature, which indeed is the eternal Law of the Creator, infused into the heart of the creature at the time of his creation, was two thousand years before any Laws written, and before any Judicial or Municipal Laws. . ." 7 Coke Report 13 a, 77 ER pg. 392. (Emphasis added.) (App. Pg. 70.)*

Calvin's Case is often misunderstood with regard to the general popular understanding of the jus soli rule, and more specifically to the exact meaning of the term, "natural-born". To be a "natural-born subject" of England, according to the ruling of Calvin's Case, does not, technically, relate directly to birth on the soil, but rather to birth within the power of

the King, as the spiritual head of God's church. Natural allegiance is born from that power being in force throughout the King's dominions and realms. So, despite Scotland and England being separate nations, with separate laws and governments, the subjects of each, born after unification of the thrones, were naturalized one to another by the spiritual power of the King, to whom the subjects of each separate nation owed a single, unified allegiance from birth:

*"The 2d. is an union of ligeance and obedience of the subjects of both kingdoms, due by the law of nature to their sovereign: and this union doth suffice to rule and overrule the case in question: and this in substance is but a uniting of the hearts of the subjects of both kingdoms one to another, under one head and sovereign." 7 Coke Report 14 b, 77 ER pg. 394. (App. Pg. 72.)*

Those born in England were naturalized as Scottish subjects, and those born in Scotland were naturalized as English subjects. The natural allegiance that creates a natural-born subject was directly owed to the King's physical person as the spiritual leader of God's Kingdom on Earth:

*"It is true, that the King hath two capacities in him: one a natural body, being descended of the blood Royal of the realm; and this body is of the creation of Almighty God, and is subject to death, infirmity, and such like; the other is a politic body or capacity, so called, because it is framed by the policy of man (and in 21 E. 4. 39. b. is called a mysticall body;) and in this capacity the King is esteemed to be immortal, invisible, not subject to death, infirmity, infancy, (a) nonage, &c. Pl. Com. in the case of The Lord Barkley, 238. and in the case of The Duchy 213. 6 E. 3. 291. and 26 Ass pl. 54. Now, seeing the King hath but one person, and several capacities, and one politic capacity for the realm of England, and another for the realm of Scotland, it is necessary to be considered, to which capacity ligeance is due. And it was resolved, that it was due to the natural person of the King (which is ever accompanied with the politic capacity, and the politic capacity as it were appropriated to the natural capacity), and it is not due to the politic capacity only, that is, to his Crown or 'kingdom distinct from his natural capacity, and that for divers reasons. First- every subject (as it hath been affirmed by those that argued against the plaintiff) is presumed by law to be sworn to the King, which is to his natural person, and likewise the King is sworn*

*to his subjects, (as it appeareth in Bracton, lib. 3. de Actionibus, cap. 9. fol. 107) which oath he taketh in his natural person: for the politic capacity is invisible and immortal; nay, **the politic body hath no soul, for it is framed by the policy of man.**"* 7 Coke Report 10 b, 77 ER pgs. 388-389. (Emphasis added.) (App. Pg. 67.)

The King has two bodies; a natural body, and a political body. The political body has no soul. It is unnatural. And therefore, natural allegiance is due to the King in his *natural* body. It is this natural allegiance that is referred to in the phrase, *natural-born subject*. Any other allegiance due to the laws and government of each nation ruled by the same monarch was deemed to be unnatural, and inapplicable:

*"Now seeing power and protection draweth ligeance, it followeth, that seeing the King's power, command and protection, extendeth out of England, that ligeance cannot be local, or confined within the bounds thereof. He that is abjured the Realm, Qui abjurat regnum amittit regnum, sed non Regem, amittit patriam, sed non patrem patriae: for notwithstanding the abjuration, he oweth the King his ligeance, and he remaineth within the King's protection; for the King may pardon and restore him to his country again. So as seeing that ligeance is a quality of the mind, and not confined within any place; it followeth, that the plea that doth confine the ligeance of the Plaintiff to the kingdom of Scotland, infra ligeantiam Regis regni sui Scotica, et extra ligeantiam regis regni sui Angliae, whereby the Defendants do make one local ligeance for the natural subjects of England, and another local ligeance for the natural subjects of Scotland, is utterly insufficient, and against the nature and quality of natural lineage, as often it hath been said."* 7 Coke Report 9 b, 77 ER pg. 388. (App. Pg. 66.)

As the King of both Scotland and England, he has one body politic for each country, but as a man he has but one natural body. If the subjects owed allegiance to the body politic, then they would be aliens to each other, but since the tie of natural allegiance was owed to the natural body of the King, the subjects share the same allegiance by the same ligament of faith. Hence, though there were two nations, the subjects of each, were, at birth, naturalized, one to another.

The common law meaning of the term - *natural-born subject* - is absolutely religious in nature; so much so, that, at common law, "infidels" - all non-Christians - were *never*

considered to be natural-born subjects, even if born in England (or Scotland) to parents who were domiciled there. This would change according to modern statutes and Royal consent, but the English common law, as discussed by Lord Coke in Calvin's Case, was absolutely certain on this point.

It is a popular fallacy that Calvin's Case created a rule by which all persons born on the soil were natural-born subjects, for it was held in that case, that natural allegiance, as it creates natural subjection, was a completely spiritual, and uniquely Christian, tenet of law:

*"All infidels are in law perpetui (d) inimici, perpetual enemies (for the law presumes not that they will be converted, that being remota potentia, a remote possibility) for between them, as with the devils, whose subjects they be, and the Christian, there is perpetual hostility, and can be no (a) peace; for as the Apostle saith, 2 Cor. 6. 15. Quæ autem conventio Christi ad Belial, aut quæ, pars fidei cum infideli, and the law saith, Judæo Christianum nullum serviat mancipium, nefas enim est quem, Christus redemit blasphemum, Christi in servitutis vinculis detinere. Register 282. Infideles sunt Christi et Christianorum inimici. And herewith agreeth the book in 12 H. 8. fol. 4. where it is holden that a Pagan cannot have or maintain any action at all (I)." 7 Coke Report 18 a, 77 ER pg. 397. (App. Pg. 75.)*

It is a well-known maxim of the common law that children born in the King's realms of *hostile* enemy parents are not natural-born subjects, but aliens at birth. Yet, the above quoted passage makes clear that the children of *spiritual* enemies are also aliens born. The hostile enemies rule was discussed by Justice Gray in Wong Kim Ark, where, unfortunately, he chose to ignore the spiritual aspect of the rule. This oversight has led to a fundamental misunderstanding, in the United States, of the jus soli concept as applied by the English common law:

*"Subject to the exceptions hereinafter mentioned, any person who (whatever the nationality of his parents) is born within the British dominions is a natural-born British subject. This rule contains the leading principle of English law on the subject of British nationality.' The exceptions afterwards mentioned by Mr. Dicey are only these two: '(1) Any person who (his father being an alien enemy) is*

***born in a part of the British dominions, which at the time of such person's birth is in hostile occupation, is an alien.'*** '(2) *Any person whose father (being an alien) is at the time of such person's birth an ambassador or other diplomatic agent accredited to the crown by the sovereign of a foreign state is (though born within the British dominions) an alien.'* ...Dicey, *Confl. Laws*, pp. 173-177, 741." U.S. v. Wong Kim Ark, 169 U.S. 649, 657-658. (Emphasis added.)

Justice Gray failed to mention that alien enemies, at the common law, included all infidels. All non-Christians were infidels. Even if the parents were pacifists from nations not at war with the throne, their status as infidels made them, at the common law, alien enemies of the King, since, as Lord Coke put it, they were considered to be subjects of *devils* who "the law presumes" will never be converted.

Spiritual enemies are not recognized by the laws of the United States, and neither is natural law part of our secular jurisprudence. Therefore, a necessary and proper consultation of the *nomenclature* of the common law, forbids any construction of the natural-born citizen clause that relies upon the English common law concept of natural allegiance.

Many colonial statutes in force prior to the Revolution granted the status of "natural-born subject" only to members of the Christian faith, so the framers were certainly aware of the spiritual element governing the term "natural-born subject". For example, two naturalization statutes in New York contained similar provisions. The title of an act passed on Nov. 1, 1683, was:

*"AN ACT for naturalizing all those of foreign Nations at present inhabiting within this province and professing Christianity, and for Encouragement of others to come and settle within the same."* Laws Of The Colony Of New York, Vol. I, pg. 123. (App. Pg. 96.)

The title of an act passed on July 5, 1715, was:

*"An Act declaring that all Persons of Foreign Birth Inhabiting within this Colony and dying Seized of any Lands Tenements or Hereditaments shall be forever hereafter Deemed Taken and Esteemed to have been Naturalized, and for Naturalizing all Protestants of Foreign Birth now Inhabiting within this Colony."*

Based upon these statutes, it is obvious that the colonies brought with them the spiritual elements of the common law. But after the Revolution, with the adoption of the Constitution (which never would have been ratified without the promised Bill of Rights), and the subsequent ratification of the 1st Amendment, this country abandoned all spiritual elements of the common law in favor of a secular government, which, by intellectual design, specifically forbid the establishment of religion.

Therefore, with regard to the term, "natural-born subject", as it relates to the jus soli rule, this nation specifically rejected that our citizens owed *natural allegiance* - as defined by the common law - with specific reference to the natural law of God. Instead, the citizens of this nation owe allegiance to the collective body politic, to which each member is a sovereign part. And, according to the common law, as announced in Calvin's Case, allegiance to the body politic is *unnatural*, since, "***[T]he politic body hath no soul, for it is framed by the policy of man.***" 7 Coke Report 10 b, 77 ER pg. 389. (Emphasis added.)

As such, it is both, intellectually dishonest, as well as absolutely unconstitutional, for the "natural born Citizen" clause to be interpreted as being synonymous with the common law term, "natural-born subject", as that term is understood in relation to jus soli subjection.

The issue of allegiance being owed to the natural body of the King was briefly, and erroneously, alluded to by Justice Gray in Wong Kim Ark:

*" 'The doctrine of the common law is that every man born within its jurisdiction is a subject of the sovereign of the country where he is born; and allegiance is not personal to the sovereign in the extent that has been contended for; it is due to him in his political capacity of sovereign of the territory where the person owing the allegiance was born.' Kilham v. Ward (1806) Id. 236, 265." U.S. v. Wong Kim Ark, 169 U.S. 649, 663.*

Justice Gray is quoting a Massachusetts case, where the opinion expressed above was by a single Judge, not the opinion of the entire court. Furthermore, Justice Sewell (and Justice Gray) simply got it wrong. This quotation completely misstates the common law rule of natural allegiance established in Calvin's Case. And Justice Gray added further

confusion to the issue:

*"It may here be observed that in a recent English case Lord Coleridge expressed the opinion of the queen's bench division that the statutes of 4 Geo. II. (1731) c. 21, and 13 Geo. III. (1773) c. 21 (hereinafter referred to), 'clearly recognize that to the king in his politic, and not in his personal, capacity, is the allegiance of his subjects due.' Isaacson v. Durant, 17 Q. B. Div. 54, 65." U.S. v. Wong Kim Ark, 169 U.S. 649, 663.*

Isaacson v. Durant was decided in 1886, and could not have possibly influenced the framers. Furthermore, the decision in that case, decided one hundred years after the adoption of the Constitution, was that the statutes *modified* the pre-existing common law. It is well established that the United States looks to the English common law for nomenclature clarification, and not to English statutory law. Furthermore, since there was no judicial determination which observed this modification of the common law until 1886, the framers would certainly not have taken it upon themselves to imagine, and invoke, a statutory modification that wasn't observed by the English courts until one hundred years later.

Additionally, no American Judge has the ability to change the common law of England:

*"No courts other than English courts can determine definitely and finally what the law of England is, and the common law of England on any subject cannot possibly be different from the final and settled determinations of the highest court in England. The common law of England is what the English courts make it. The courts of New York and Illinois may express an opinion as to the common law of England, but they cannot by any possibility make the law of England as the English courts in fact make it . . ."* "The English Common Law In The United States", by Herbert Pope, Harvard Law Review, Vol. 24, No. 1, pg. 6, 13-14 (Nov., 1910.) (App. Pg. 108-109.)

Calvin's Case was decided in the Court of King's Bench, which was the tribunal for all matters involving the monarch. Therefore, its determination in Calvin's Case has always been held as *the* common law on the issue of natural allegiance. The common law is established by the first judicial determination on the point in question:

*"As it does not rest on any statute or other written declaration of the sovereign, there must, as to each principle thereof, be a first statement. Those statements are found in the decisions of courts, and the first statement presents the principle as certainly as the last. Multiplication of declarations merely adds certainty. For after all, the common law is but the accumulated expressions of the various judicial tribunals in their efforts to ascertain what is right and just between individuals in respect to private disputes."* Kansas v. Colorado, 206 U. S. 46, 96-97 (1907).

Since religion was the basis for the English common law designation, *natural-born subject*, the natural-born citizen clause cannot be synonymous with it, as this construction would be directly repugnant to the Constitution. The 1st Amendment forbids the establishment of religion, so the framers must have relied upon something else when they enacted the natural-born citizen clause.

Therefore, based on all of the above, it is clear that invocation by the framers, of the term, "natural born Citizen", in Article 2, Section 1, could not have embraced the meaning of "natural-born subject" as that term relates to the concept of *jus soli* under the English common law. Therefore, we must look elsewhere to ascertain the true definition of "natural born Citizen".

## **ii). Jus Sanguinis In The British Common Law Emanates From The Natural Relation Of Parent To Child.**

We must look again to the English common law to see whether its *nomenclature* embraces the term "natural-born subject" with regard to a *jus sanguinis* rule, which is associated with the blood of ones parents, rather than the soil upon which one is born.

Indeed, the *nomenclature* of the common law does associate the *jus sanguinis* rule with the term "natural-born subject". But in doing so, it's the blood of the parents, which is said to communicate nature to the child, rather than the spiritual power of the King emanating throughout his realms. With regard to *jus sanguinis* subjection, the blood of nature initiates natural allegiance, rather than the place of birth.

It is well known that many English statutes, going all the way back to the 14th century, deem persons born abroad to English parents to be "natural-born subjects". But there exists an ongoing dispute in British law as to whether these statutes were *declaratory* of the common law, or whether the statutes enacted *new* law. This dispute began in 1351 with the *Statute De Natis Ultra Mare*, 25 Edw. III, and the dispute has never been affirmatively settled. Justice Gray raised the issue in *Wong Kim Ark*:

*"It has sometimes been suggested that this general provision of the statute of 25 Edw. III. was declaratory of the common law. See Bacon, arguendo, in Calvin's Case, 2 How. St. Tr. 585; Westlake and Pollock, arguendo, in De Geer v. Stone, 22 Ch. Div. 243, 247; 2 Kent, Comm. 50, 53; Lynch v. Clarke, 1 Sandf. Ch. 583, 659, 660; Ludlam v. Ludlam, 26 N. Y. 536. But all suggestions to that effect seem to have been derived, immediately or ultimately, from one or the other of these two sources: The one, the Year Book of 1 Rich. III. (1483) fol. 4, pl. 7, reporting a saying of Hussey, C. J., 'that he who is born beyond sea, and his father and mother are English, their issue inherit by the common law, but the statute makes clear,' etc.,-which, at best, was but obiter dictum, for the chief justice appears to have finally rested his opinion on the statute. The other, a note added to the edition of 1688 of Dyer's Reports, 224a, stating that at Trinity term 7 Edw. III. Rot. 2 B. R., it was adjudged that children of subjects born beyond the sea in the service of the king were inheritable,-which has been shown, by a search of the roll in the king's bench so referred to, to be a mistake, inasmuch as the child there in question did not appear to have been born beyond sea, but only to be living abroad. Westl. Priv. Int. Law (3d Ed.) 324.*

*"The statute of 25 Edw. III. recites the existence of doubts as to the right of foreignborn children to inherit in England; and, while it is declaratory of the rights of children of the king, and is retrospective as to the persons specifically named, yet as to all others it is, in terms, merely prospective, applying to those only 'who shall be born henceforth.'"* U.S. v. Wong Kim Ark, 169 U.S. 649, 669-670.

Justice Gray's opinion appears to have been that the 25 Edw. III statute, as it related to the children of subjects born abroad, was not declaratory, but that it created new law. He therefore concluded that *jus sanguinis* was not a common law principle, but only a

statutory creation, and therefore was not adopted by the United States as a general rule of citizenship embraced by the Constitution. Whether this view was a correct interpretation of the common law is not important to the issue at bar. What is important is that the *nomenclature* of the common law embraced jus sanguinis, and associated it directly with the term "natural-born subject".

Important English authorities on the common law were listed by Justice Gray as having taken the position that jus sanguinis was a legitimate principle of the common law. The authorities cited include Francis Bacon's argument in Calvin's Case. These English authorities contradict Justice Gray's contention that jus sanguinis was not a common law principle. And he failed to acknowledge a legal text published in London in 1785, just three years before the Constitution was adopted, which provided a strong argument that jus sanguinis was an ancient part of the common law.

In, *A Supplement To The Investigation Of The Native Rights Of British Subjects*, by Francis Plowden, Esq., (London, 1785), Solicitor General Francis Bacon's statement to the court in Calvin's Case, concerning jus sanguinis, was quoted as follows:

*"I will conclude my observations upon the statute de natis ultra mare with a repetition of Lord Bacon's words, 'By the Law of England it should suffice either place or parents. If he be born in England, it is no matter though his parents be Spaniards or what you will. On the other fide, if he be born of English parents, it skilleth not though he be born in Spain, or in any other place of the world.' Such then is the common Law of England and with this agree Hussey, Rastal, Brook, Fitzherbet . . ." Id. pg. 79. (App. Pg. 127.)*

Plowden's text was a contemporary work, published in London only two years prior to the Constitution having been adopted. It was available to the framers. And it thoroughly discussed the dispute, holding that jus sanguinis subjection was, indeed, part of the English common law, and that the 25 Edw. III was declaratory thereof.

Whether Plowden's view, or Justice Gray's opposing view, was correct has never been firmly settled by English authorities. But the final determination of that theoretical dispute is irrelevant to the issue now before this court. What is, however, extremely relevant to a determination of the framers' intent behind the natural-born citizen clause, is

that the *nomenclature* of the common law embraced the term "natural-born subject" in relation to the jus sanguinis rule.

Since the nomenclature of the common law (if not the actual principle) acknowledged the theory of natural-born subjection via jus sanguinis, it is perfectly rational to consider that the framers may have enacted the natural-born citizen clause with reference to the jus sanguinis rule, which is based upon the organic relationship of parent and child.

Furthermore, since the natural-born citizen clause only relates to the civic right of holding public office, and not to one's political status as a citizen, it is possible for the jus sanguinis to be incorporated into Article 2, Section 1, without infringing upon the general rule of jus soli citizenship under the 14<sup>th</sup> Amendment, as was established by the holding in Wong Kim Ark. And since we have established that the common law's spiritual usage of the jus soli rule could not have been a Constitutional source of the natural-born citizen clause, it becomes much more likely that the words "natural born" in Article 2, Section 1, require citizen parents.

While "natural-born" at common law, with regard to jus soli - as per the holding in Calvin's Case - is based entirely upon spiritual grounds, "natural born" at common law, with regard to jus sanguinis, is initiated by the *science of nature*, as conveyed by the blood of the parent giving birth to the child.

The issue was discussed in another famous case, *Bacon v. Bacon*, where an English merchant married a Polish woman, and had children in Poland. The Court stated the common law of England to be *partus sequitur patrem*, which means that the child follows the condition of the father. The child born in Poland was, therefore, held to be a natural-born subject of England. *Bacon v. Bacon* was analyzed by Charles Viner, Esq. in his text, *A General Abridgment of Law and Equity*, Vol. 2 (1791), at pg. 262:

*"A merchant trading in Poland married an alien and died leaving her big with child. . . And per Brampfton, though the civil law is that partus sequitur ventrem, yet our law is otherwise, and the child shall be of the father's condition, and he being an English merchant, and residing there for merchandize, his children shall by the common law, or rather, as Berkley said, by the statute 25 E. 3 be accounted the king's lieges, as their father was. . . So where such merchant had several*

*children born in Poland of a Polish woman, and devised his lands in England to such children; and it being demanded of all the justices of England at Serjeant's-inn, as Yelverton J. said, they made no scruple any of them but that the issue should inherit, and were not aliens, because the father went with licence, being a merchant, and in our law partus sequitur patrem: and also there is blood between him and his issue, and he communicates nature to them;"* (Emphasis added.) (App. Pg. 131.)

Therefore, when the common law considers jus sanguinis subjection, the father is said to "communicate nature" to the children by the blood between them. That the *nomenclature* of the common law embraced jus sanguinis in relation to creating natural-born subjects is made perfectly clear in Bacon v. Bacon, and Viner's text.

Since the common law application of jus soli requires, as its basis of power, submission to Christ, the framers could not have intended to incorporate the jus soli element of natural allegiance into Article 2, Section 1. Therefore, it begins to look more and more likely that the specific intention of the natural-born citizen clause was to require both, jus soli, and, jus sanguinis.

### **iii.) Not All Natural-Born Subjects Shared The Same Civic Rights.**

In the United States, a natural-born citizen is entitled to obtain the highest public office of the nation. Such a person holds the political status of being a member of this nation, and also stands at the pinnacle of civic status. If it is contended that the term "natural-born subject" is synonymous with "natural-born citizen", then we should expect that all natural-born subjects were also entitled to stand at the pinnacle of civic status bestowed by the country. But this is not the case in England, where many natural-born subjects, born in England, suffered a lower civic status due to their parents having been aliens. While their political status was protected as natural-born subjects, many were deprived of a variety of civic rights, even by the Crown, on account of their not being born of English parents.

The plight of this class of natural-born subjects was discussed in a book, titled, *Diversity and Difference in Early Modern London*, by Jacob Selwood, Ashgate Publishing (2010). In Chapter 3, "English-born Reputed Strangers": *Birth and Descent in Theory and*

*Practice*, Selwood highlights an English statute which recognized that persons born in England of English parents enjoyed certain civic rights denied to natural-born subjects born of alien parents:

*"The 1660s were, in fact, a mixed bag, bringing new measures for the naturalization of strangers together with the ongoing exclusion of their Englishborn children. A 1662 statute for 'preventing frauds and regulating abuses in his Majesty's customs' contained a provision that 'no children of aliens under the age of twenty-one years be permitted to be traders or any goods or merchandizes to be entered in their names.' The full rights of all English-born were, apparently, open to question in Westminster too, and in a manner that received royal assent." Id. 119. (App. Pg. 133.)*

The chapter discusses numerous instances where natural-born subjects were denied, by the City of London, the same civic rights as subjects born of English parents. But in this particular statute, the Crown itself recognized that those born of English parents enjoyed a higher civic status.

The statute illustrates that, in England, *jus sanguinis* was considered relevant to civic status, and public rights. Even after statutes were enacted to change the common law, which restricted non-Christians from being subjects, the civic rights of non-Christians were still restricted:

*"Charles II, after his return, allowed Jews to remain, and their English-born children became subjects under the jus soli rule. Although, like other non-Anglicans, these Jewish subjects were excluded from public life and the universities. . ."* "Subjects, Citizens, Aliens And Others", by Ann Dummett and Andrew Nicol, Fred B Rothman & Co (1990), pg. 77. (App. Pg. 135.)

The term, natural-born subject, covered a multiplicity of subjection devices, including; *jus soli*, *jus sanguinis*, and all forms of naturalization. Being a natural-born subject, however, most certainly did not confer upon the subjects an equal civic status, whereas the natural-born citizen clause infers the pinnacle of civic status.

From the first naturalization act in 1790, and ever since, the United States has required a federal statute to establish citizenship for persons born abroad, even those born to citizen

parents. This leads to an implication, that, with regard to general citizenship, prior to the 14<sup>th</sup> Amendment, birth on U.S. soil was necessary for birthright citizenship. This was later absolutely established by the 14<sup>th</sup> Amendment. Whether, prior to the Amendment, U.S. citizenship required citizen parentage as well as birth on the soil, remains an open issue, *unless* Justice Gray's opinion in Wong Kim Ark, that the jus soli rule was in force before, during, and after July 4, 1776, is precedent on that issue, and not dicta.

Since (as will be discussed in great detail below) Justice Gray's opinion from Wong Kim Ark contains numerous objective errors with regard to Supreme Court decisions on citizenship prior to the 14<sup>th</sup> Amendment, the decision in Wong Kim Ark ought to be strictly confined to the holding, and should, therefore, only be applied to citizenship issues which involve the 14<sup>th</sup> Amendment.

Regardless, even if jus soli were enough to establish the *general* political status of citizenship, the issue of whether a citizen has the *specific* civic status necessary to be considered a natural-born citizen, requires a completely separate construction and definition of the term "natural-born". Since we know birth in the country was necessary for general citizenship, and since Presidential eligibility requires, by the very words of the Constitution, something more than being a citizen, it is perfectly logical that the true intention of the natural-born citizen clause was to require both, jus soli, and jus sanguinis, so that the President/Commander In Chief, would not have been born with divided loyalties. Requiring the President to have a singular allegiance to the United States avoids complications with regard to treaties, and treason, both of which relate to our relationships with other countries, such issues always having been determined with respect for the Law of Nations.

### **C. The Law Of Nations.**

Now that we have closely examined the English common law for guidance, it is proper to consult the Law of Nations, which is specifically referred to the U.S. Constitution:

*"The Congress shall have power...To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;"* U.S.

Constitution, Art. I, Sec. 8, Cl. 10.

Lord Chancellor Ellesmere's opinion in Calvin's Case determined that the Law of Nations was also adopted as part of the English common law.

*"And the end they have in this question what is the common law is to shake and weaken the ground and principles of all government and in this particular question of the law of England to overthrow that law whereby this realme hath many hundred yeares beene governed in all honour and happinesse: or at least to cast an aspersion upon it, as though it were weake and uncertaine. I will therefore declare mine opinion in this point plainly and confidently, as I thinke in my conscience, and as I finde to be sufficiently warranted by ancient writers, and good authorities voide of all exception.*

*"The common law of England is grounded upon the law of God and extendes itselfe to the original law of nature and the universal law of nations."* Calvin's Case, Lord Chancellor Ellesmere, Exchequer Chamber, STATE TRIALS, 6 James I., 1608 – The Case of the Postnati, pgs. 669-670. (App. Pg. 142.)

The Law of Nations is, in all actuality, a universal common law of international jurisprudence. That the framers of the Constitution were influenced by the Law of Nations cannot be disputed. It has always been considered, by the Supreme Court, as relevant to international legal disputes in American tribunals.

In 1775, Benjamin Franklin wrote a gracious note to Charles Dumas, for "the kind present you have made us of your edition of Vattel. It came to us in good season, when the circumstances of a rising state make it necessary frequently to consult the law of nations." Franklin also stated that Vattel's treatise was, "continually in the hands of the members of our Congress." (From a letter, Benjamin Franklin to Charles Dumas, Dec. 19, 1775.)

From the 1775 edition of Vattel's text, *The Law of Nations or Principles of the Law of Nature*:

*"Les citoyen font les member de la societe civile: lies a cette societe par certain*

*devoirs, & fournis a fon autorite, ils participent avec egalite a fes avantages. Les naturels, ou indigenes, font ceux, qui font nes dans le pays, de parens citoyens.*”

“Le Droit Des Gens ou Principes De La Loi Naturelle”, E. de Vattel, (Amsterdam, 1775), § 212, pg. 115. (App. Pg. 157.)

Vattel’s treatise was first published in 1758, in French. The first edition contains the exact same passage as the 1775 edition give to Franklin by Dumas. In 1759, the first English edition was published in London, translated as follows:

*“The citizens are the members of the civil society : bound to this society by certain duties, and subject to its authority, they equally participate in its advantages. The natives, or indigenes, are those born in the country of parents who are citizens.”* “The Law of Nations or Principles of the Law of Nature”, E. de Vattell, (London, 1759), § 212, pg. 92. (App. Pg. 159.)

“*Les naturels, ou indigenes*”, was not accurately translated. The proper translation of “indigenes” is “natives”. The 1759 London edition makes the mistake of repeating the same word twice, once in English and once in French; “natives or indigenes” means “natives or natives”.

The influence of the U.S. Constitution may have played a part in correcting the error, since, in the 1797 London edition, and thereafter, the French passage was correctly translated as follows:

*“The citizens are the members of the civil society : bound to this society by certain duties, and subject to its authority, they equally participate in its advantages. **The natives, or natural-born citizens, are those born in the country of parents who are citizens.**”* (Emphasis added.) “The Law of Nations or Principles of the Law of Nature”, E. de Vattell, (London, 1797), § 212, pg. 101. (App. Pg. 161.)

The passage was first introduced to American Jurisprudence in the case of *The Venus*, 12 U.S. 253 (1813):

*“The whole system of decisions applicable to this subject, rests on the law of nations as its base. It is, therefore, of some importance to enquire how far the*

*writers on that law consider the subjects of one power residing within the territory of another, as retaining their original character, or partaking of the character of the nation in which they reside.*

*“Vattel, who, though not very full to this point, is more explicit and more satisfactory on it than any other whose work has fallen into my hands, says, ‘the citizens are the members of the civil society; bound to this society by certain duties, and subject to its authority, they equally participate in its advantages. The natives, or indigenes, are those born in the country, of parents who are citizens.’” Id. 289.*

Vattel first introduces the citizens as the general members of civil society. He then identifies a specific subset of citizens, the “natives ou naturels”, who are born in the country of parents who are citizens.

Since general citizenship is, of course, determined by the will of each separate nation, it is not suggested that the Law of Nations need be consulted in determining whether a nation adopts jus soli, or jus sanguinis. However, when we consider the advantages of having a chief executive who was not born owing allegiance to an alien power, it becomes obvious that a requirement of jus soli, *and* jus sanguinis, as to the chief executive, would avoid all possible conflicts of allegiance, with regard to the chief executive’s power to execute and enforce treaties, and to declare and conduct war.

If the chief executive is confronted with the possibility of war with the foreign nation to which he was born owing a second allegiance, he might have to choose treason against one of the two nations. This would be a very unnatural situation. Similar conflicts of interest are possible with regard to the negotiation and execution of treaties. Requiring a singular allegiance in the chief executive avoids all possible conflicts of interest, and simply makes common sense.

John Jay, the first Chief Justice of the Supreme Court, is credited with being the first to suggest that the Commander In Chief be a natural-born citizen. In a letter to George Washington, dated July 25, 1787, Jay wrote:

*“Permit me to hint, whether it would be wise and seasonable to provide a strong check to the admission of Foreigners into the administration of our national*

*Government; and to declare expressly that the Commander in Chief of the American army shall not be given to nor devolve on, any but a natural born Citizen. " (App. Pg. 162.)*

Jay underlined “born” in his own hand. More interesting, perhaps, is that the letter is concerned with the capacity of Commander In Chief. This provides clarity that the natural-born citizen clause is a national security measure. Jay appears to have been uniquely focused upon a fear that the military might be infiltrated by foreign powers. Considering that he called for, “*a strong check to the admission of foreigners into the administration of our national government*”, it makes sense that the natural-born citizen clause was designed to guarantee a singular allegiance to this nation. Anything less would not be a very strong check at all.

If the natural-born citizen clause was intended as a unification of jus soli, and jus sanguinis, we would expect to have at least one Supreme Court decision in our national judicial history, which confirms that the natural-born citizen clause does, in fact, require a unified allegiance , via birth in the country to citizen parents. *Minor v. Happersett* is that case.

#### **D. Minor v. Happersett, 88 U.S. 162 (1874).**

The only Supreme Court decision which has directly construed the natural-born citizen clause from Article 2, Section 1, is *Minor v. Happersett*, 88 U.S. 162 (1874). In that case, Virginia Minor petitioned the court to determine whether women were equal citizens to men, and further argued that if she was a citizen, her right to vote was protected by the 14th Amendment, which she also claimed made her a citizen. The Court's unanimous decision declined to construe the 14th Amendment's citizenship clause. Instead, the Court held that Minor was a citizen prior to the adoption of the 14th Amendment.

The Court established her citizenship by defining the word "citizen", and then identifying the class of “natural-born citizens”, to which she belonged. Their holding was that natural-born citizens were citizens at birth who do not require the 14th Amendment to establish their membership in the nation. The Court also noted that persons, who were not eligible to the class of *natural-born citizens*, might, however, be *citizens* under the 14th Amendment:

*"The Constitution does not, in words, say who shall be natural-born citizens. Resort must be had elsewhere to ascertain that. At common-law, with the nomenclature of which the framers of the Constitution were familiar, it was never doubted that all children born in a country of parents who were its citizens became themselves, upon their birth, citizens also. These were natives, or natural-born citizens, as distinguished from aliens or foreigners." Minor v. Happersett, 88 U.S. 162, 168.*

There are two classes of persons discussed in the above quotation. Those born in the country of citizen parents were labeled by the Court as "natives, or natural-born citizens", but these were also further identified as being "distinguished from aliens or foreigners". The distinction is crucial.

On one side are those who have no citizenship other than that of the United States, as distinguished from those on the polar opposite side, who have absolutely no claim to citizenship in the United States; *"These were natives, or natural-born citizens, as distinguished from aliens or foreigners."* Id. Those who fall in between these two extremes make up a third class of persons whose citizenship status, the Court noted, was subject to doubt:

*"Some authorities go further and include **as citizens** children born within the jurisdiction without reference to the citizenship of the parents. As to this class there have been doubts, but never as to the first."* Id. (Emphasis added.)

Had this third class been contemplated as having any claim to natural-born citizen status, the distinction employed by the court would not make sense. The distinction appears to have been created to more specifically identify the class of persons who were natural-born citizens under Article 2, Section 1, since the two classes discussed are in direct opposition to each other.

For example, a person born in the U.S., to a British father and U.S. citizen mother, would be considered a British subject. Whether this child would be, at his birth, a citizen under the 14th amendment, was left undecided by the Supreme Court in *Minor*. But let's assume that the child is a U.S. citizen. Where does that child fit into the distinction offered by the Court in *Minor*? The child is not on either polar extreme, since the child

was not exclusively a U.S. citizen at birth, nor was the child exclusively a British subject at birth. He would not fit into the distinction.

By choosing two extremes – those who, at their birth, are nothing but U.S. citizens – “as distinguished from aliens or foreigners” – those who, at their birth, have absolutely no claim to U.S. citizenship – the Supreme Court in *Minor* provided extra criteria to properly discern their holding, so that nothing has been left open as to the Court’s identification of the specific natural-born citizen class. This is made even more clear by the *other* federal citizenship holding from *Minor v. Happersett*:

*“The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a **member of the nation** formed by the association...*

*For convenience it has been found necessary to give a name to this membership. The object is to designate by a title the person and the relation he bears to the nation. For this purpose the words ‘subject,’ ‘inhabitant,’ and ‘citizen’ have been used, and the choice between them is sometimes made to depend upon the form of the government. Citizen is now more commonly employed, however, and as it has been considered better suited to the description of one living under a republican government, it was adopted by nearly all of the States upon their separation from Great Britain, and was afterwards adopted in the Articles of Confederation and in the Constitution of the United States. **When used in this sense it is understood as conveying the idea of membership of a nation, and nothing more.**” *Minor v. Happersett*, 88 U.S. 162, 165-166 (1874). (Emphasis added.)*

Therefore, when the Court uses the words, “citizen” or “citizenship”, no other meaning may be implied other than, “membership of a nation”, whereas, the natural-born citizen clause only pertains to a requirement for holding public office. Those who are natural-born meet that qualification, but all who are citizens, natural-born, naturalized abroad, naturalized here, at birth, or later in life, are members of the nation. The word “citizen”, according to the Supreme Court in *Minor*, refers to membership of a nation, *and nothing more*.

The following statement only left open the issue of whether persons born here of aliens

were *citizens*. The Court did not leave open the class of *natural-born citizens*:

*“Some authorities go further and include as **citizens** children born within the jurisdiction without reference to the **citizenship** of their parents. As to this class there have been doubts, but never as to the first. For the purposes of this case it is not necessary to solve these doubts. It is sufficient for everything we have now to consider that all children born of citizen parents within the jurisdiction are themselves **citizens**.”* Id. at 167-168. (Emphasis added.)

When the Court stated that, according to the *nomenclature* of the common law, it was never *doubted* that natives were citizens, it clearly drew a distinction between the *general* class of all members of the nation (citizens), and the *specific* subset of that class, the “natives, or natural-born citizens”. When the Court returned to the word, *doubts*, it was related only to the general issue of membership in the nation, *and nothing more*.

Reading the above quoted passage in light of the definition of “citizen” from pg. 166 of *Minor*’s unanimous opinion, it becomes evident that what is referred to here is membership in our nation, *and nothing more*. Any attempt to insert the words – “natural-born” – into this statement would be in direct opposition to the Court’s very holding of the case.

More light may be shed on the issue by examining the opinion of the Supreme Court in *The Slaughter-House Cases*, decided two years earlier than *Minor*, when the Court was composed of 8 of the 9 Justices involved with *Minor*’s unanimous opinion. The Court issued the following statement concerning the meaning of “subject to the jurisdiction thereof” in the 14<sup>th</sup> Amendment:

*“The phrase, 'subject to its jurisdiction' was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States.”* *The Slaughter-House Cases*, 83 U.S. 36, 73 (1872).

Only two years prior to *Minor*, the Court was of the opinion that persons born in the country to alien parents were not even *citizens*, never mind *natural-born*. Then, two years later, in *Minor*, the Court identified the *specific* class of natural-born citizens as those born in the country of citizen parents, but left open the issue of who was eligible to the

*general* class of citizens.

While the Court in *Minor v. Happersett* humbly recognized authorities that ran counter to their dicta from the Slaughter-House Cases, they were firm in their identification of the natural-born citizen class. Since Virginia Minor was a member of that specific class, she was automatically a member of the general class, and therefore, the 14<sup>th</sup> Amendment was held to be unnecessary to determine the citizenship of anyone eligible to the specific natural-born class.

When the Supreme Court eventually revisited the 14<sup>th</sup> Amendment citizenship clause in *Wong Kim Ark*, it could not include the petitioner in the *specific* class, so the Court was required to invoke the 14<sup>th</sup> Amendment to establish the petitioner's membership in the *general* class as a citizen. Had *Wong Kim Ark* been a natural-born citizen, the Court would not have been required to reach for the 14<sup>th</sup> Amendment, just as it didn't reach it in *Minor v. Happersett*.

### **Precedent v. Dicta.**

In 1996, the US Supreme Court's majority opinion by Justice Breyer in *Ogilvie Et Al., Minors v. United States*, 519 U.S. 79 (1996), stated that when the Court discusses a certain reason as an independent ground in support of their decision, then that reason is not dictum:

*"Although we gave other reasons for our holding in Schleier as well, we explicitly labeled this reason an 'independent' ground in support of our decision, id., at 334. We cannot accept petitioners' claim that it was simply a dictum."* Id. 84.

The *Minor* Court's construction of the natural-born citizen clause was the independent ground by which the Court avoided construing the 14th Amendment's citizenship clause. Therefore, such construction is precedent, not dicta, despite Presidential eligibility not being an issue in that case. The Court determined it was necessary to define the class of natural-born citizens, and the definition remains current legal precedent.

The *Minor* Court's unanimous opinion has never been overruled or even questioned. In fact, the very passage defining the natural-born citizen class was re-stated in Justice Gray's opinion from *Wong Kim Ark*:

*“That neither Mr. Justice Miller, nor any of the justices who took part in the decision of the Slaughter House Cases, understood the court to be committed to the view that all children born in the United States of citizens or subjects of foreign states were excluded from the operation of the first sentence of the fourteenth amendment, is manifest from a unanimous judgment of the court, delivered but two years later, while all those judges but Chief Justice Chase were still on the bench, in which Chief Justice Waite said. . .’At common law, with the nomenclature of which the framers of the constitution were familiar, it was never doubted that all children born in a country, of parents who were its citizens, became themselves, upon their birth, citizens also. These were natives or natural-born citizens, as distinguished from aliens or foreigners. Some authorities go further, and include as citizens children born within the jurisdiction, without reference to the citizenship of their parents. As to this class there have been doubts, but never as to the first. For the purposes of this case, it is not necessary to solve these doubts. It is sufficient, for everything we have now to consider, that all children, born of citizen parents within the jurisdiction, are themselves citizens.’ “ U.S. v Wong Kim Ark, 169 U.S. 649, 679-680.*

In this passage, Justice Gray has cited to the unanimous opinion from *Minor v. Happersett* to counter dicta from *The Slaughter-House Cases*, which excluded children of aliens from the *general* citizenship class, while, at the same time, the *Minor* Court’s identification of the *specific* natural-born citizen class was not questioned at all. In fact, it appears to have been cited as an example of precedent, as contrasted with the dicta from *The Slaughter-House Cases*. Surely, if the majority from *Wong Kim Ark* had taken issue with the *Minor* Court’s natural-born citizen definition, this was the place for them to speak up and be heard. Since no issues were raised, it’s fair to conclude that the Court approved.

While it is true that the dissent in *Wong Kim Ark* appeared to believe the majority holding would have made Ark eligible to be President (*Id.* 715), the majority having cited the exact definition of natural-born citizen from *Minor v. Happersett* may have been intended to lay the dissent’s fears to rest.

Directly after quoting the *Minor* Court’s definition of natural-born citizen, Justice Gray noted that the holding in *Minor* incorporated two citizen parents:

*"The decision in that case was that a woman born of citizen parents within the United States was a citizen of the United States, although not entitled to vote, the right to the elective franchise not being essential to citizenship." U.S. v. Wong Kim Ark, 169 U.S. 649, 680.*

Had the Court in Wong Kim Ark identified the petitioner as a natural-born citizen, there would have been no need to construe the 14th Amendment's citizenship clause, just as it wasn't necessary to construe it to determine Virginia Minor's citizenship. But Wong Kim Ark was not natural-born, and, therefore, the Court was required to construe the 14th Amendment to determine his citizenship.

#### **E. Citizenship Cases Prior To Adoption of the 14<sup>th</sup> Amendment.**

In 1898, the Supreme Court, in *U.S. v. Wong Kim Ark*, construed the 14<sup>th</sup> Amendment's citizenship clause, and determined that all persons born in the U.S. to parents who were domiciled in the country, were, upon their birth, citizens. While Justice Gray's majority opinion indicates that the holding is restricted to citizenship issues after the adoption of the 14<sup>th</sup> Amendment, the opinion discusses many important citizenship decisions leading up to the Amendment.

Unfortunately, Justice Gray made some obvious mistakes with regard to these cases, and other points of authority. As such, the decision of the Court ought to be restricted to its holding. And since we are searching for the framers' intent with regard to the natural-born citizen clause, the earliest decisions of the Supreme Court, though superseded by the 14<sup>th</sup> Amendment, and the accompanying general citizenship holding in Wong Kim Ark, remain relevant to this discussion for their probatory value as to the specific issue now before this Court.

##### **i.) Inglis v. Trustees Of Sailor's of Snug Harbor, 28 U.S. 99 (1830).**

In Wong Kim Ark, Justice Gray discussed this case as follows:

*In Inglis v. Sailors' Snug Harbor (1830) 3 Pet. 99, in which the plaintiff was born in the city of New York, about the time of the Declaration of Independence, the justices of this court (while differing in opinion upon other points) all agreed that the law of England as to citizenship by birth was the law of the English colonies*

*in America. Mr. Justice Thompson, speaking for the majority of the court, said: 'It is universally admitted, both in the English courts and in those of our own country, that all persons born within the colonies of North America, while subject to the crown of Great Britain, were natural-born British subjects.' Id. 120. Mr. Justice Johnson said: 'He was entitled to inherit as a citizen born of the state of New York.' Id. 136. Mr. Justice Story stated the reasons upon this point more at large, referring to Calvin's Case, Blackstone's Commentaries, and Doe v. Jones, above cited, and saying: 'Allegiance is nothing more than the tie or duty of obedience of a subject to the sovereign under whose protection he is; and allegiance by birth is that which arises from being born within the dominions and under the protection of a particular sovereign. Two things usually concur to create citizenship: First, birth locally within the dominions of the sovereign; and, secondly, birth within the protection and obedience, or, in other words, within the ligeance, of the sovereign. That is, the party must be born within a place where the sovereign is at the time in full possession and exercise of his power, and the party must also at his birth derive protection from, and consequently owe obedience or allegiance to, the sovereign, as such, de facto...' Id. 155... 'Nothing is better settled at the common law than the doctrine that the children, even of aliens, born in a country, while the parents are resident there under the protection of the government, and owing a temporary allegiance thereto, are subjects by birth.' Id. 164."* U.S. v. Wong Kim Ark, 169 U.S. 649, 659, 660.

All of the above is well and good as a restatement of the English common law principles of allegiance, but Justice Gray completely ignored the actual holding of the majority opinion of the Court in the Inglis case. Instead, he focused on the minority concurring opinions of Justice Johnson, and Justice Story, which only served to mislead from the fact that the holding in this case is exactly opposite to the principles contended for by Justice Gray.

The issue in Inglis was whether the plaintiff could inherit land in the United States, and the question turned on whether he was to be considered a British subject, or an American citizen. If British, he could not inherit, but if he was an American, he could. The date of his birth was uncertain, so the court was required to analyze the facts based upon three different birth date scenarios.

The Court held that if the plaintiff was born in New York, prior to July 4, 1776, then he was an alien, and could not inherit.

On July 4<sup>th</sup>, 1776, the Colonial army officially took possession of New York, which was, therefore, United States land. But the British managed to take back possession of New York on September 15, 1776. And the Court held that if the plaintiff was born on, or after September 15<sup>th</sup>, he was also a British alien and could not inherit.

But if the plaintiff was born between July 4<sup>th</sup>, and September 15<sup>th</sup>, he was born in the United States. And this was the only issue in the case that was directly relevant to the Court's decision in *Wong Kim Ark*. If, as Justice Gray contended, the general rule in this country had always been that persons born here were recognized as citizens, regardless of the citizenship of their parents, then we would expect that the Supreme Court, in the *Inglis* case, would have held that the plaintiff – if born when New York was in possession of the colonial forces - was a United States citizen at birth. And this is certainly the impression given by Justice Gray's discussion of the case. But that impression is proved false by Justice Thompson's majority opinion of the Court:

*"1. If the demandant was born before the 4th of July 1776, he was born a British subject; and no subsequent act on his part, or on the part of the state of New York, has occurred to change that character; he of course continued an alien, and disabled from taking the land in question by inheritance.*

*"2. If born after the 4th of July 1776, and before the 15th of September of the same year, when the British took possession of New York, **his infancy incapacitated him from making any election for himself, and his election and character followed that of his father, subject to the right of disaffirmance in a reasonable time after the termination of his minority;** which never having been done, he remains a British subject, and disabled from inheriting the land in question.*

*"3. If born after the British took possession of New York, and before the evacuation on the 25th of November 1783, he was, under the circumstances stated in the case, born a British subject, under the protection of the British government, and not under that of the state of New York, and of course owing no allegiance to the state of New York." (Emphasis added.) Inglis v. Trustees Of Sailor's of Snug Harbor, 28 U.S. 99, 126 (1830).*

The holding makes clear that, even if born between July 4, 1776, and September 15, 1776, when New York was United States soil, *Inglis* took the national character of his British father, from birth, and throughout his minority. The Court also stated that the

child had a right of disaffirmance after reaching majority. But the opinion does not recognize a dual allegiance at birth. It clearly states that the child was incapable of making an election, and therefore, until he was so capable, he would remain British, having taken his father's national character at birth.

By relying so heavily on the minority concurring opinions, rather than the majority holding of the case, Justice Gray made it appear as if the Inglis Court had held that the plaintiff was a U.S. citizen at birth, when, in reality, under all three scenarios, it was held that the plaintiff was born a British subject. Rather than supporting the holding in *Wong Kim Ark*, the majority opinion in *Inglis v. Trustees of Sailor's of Snug Harbor* goes directly against it.

Justice Gray's faulty analysis was further compounded in *Shanks v. Dupont*:

**ii.) Shanks v. Dupont, 28 U.S. 242 (1830).**

In *Wong Kim Ark*, Justice Gray discussed this case as follows:

*"In Shanks v. Dupont, 3 Pet. 242, decided (as appears by the records of this court) on the same day as the last case, it was held that a woman born in South Carolina before the Declaration of Independence, married to an English officer in Charleston during its occupation by the British forces in the Revolutionary War, and accompanying her husband on his return to England, and there remaining until her death, was a British subject, within the meaning of the treaty of peace of 1783, so that her title to land in South Carolina, by descent cast before that treaty, was protected thereby. It was of such a case that Mr. Justice Story, delivering the opinion of the court, said: 'The incapacities of femes covert, provided by the common law, apply to their civil rights, and are for their protection and interest. But they do not reach their political rights, nor prevent their acquiring or losing a national character. Those political rights do not stand upon the mere doctrines of municipal law, applicable to ordinary transactions, but stand upon the more general principles of the law of nations.' Id. 248. This last sentence was relied on by the counsel for the United States, as showing that the question whether a person is a citizen of a particular country is to be determined, not by the law of that country, but by the principles of international law. But Mr. Justice Story certainly did not mean to suggest that, independently of treaty, there was any principle of international law which could defeat the*

*operation of the established rule of citizenship by birth within the United States: for he referred (page 245) to the contemporaneous opinions in Inglis v. Sailors' Snug Harbor, above cited, in which this rule had been distinctly recognized, and in which he had said (page 162) that 'each government had a right to decide for itself who should be admitted or deemed citizens.'* U.S. v. Wong Kim Ark, 169 U.S. 649, 660-661.

In point of fact, there was never an *established* rule of citizenship by simple birth in the United States. What was “distinctly recognized” in the Inglis case was the general English common law rule, that birth within the King’s realms, even to alien parents, made one a natural-born subject. But this general common law rule was definitely *not* “distinctly recognized” by the Court in Inglis as having been adopted by the United States, since it was held that the child followed the condition of his father at birth, and throughout his minority.

Furthermore, in Shanks v. Dupont, Justice Gray again ignored the holding of the majority opinion of the Court, which directly opposed his analysis. The issue in Shanks was similar to the Inglis case, turning on whether Ann Scott was British or American. Justice Story delivered the opinion of the Court:

*Ann Scott was born in South Carolina, before the American revolution; and her father adhered to the American cause, and remained and was at his death a citizen of South Carolina. There is no dispute that his daughter Ann, at the time of the revolution, and afterwards, remained in South Carolina until December 1782. Whether she was of age during this time does not appear. If she was, then her birth and residence might be deemed to constitute her by election a citizen of South Carolina. If she was not of age, then she might well be deemed under the circumstances of this case to hold the citizenship of her father; **for children born in a country, continuing while under age in the family of the father, partake of his national character, as a citizen of that country.** Shanks v. Dupont, 28 U.S. 242, 245 (1830).*

Justice Gray’s opinion from Wong Kim Ark failed to quote this passage, where the Supreme Court – *on the same day they decided Inglis* - held again, that children, at birth, and throughout their minority, take the national character of the father.

The holding in *Shanks* further calls into question Justice Gray's analysis in *Wong Kim Ark*. The tandem cases of *Shanks* and *Inglis* are consistent in their reflection of early American citizenship law, which did not uniformly follow the English common law rule of *jus soli*.

**iii.) *Levy v. McCartee*, 31 U.S. 102, 109 (1832)**

*"Again, in Levy v. McCartee (1832) 6 Pet. 102, 112, 113, 115, which concerned a descent cast since the American Revolution, in the state of New York, where the statute of 11 & 12 Wm. III. had been repealed, this court, speaking by Mr. Justice Story, held that the case must rest for its decision exclusively upon the principles of the common law, and treated it as unquestionable that by that law a child born in England of alien parents was a natural-born subject; quoting the statement of Lord Coke in Co. Litt. 8a, that 'if an alien cometh into England, and hath issue two sons, these two sons are indigenae, subjects born, because they are born within the realm'; and saying that such a child 'was a native-born subject, according to the principles of the common law, stated by this court in McCreery v. Somerville, 9 Wheat. 354.'"* U.S. v. Wong Kim Ark, 169 U.S. 649, 662.

There is absolutely nothing in *Levy v. McCartee* that concerns the citizenship status of a relevant party. The decision turned upon statutes in New York that had incorporated older English statutes. The issues strictly concerned New York law. And the case has absolutely no bearing on the issue of federal citizenship. It provides no support at all for the holding in *U.S. v. Wong Kim Ark*.

**iv.) *McCreery v. Somerville*, 22 U.S. 354 (1824).**

One of the foundational building blocks for Justice Gray's opinion in *U.S. v. Wong Kim Ark* is the case, *McCreery v. Somerville*, 22 U.S. 354 (1824), to which Justice Gray made a flawed assumption based upon his failure to acknowledge a judicially recognized misquote. Justice Gray failed to inform his opinion in *Wong Kim Ark* with the fact that the U.S. Supreme Court had questioned the *McCreery* opinion in 1881, just prior to Justice Gray having joined the Court.

In *Sullivan v. Burnett*, 105 U.S. 334 (1881), the Court stated:

*"This view is controverted by the plaintiffs on the authority of McCreery's Lessee*

*v. Somerville*, 9 Wheat. 354, where this Court had occasion to determine the meaning of the statute of 11 & 12 William III. c. 6,... **We remark in reference to that case that the English statute is not accurately quoted in the opinion of the Court**, as an examination of 10 British Stat. at Large 319(Pickering's Ed.) will show. but without deciding that the words omitted ought to have produced a judgment different from that rendered, we are of opinion that the present case is not governed by *McCreery's Lessee v. Somerville*." *Sullivan v. Burnett*, 105 U.S. 334, 340-341. (Emphasis added.)

Justice Story's misquote would not have changed the outcome of the case. However, the correct citation to the statute would have prevented the following assumption made by Justice Gray in *Wong Kim Ark*:

*"In McCreery v. Somerville (1824) 9 Wheat. 354, which concerned the title to land in the state of Maryland, it was **assumed** that children born in that state of an alien who was still living, and who had not been naturalized, were 'native-born citizens of the United States'; and without such assumption the case would not have presented the question decided by the court, which, as stated by Mr. Justice Story in delivering the opinion, was 'whether the statute applies to the case of a living alien ancestor, so as to create a title by heirship, where none would exist by the common law, if the ancestor were a natural-born subject.'* *Id.* 356." *U.S. v. Wong Kim Ark*, 169 U.S. 649, 661. (Emphasis added.)

We have, in the passage above, a very misleading quote. Justice Gray cites to pg. 356 of *McCreery* at the end of the passage wherein he placed quotes around 'native-born citizens of the United States'. But no such quote appears on pg. 356 of the *McCreery* opinion. In fact, the Court's *opinion* in *McCreery* nowhere states that the plaintiff was a U.S. citizen, native-born or otherwise. The headnote and facts agreed upon by the parties call the plaintiff a citizen, but these are not part of the Court's opinion, and are not law.

Since the plaintiff's ancestor was alive, the Court held that the plaintiff could not inherit from him. And this would have been the holding regardless of the plaintiff's citizenship status. Having determined that the plaintiff couldn't inherit from that particular ancestor, the Court never reached the direct issue of her citizenship. And a thorough review of the facts and the British statute construed in *McCreery* reveals that the Court, contrary to Justice Gray's unfounded assumption, would *not* have been required to determine she was a native-born citizen of the U.S. in order for her to inherit.

Gray's assumption is culled from this passage in *McCreery*:

*"The only point, therefore, is whether the statute applies to the case of a living*

*alien ancestor, so as to create a title by heirship where none would exist by the common law, if the ancestor were a natural born subject.”* McCreery v. Somerville, 22 U.S. 354, 355-356.

The Court’s use of “the only point” is the basis for Gray’s assumption. The title to the statute in question is:

*“An act to enable his Majesty’s natural-born subjects to inherit the estate of their ancestors, either lineal or collateral, notwithstanding their father or mother were aliens.”* Id. 356.

With regard to the title, Justice Story also stated, *“The title is not unimportant, and manifests an intention merely to remove the disability of alienage.”* Justice Gray’s analysis assumed the title to the act meant that it pertained *only* to “natural-born subjects”. And if that were true, then Gray’s assumption would be fair. This is because “the only point” stated in McCreery was whether the plaintiff could inherit despite the ancestor being alive. If the plaintiff’s citizenship were in question, then there would have been more than one point to decide.

Therefore, if the statute applied *only to natural-born subjects*, the Court’s opinion in McCreery could be said to have recognized the plaintiff as a native-born citizen of the U.S., despite her being born here to an alien father. But, in true actuality, the statute specifically refers to natural-born subjects *as well as* “subjects within any of the King’s realms or dominions”. In the United Kingdom, “subjects within any of the King’s realms or dominions”, pertains to resident aliens. These are persons permanently domiciled within the UK who are neither natural-born nor naturalized.

A “natural-born subject” is a subject wherever he goes in the world, but a resident alien is only a subject of the United Kingdom when he is actually in the King’s realms.

Therefore, Gray’s assumption is misplaced, since the plaintiff in McCreery was within the statute regardless of whether she was considered by the Court to be a U.S. citizen or a resident alien. Since the Court’s opinion doesn’t mention the citizenship status of the plaintiff, it should not have been *assumed* by Justice Gray that the McCreery Court had *assumed* the plaintiff was a U.S. citizen rather than a resident alien.

Justice Story’s reference in McCreery to “the only point”, while being correct, does not establish that the Court assumed the plaintiff to be a native-born citizen. Regardless, if the Court in McCreery did make the assumption attributed to it by Justice Gray, that assumption was unfounded according to the relevant statute, which, as the Supreme Court

noted in *Sullivan v. Burnett*, had been misquoted by Justice Story.

The Supreme Court's opinions in *McCreery*, *Shanks*, *Inglis*, and *Levy*, provide no genuine support for Justice Gray's opinion in *Wong Kim Ark*. In fact, prior to *Wong Kim Ark*, there is not one U.S. Supreme Court decision that establishes the English common law rule of *jus soli* citizenship. Justice Gray simply overruled every prior decision of the Supreme Court that ran against his analysis, while making it appear as if those cases supported his argument.

#### **F. The 1790 Naturalization Act.**

In 1790, the first naturalization act was passed by Congress. It contained a provision which deemed all persons born abroad of United States citizens to be "natural born citizens", provided that the father had, at some time, resided in the United States. This was the only congressional statute that attempted to infringe upon Article 2, Section 1's authority. There is no provision in the U.S. Constitution that grants Congress any power, as to citizenship, beyond their exclusive control over naturalization. Accordingly, the words "natural born" were repealed in the 1795 naturalization act. Regardless, this, the one and only time that Congress passed legislation using the words "natural born citizen", was directly related to the citizenship of the parents.

Additionally, the 1790 act, as well as the naturalization acts of 1795, and 1802, specifically conferred naturalization at birth. Therefore, while it is true that citizenship may only be gained by birth or naturalization, one may certainly be naturalized at birth. And if one requires naturalization, then citizenship is not natural-born. Rather, it is completely dependent upon an act of Congress.

#### **E. Every President Other Than Chester Arthur Was Born In The U.S. Of Citizen Parents, Or Was Eligible Under The Grandfather Clause In Article 2, Section 1.**

Chester Arthur's father, William, did not naturalize until 1843, fourteen years after Chester was born. (Naturalization certificate for William Arthur, 1843; Library of Congress, Chester Arthur Papers.) (App. Pg. 163.) Therefore, Chester Arthur was, at birth, a British subject.

On Nov 3, 1884, President Arthur's Fourth Annual Message to Congress included the

following cryptic statement:

*"An uniform rule of naturalization such as the Constitution contemplates should, among other things, clearly define **the status of persons born within the United States subject to a foreign power** (section 1992) and of minor children of fathers who have declared their intention to become citizens but have failed to perfect their naturalization...A just and uniform law in this respect would strengthen the hands of the Government in protecting its citizens abroad and would pave the way for the conclusion of treaties of naturalization with foreign countries."* (Emphasis added.) President Chester Arthur, Fourth Annual Message to Congress, Dec. 1, 1894., pg. 8. (App. Pg. 173. )

The statement is rich with context. President Arthur indicated that persons born in the U.S., subject to a foreign power, required naturalization. Additionally, he calls for the status of such persons to be clarified. Which class of persons subject to a foreign power does he refer to? Certainly not ambassadors and ministers, since their status has always been clear. And only four weeks earlier, in Nov. 1884, the status of Indians was declared in *Elk v. Wilkins*, so he's not making reference to them. That leaves the third class of persons discussed on page 73 of *The Slaughter-House Cases*, "*citizens or subjects of foreign States born within the United States*".

Since Justice Gray cited to that exact page as precedent, just four weeks earlier, in the Supreme Court's opinion in *Elk v. Wilkins*, President Arthur, having been born to an alien father, had good reason to be alarmed. Justice Gray, at that time (Nov. 1884), certainly appeared to have adopted the opinion stated in the *Slaughter-House Cases*, that children of aliens, born in the country, were not subject to the jurisdiction of the United States:

*"The main object of the opening sentence of the fourteenth amendment was to settle the question, upon which there had been a difference of opinion throughout the country and in this court . . . and to put it beyond doubt that all persons . . . born or naturalized in the United States, **and owing no allegiance to any alien power**, should be citizens of the United States and of the state in which they reside. *The Slaughter-House Cases*, 16 Wall. 36, 73;" *Elk v. Wilkins*, 112 U.S. 94, 101 (1884). (Emphasis added.)*

Note that Justice Gray cited to pg. 73 of The Slaughter-House Cases, and the statement bears repeating:

*"The phrase, 'subject to its jurisdiction' was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States." The Slaughter-House Cases, 83 U.S. 36, 73 (1872).*

Furthermore, Justice Gray, at this point in time, treated the 14<sup>th</sup> Amendment's citizenship clause requirement, "subject to the jurisdiction thereof", as synonymous with "owing no allegiance to any alien power".

Chester Arthur's Message makes clear he believed that persons born to aliens in the U.S. required naturalization. And since those who require naturalization are not natural-born, Chester Arthur's statement appears to be a veiled admission that he was not eligible to be President.

Furthermore, that the Civil Rights Act of 1866 was an act to naturalize the children of aliens born in the U.S. was discussed in Congress during the debates, such discussion actually having been quoted by Justice Gray in WKA:

*"During the debates in the senate in January and February, 1866, upon the civil rights bill, Mr. Trumbull, the chairman of the committee which reported the bill, moved to amend the first sentence thereof so as to read: 'All persons born in the United States, and not subject to any foreign power, are hereby declared to be citizens of the United States, without distinction of color.' Mr. Cowan, of Pennsylvania, asked 'whether it will not have **the effect of naturalizing the children of Chinese and Gypsies, born in this country?**' Mr. Trumbull answered, '**Undoubtedly;**'...Cong. Globe, 39th Cong. 1st Sess. pt. 1, pp. 498, 573, 574." U.S. v. Wong Kim Ark, 169 U.S. 649, 698.*

Justice Gray took no issue with the indication that persons born in the U.S. of alien parents require naturalization. His approving citation further confirms that the Civil Rights Act of 1866 was a naturalization act. This is because the only congressional power to regulate citizenship pertains to naturalization. For example:

*"The simple power of the national Legislature, is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual." Osborn v. Bank of United States, 9 Wheat. 738, 827. And see Luria v. United States, 231 U.S. 9, 22 ; United States v. MacIntosh, 283 U.S. 605, 624 ; Knauer v. United States, 328 U.S. 654, 658 ."* Schneider v. Rusk, 377 U.S. 163, 166 (1964).

The "simple power" of Congress over citizenship is strictly limited to naturalization. Therefore, if native-born persons of alien parents required naturalization prior to the 14<sup>th</sup> Amendment, they can *never* be considered natural-born citizens, since, whatever the 14th Amendment may have done to cure their need for naturalization, it did not contain the phrase "natural-born", and it did not confer any new privileges or immunities:

*"The amendment did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had."* Minor v. Happersett, 88 U.S. 162, 171 (1874).

Therefore, no citizen is eligible to be President who wouldn't have been eligible prior to the enactment of the 14th Amendment.

President Arthur's Fourth Annual Message was also concerned with children born of fathers who had failed to complete their naturalization after declaring intent to naturalize. This point would be moot if such a person, born in the U.S. to an alien father, was eligible to be President. Chester Arthur made this statement *while he was President*. Therefore, the Fourth Annual Message appears to be a cryptic admission his own ineligibility. If all children born in the U.S. to a domiciled father who had declared his intention to be a citizen still required naturalization, then Chester Arthur was not a citizen at the time of his birth, and was not eligible to be President. There is no other way to read his Fourth Annual Message other than as an implied admission of guilt. If the fact of Arthur's birth to an alien father had been known, there would have been no need for him to raise this particular issue with the public in his Fourth Annual Message.

But when we consider the timing of the message, only four weeks after the Supreme Court's decision in Elk v. Wilkins was issued, Chester Arthur's statement becomes even more relevant and telling.

Since Justice Gray was appointed to the Supreme Court by Chester Arthur, it's incredible that Gray never mentioned Arthur anywhere in his 55 page opinion from Wong Kim Ark. If a person born of an alien father was eligible to be President, there would have been no need for the Supreme Court to decide the fate of Ark's citizenship. The very issue before the Court would have been rendered moot if the nation had knowingly embraced a person born to an alien father as President and Commander In Chief. Either Justice Gray was ignorant of the fact that Chester Arthur was born to an alien father, or Justice Gray purposely excluded that fact from the Court's opinion.

When Charles Evans Hughes was running for President, this very issue was brought to the attention of the public by former Secretary of State and Ambassador to Italy, Breckenridge Long, in an article written for the Chicago Legal News in 1916:

*"Whether Mr. Hughes is, or is not, a 'natural born' citizen within the meaning of the Constitution, so as to make him eligible or ineligible, to assume the office of President, presents an interesting inquiry.*

*"He was born in this country and is beyond question 'native born.' But is there not a distinction between 'native born' and 'natural born'? At the time he was born his father and mother were subjects of England. His father had not then been naturalized. The day after Mr. Hughes was born his father had a right, as an English subject, to go to the British consul, at New York, and to present his wife and infant and to claim any assistance he might need from the consul as the representative of the English government.*

*"If war had broken out between this government and England this government would have had a right to intern the father, the mother and the son as subjects of an enemy power."* Chicago Legal News, Vol. 146-148, pp. 220-222. (1916) (App. Pg. 187.)

The article does not address the issue of Chester Arthur's father having been an alien. Again, had the nation at large been aware of that fact, such knowledge would have determined the very issue in question thereby rendering it moot as well.

However, Long does mention Chester Arthur in the article for a separate reason. In a strange turn of events, Breckenridge Long specifically quotes Chester Arthur's Fourth

Annual Message, the very passage discussed above, in *support* of his questioning the eligibility of Hughes!

*“President Arthur, in his Fourth Annual Message, in 1884, said: ‘Our existing naturalization laws also need revision. \* \* \* Section 2172, recognizing the citizenship of the children of naturalized parents, is ambiguous in its terms\* \* \*.*

*“An uniform rule of naturalization, such as the Constitution contemplates, should, among other things, clearly define the status of persons born within the United States subject to a foreign power and of minor children of fathers who have declared their intention to become citizens\* \* \*.” Id. (App. Pg. 188.)*

This ironically establishes that Breckenridge Long, and the nation at large, certainly had no idea Chester Arthur was British at birth.

#### **F. Assuming Birth In The United States, President Obama's Citizenship Has Not Been Conclusively Established Under The Constitution.**

While analyzing whether a person is eligible to the specific natural-born citizen class, an analysis as to the source of membership in the general citizen class ought to be helpful.

The 14th Amendment states:

*"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."*

This clause was directly interpreted by the Supreme Court in U.S. v. Wong Kim Ark, where the Court held:

*"The evident intention, and the necessary effect, of the submission of this case to the decision of the court upon the facts agreed by the parties, were to present for determination the single question, stated at the beginning of this opinion, namely, whether a child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the emperor of China, but have a permanent domicile and residence in the United States, and are there carrying on business,*

*and are not employed in any diplomatic or official capacity under the emperor of China, becomes at the time of his birth a citizen of the United States."* U.S. v. Wong Kim Ark, 169 U.S. 649, 705.

Since the Court could not establish citizenship for the petitioner under the natural-born citizen standard invoked by the Court in Minor, resort was made to the 14th Amendment to do so. The holding, and question presented, directly refer to the domicile of the parents. And the Court's opinion specifically indicates that a permanent domicile is required for the native-born children of aliens to be entitled to citizenship:

*"In a very recent case, the supreme court of New Jersey held that a person born in this country of Scotch parents who were **domiciled**, but had not been naturalized, here, was 'subject to the jurisdiction of the United States,' within the meaning of the fourteenth amendment, and was 'not subject to any foreign power,' within the meaning of the civil rights act of 1866; and in an opinion delivered by Justice Van Syckel, with the concurrence of Chief Justice Beasley, said: ' . . . **unless the general rule that, when the parents are domiciled here, birth establishes the right to citizenship, is accepted, the fourteenth amendment has failed to accomplish its purpose . . .** ' Benny v. O'Brien (1895) 58 N. J. Law, 36, 39, 40, 32 Atl. 696.*

*"The foregoing considerations and authorities irresistibly lead us to these conclusions . . . The amendment, in clear words and in manifest intent, includes the children born within the territory of the United States of all other persons, of whatever race or color, **domiciled within the United States**. Every citizen or subject of another country, **while domiciled here**, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States."*  
U.S. v. Wong Kim Ark, 169 U.S. 649, 692-693 (Emphasis added.)

In *Benny v. O'Brien*, the N.J. Supreme Court reversed a lower court's determination that a candidate for local office was disqualified based upon a holding that, despite birth in the U.S., the candidate, having been born of domiciled alien parents, was not a citizen of the U.S. The N.J. Supreme Court held that the general rule of citizenship in this country, by

virtue of birth on U.S. soil, required the parents to be permanently domiciled here:

*"Persons intended to be excepted are only those born in this country **of foreign parents who are temporarily traveling here**, and children born of persons resident here in the diplomatic service of foreign governments. Such children are, in theory, born within the allegiance of the sovereign power to which they belong or which their parents represent. . . In my opinion, therefore, Allan Benny is a citizen of the United States in virtue of his birth here of alien parents who at the time of his birth were domiciled in this country."* Benny v. O'Brien, 58 N.J. 36, 39-40. (Emphasis added.) (App. Pg. 202.)

The requirement, for citizenship at birth under the 14th Amendment, that the alien parents must be domiciled here, was upheld in *Kwok Jan Fat v. White*, 253 U.S. 454 (1920):

*"It is not disputed that if petitioner is the son of Kwock Tuck Lee and his wife, Tom Ying Shee, he was born to them when they were permanently domiciled in the United States, is a citizen thereof, and is entitled to admission to the country. United States v. Wong Kim Ark, 169 U.S. 649."* Kwok Jan Fat v. White, 253 U.S. 454, 457.

President Obama's father was never a permanent resident of the United States, never applied for citizenship, or declared an intent to become a citizen, and never had a permanent domicile in this country. He was here as a "nonimmigrant student" (See App. 1.) on a temporary visa.

Since President Obama's father was not domiciled here, the holding in *Wong Kim Ark* does not cover him. Regardless, it has been a custom in this country to *presume* that persons born here, whether the parents are domiciled or not, are citizens. But the nation is still waiting for the Supreme Court to clarify the citizenship status of persons born here who, because their parents are not domiciled here, do not fall within the holding of *Wong Kim Ark*.

In *Hamdi v. Rumsfeld*, No. 03-6696 (April 28, 2004), Justice Scalia's dissent (joined by

Justice Stevens) referred to Hamdi, a person born in the U.S. to parents here via the father's temporary work visa, as a "presumed citizen".

The Foreign Affairs Manual, published by the U.S. Department of State, from 1995 through August 20, 2009, stated, at 7 FAM 1116.2-1(c), with regard to the holding in Wong Kim Ark:

c. Pursuant to this ruling, it has been *considered* that:

(1) Acquisition of U.S. citizenship *generally* is not affected by the fact that the parents may be in the United States temporarily or illegally; (App. Pg. 204.)

This was the language used by the Clinton and Bush administrations, and even the Obama administration up until August 20, 2009. The words "considered" and "generally" were placed in italics by the State Department to emphasize that the practice stated above has never been clarified as law by the Supreme Court.

On this point, the Foreign Affairs Manual had been a rational document, in that it reflected the true state of affairs. It stated the common presumption, but it refrained from listing what was *considered* to be law, as if it actually was law.

On August 21, 2009, eight months into the Obama administration, the Foreign Affairs Manual was changed to read:

d. **"Subject to the Jurisdiction of the United States"**: All children born in and subject, at the time of birth, to the jurisdiction of the United States acquire U.S. citizenship at birth **even if their parents were in the United States illegally at the time of birth.**

(1) The U.S. Supreme Court examined at length the theories and legal precedents on which the U.S. citizenship laws are based in U.S. v. Wong Kim Ark, 169 U.S. 649 (1898). In particular, the Court discussed the types of persons who are subject to U.S. jurisdiction...

Pursuant to this ruling:

(a) Acquisition of U.S. citizenship generally is not affected by the fact that the parents may be in the United States temporarily or illegally; (App. Pg. 206.)

This was a unilateral alteration. The language, which had been approved by the two prior administrations, was scrapped, and replaced by the Obama administration with language more suitable to the President's very own situation. The holding in Wong Kim Ark did not provide conclusive grounds to determine the President's citizenship. At best, he was *presumed* to be a citizen under the 14<sup>th</sup> Amendment, but not conclusively so.

Furthermore, according to well established legal principles, President Obama's citizenship status followed that of his father, an alien, according to the common law rule, long adapted in this country, *partus sequitur patrem*.

### **Partus Sequitur Patrem.**

The English common law rule - *partus sequitur patrem* – means that the child follows the condition of the father. This rule has also been established by a multitude of federal and state decisions, including those of the U.S. Supreme Court. It has arisen most often in cases where the issue concerned whether a person, born of one American Indian parent, and one non-Indian parent, was to be considered an Indian. The issue often required determination in criminal cases where a person was trying to avoid jurisdiction of an American court, at a time when our courts had no jurisdiction over Indian affairs between Indians who lived on reservations.

The most extensive discussion of *partus sequitur patrem* comes from *Ex Parte Reynolds*, 20 F. Cas. 582, 1879 U.S. App. LEXIS 1666, 5 Dill. 394 (W.D. Ark., 1879), where the rule was strictly followed:

*[B]y the common law. . . [the] offspring follows the condition of the father, and the rule partus sequitur patrem prevails in determining their status. 1 Bouv. Inst., 198, §502; 31 Barb. 486; 2 Bouv. Law Dict. 147; Shanks v. Dupont, 3 Pet. [28 U.S.]242. This is the universal maxim of the common law with regard to freemen - as old as the common law, or even as the Roman civil law. . .*

*“No other rules than the ones above enumerated ever did prevail in this or any other civilized country. In the case of Ludlam v. Ludlam, 31 Barb. 486, the court says: ‘The universal maxim of the common law being partus sequitur patrem, it is sufficient for the application of this doctrine that the father should be a subject lawfully, and without breach of his allegiance beyond sea, no matter what may be the condition of the mother.’*

*“The law of nations, which becomes, when applicable to an existing condition*

*of affairs in a country, a part of the common law of that country, declares the same rule. Vattel, in his Law of Nations (page 101), says: 'As the society cannot exist and perpetuate itself otherwise than by the children of the citizens, these children naturally follow the condition of their fathers and succeed to their rights. \* \* \* The country of the father is, therefore, that of the children, and these become true citizens merely by their tacit consent.'* Again, on page 102, Vattel says: 'By the law of nature alone, children follow the condition of their fathers and enter into all their rights.' This law of nature, as far as it has become a part of the common law, in the absence of any positive enactment on the subject, must be the rule in this case." Ex Parte Reynolds, 20 F. Cas. 582, 585. (Emphasis added.)

Besides being directly relevant to our prior discussion of the Law of Nations definition of natural-born citizen, this holding from Ex Parte Reynolds was cited approvingly by Justice Gray in Elk v. Wilkins:

*"The Case of Reynolds was an indictment, in the circuit court of the United States for the Western district of Arkansas, for a murder in the Indian country, of which that court had jurisdiction if either the accused or the dead man was not an Indian, and was decided by Judge PARKER in favor of the jurisdiction, upon the ground that both were white men, and that, conceding the one to be an Indian by marriage, the other never was an Indian in any sense. 5 Dill. 397, 404."* Elk v. Wilkins, 112 U.S. 94, 108 (1884).

The Court's holding in Ex Parte Reynolds on the *partus sequitur patrem* rule was also followed in *U.S. v. Ward*, 42 F. 320, 1890 U.S. App. LEXIS 1586, 14 Sawy. 472 (S.D. Cal., 1890), where the above passage and holding were directly quoted.

And the rule was also followed by the U.S. Supreme Court in *Halbert v. U.S.*, 283 U.S. 753, 763 (1931), subject to an exception if the father has abandoned the child:

*"The children of a marriage between an Indian woman and a white man usually take the status of the father, but if the wife retains her tribal membership and the children are born in the tribal environment and there reared by her, with the husband failing to discharge his duties to them, they take the status of the mother."*

*Partus sequitur patrem* was also followed in *In Re Thenault*, 47 F. Supp. 952, 1942 U.S. Dist. LEXIS 2195 (1942), where a French diplomat father was married to a natural-born citizen of the United States. Their child was born in the U.S., but was required to petition for naturalization. The child followed the condition of the father and was not entitled to U.S. citizenship on account of his native-born status to a citizen mother.

For purposes of allowing the child to petition for naturalization, a fiction was observed by the Court, which held that, since the father was not subject to the jurisdiction of the U.S., the child was considered to have been born on French soil, and was therefore allowed to

petition for naturalization as if he had truly been born abroad.

If the *holding* of Wong Kim Ark (as confirmed by *Kwok Jan Fat v. White*, 253 U.S. 454) is applied to President Obama's situation, a similar result as *In re Thenault* should apply. If the father of the child is not subject to the jurisdiction of the U.S. to the extent required by the holding in Wong Kim Ark, then the child takes the father's national character.

President Obama's birth status is not covered by the holdings in Wong Kim Ark, and Kwok Jan fat. Therefore, his status as a 14<sup>th</sup> Amendment citizen remains questionable. He is, at best, *presumed*, or *considered*, to be a citizen under the 14<sup>th</sup> Amendment, but his political status thereunder is certainly not conclusive, despite his administration having changed the State Department Manual to indicate otherwise.

#### **G. President Obama Is A Naturalized Citizen Under Title 8 U.S.C. § 1405.**

If President Obama had been born in any other State but Hawaii, his status as a U.S. citizen would only be presumed, as discussed above. Assuming birth in Hawaii, President Obama was naturalized at birth by Title 8 U.S.C. § 1405, which states:

##### **§ 1405. PERSONS BORN IN HAWAII**

*A person born in Hawaii on or after August 12, 1898, and before April 30, 1900, is declared to be a citizen of the United States as of April 30, 1900. A person born in Hawaii on or after April 30, 1900, is a citizen of the United States at birth. A person who was a citizen of the Republic of Hawaii on August 12, 1898, is declared to be a citizen of the United States as of April 30, 1900.*

This statute was first enacted as part of the Immigration and Nationality Act of 1952 (aka the McCarran Act). It served to naturalize anyone born in Hawaii. But in 1959, when Hawaii became a State, the Hawaii Statehood Act, Sec. 20, continued this provision, unchanged or modified, and the statute is still in force today.

It should be noted, however, that the statute does not require anyone born in Hawaii to also be subject to the jurisdiction of the United States. In that regard, it is more relaxed than the 14<sup>th</sup> Amendment. If the statute was invoked to establish citizenship outside of the naturalization power of Congress, the statute would be subversive to the 14<sup>th</sup> Amendment. Congress has no authority to modify the Constitutional requirements of the 14<sup>th</sup> Amendment, other than by a new amendment. Therefore, this statute must be a

naturalization act.

If the Supreme Court were to restrict the application of Wong Kim Ark to its holding, this naturalization statute would be President Obama's only source of citizenship. But those who require naturalization are not natural-born citizens:

*"We start from the premise that the rights of citizenship of the native born and of the naturalized person are of the same dignity and are coextensive. The only difference drawn by the Constitution is that only the "natural born" citizen is eligible to be President. Art. II, I."* Schneider v. Rusk, 377 U.S. 163, 165 (1964).

This is a very important statement by the Supreme Court, in that it appears to specifically recognize natural-born citizens as a subset of native-born citizens. It also clarifies that, to be considered a natural-born citizen, one *must* be native-born. Therefore, all naturalized persons, even those born of citizen parents outside of the United States are not eligible to be President.

While some might argue that the Court used native-born and natural-born as synonyms here, the Court's use of quotation marks around "natural born" signals otherwise, and is indicative of the Court's respect for the exact words of the Constitution. While it's possible the Court was purposefully evasive as to the exact definition of natural-born citizen, had they meant to say that all native-born citizens were eligible to be President, they certainly could have phrased their statement clearly to that effect. That the Court specifically declined to identify all native-born persons as natural-born, should be respected as intentional.

For the purposes of the McCarren Act, naturalization was defined as the conferring of nationality upon a person *after birth*, while §1405 confers citizenship *at birth*.

Regardless, Congress has no authority to increase its power in the citizenship lexicon, which is directly limited to naturalization, simply by redefining the word. Furthermore, the State Department Foreign Affairs Manual, at 7 FAM 1111 C., confirms that naturalization may also take place at birth:

**c. Naturalization – Acquisition of U.S. Citizenship Subsequent to Birth:**

Naturalization is "the conferring of nationality of a State upon a person after birth,

by any means whatsoever” (INA 101(a)(23) (8 U.S.C. 1101(a)(23)) **or conferring of citizenship upon a person** (see INA 310, 8 U.S.C. 1421 and INA 311, 8 U.S.C. 1422). Naturalization can be granted automatically or pursuant to an application. (See 7 FAM 1140.) (Emphasis added.)

### **CONCLUSION.**

Since President Obama does not qualify as a member of the class of persons identified as natural-born citizens by the U.S. Supreme Court in *Minor v. Happersett*, he is not eligible to be President of the United States, and his name, therefore, should not be allowed on Georgia ballots for the 2012 Presidential election.

### **CERTIFICATION**

I, Leo Donofrio, hereby certify that this brief has not been filed for any improper purpose.

Signed: /s/ Leo Donofrio

---

Leo Donofrio, Esq., appearing Amicus Curia

New Jersey Bar No. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Dated: January 23, 2012

**PROOF OF SERVICE**

I, Leo Donofrio, Esq., hereby certify that I personally served the following document(s):

***AMICUS BRIEF***

By forwarding emails, to the following:

**Dr. Orly Taitz**

[REDACTED]

**Van R. Irion**

[REDACTED]

**J. Mark Hatfield**

[REDACTED]

**Michael Jablonski**

[REDACTED]

Dated: January 23, 2012

Signed: /s/ Leo Donofrio

Leo Donofrio, Esq.

\_\_\_\_\_

**UNITED STATES DEPARTMENT OF JUSTICE  
IMMIGRATION AND NATURALIZATION SERVICE**

**NOTICE AND REPORT CONCERNING NONIMMIGRANT "F-1" STUDENT**

**PART I**

|                           |                                         |
|---------------------------|-----------------------------------------|
| Name of school            | Name of Student (First) (Middle) (Last) |
| University of Hawaii      | Barack Obama                            |
| Address                   | Date of birth Country of birth          |
| 1801 University of Hawaii | June 18, 1934 Kenya, Africa             |
| Honolulu, Hawaii          | Country of citizenship                  |
|                           | Africa                                  |

**PART II — NOTICE TO SCHOOL CONCERNING "F-1" STUDENT**

As indicated herein, the above named student was admitted to or authorized to remain in the United States for a temporary period as a nonimmigrant student.

For Immigration Official

If any of the following occurs, please fill in Part III below and mail this Form to the immigration office having jurisdiction over the area in which your school is located:

- (A) The student does not register personally at your school within 60 days of the time you expect him to register;
- (B) The student does not carry a full course of study;
- (C) The student does not attend classes to the extent normally required;
- (D) The student's attendance is terminated. (This does not include temporary discontinuance of attendance during a visit abroad, or because of acute illness or injury. However, if the student fails to resume attendance, this report must be submitted.)

**PART III — REPORT BY SCHOOL CONCERNING "F-1" STUDENT**

Student's File Number (if known)

A-11938537

TO: Immigration and Naturalization Service

1. The student (Check one):

- (A) ☐ Did not register personally at this school.
- (B) ☐ Is not carrying a full course of study. (Explain in Remarks)
- (C) ☐ Is not attending classes to the extent normally required. (Explain in Remarks)
- (D) ☒ Is no longer attending this school. (Give date and reason for termination in Remarks)

2. The student's present address is:

Harvard University, Cambridge, Massachusetts

3. The following information is furnished concerning the student's departure or planned departure from the United States:

|                   |                   |                                                  |
|-------------------|-------------------|--------------------------------------------------|
| Date of departure | Port of departure | Name of ship, airline, or transportation company |
| Address abroad    |                   |                                                  |

4. Remarks:

Mr. Obama graduated from the University of Hawaii in June 1962; to continue advanced studies at Harvard University.

Signature

Title

Foreign Student Adviser

Date

June 27, 1962

### Calvin's Case 7 Coke Report 1a, 77 ER 377

The SEVENTH PART of the REPORTS of SIR EDWARD COKE, Knt. Lord Chief Justice of the Common Pleas, of divers RESOLUTIONS and JUDGMENTS given, upon solemn Arguments, and with great Deliberation and Conference of the reverend Judges and Sages of the Law, of CASES IN LAW which were never Resolved or Adjudged before: and the REASONS and CAUSES of the said Resolutions and Judgments. Published in the Sixth Year of the Most High and Most Illustrious JAMES, King of England, France, and, Ireland, and of Scotland the XLII. the Fountain of all Piety and Justice, and the Life of the Law. With NOTES and REFERENCES, by JOHN FARQUHAR FRASER, Esq., of Lincoln's Inn, Barrister-at-Law.

[7-Coke-1 a] \* POSTNATI (A).

Calvin's Case 7 Coke Report 1a, 77 ER 377

Report Date: 1608

CALVIN'S CASE.

Trin. 6 Jac. 1.

[See Low v. Routledge, 1865-68, LR 1 Ch 47; LR 3 HL 100; Reg v. Keyn, 1876, 2 Ex. D. 236; De Geer v. Stone, 1882, 22 Ch D. 251. Dicta at 27 b dissented from, In re Stepney Election Petition, 1886, 17 QBD 46; In re Johnson [1903] 1 Ch. 833.]

James by the grace of God of England, Scotland, France, and Ireland, King, defender of the faith, &c. To the Sheriff of Middlesex greeting: Robert Calvin,

7 Coke Report 2 a, 77 ER p378

gent, hath complained to us, that Richard Smith and Nicholas Smith, unjustly, and without judgment, have disseised him of his freehold in Haggard, otherwise Haggerston, otherwise Aggerston, in the parish of St. Leonard, in Shoreditch, within thirty years now last past; and therefore we command you, that if the said Robert shall secure you to prosecute his claim, then that you cause the said tenement to be reseised with the chattels which within it were taken, and the said tenement with the chattels to be in peace until Thursday next after fifteen days of Saint Mai-tin next coming; and, in the mean time, cause twelve free and lawful men of that neighbourhood to view the said tenement, and the names of them to be inbreviated; and summon them by good summoners, that they be then before us wherever we shall then be in England, ready thereof to make recognition; and put, by sureties and safe pledges, the aforesaid Richard and Nicholas, or their bailiffs, (if they cannot be found), that they be then there, to hear the recognition; and have there the summoners, the names of the pledges, and this writ. Witness ourself at Westminster, the 3d. day of November, in the 5th year of our reign of England, France, and Ireland, and of Scotland the one-and-fortieth.

For 40s. paid in the hamper,

KINDESLEY.

Middlesex, ss. The assize cometh to recognise, if Richard Smith, and Nicholas Smith unjustly, and without judgment, did disseise Rob. Calvin, gent of his freehold in [etb] Haggard, otherwise Haggerston, otherwise Aggerston, in the parish of St. Leonard in Shoreditch, within thirty years now last past: and whereupon the said Robert, who is within the age of twenty-one years, by John Parkinson, and William Parkinson, his guardians, by & Court, of the said King here to this being jointly and severally specially admitted, complaineth, that they disseised him of one messuage with the appurtenances, &c. And the said Richard and Nicholas, by William Edwards, their attorney, come and say, that the said Robert ought not to be answered to his writ aforesaid, because they say, that the said Robert is an alien born, on the 5th day of Noy in the 3rd year of the reign of the King that now is, of England, France, and Ireland, and of Scotland the thirty-ninth, at Edinburgh within his kingdom of Scotland aforesaid and within the allegiance of the said lord the King, of the said kingdom of Scotland, and out of the allegiance of the said lord

the King of his kingdom of England; and at the time of the birth of the said Robert Calvin, and long before, and continually afterwards, the aforesaid kingdom of Scotland, by the proper rights, laws, and statutes of the same kingdom, and not by the rights, laws, or statutes of this kingdom of England, was and yet is ruled and governed. And this he is ready to verify, and thereupon prayeth judgment, if the said Robert, to his said writ aforesaid, ought to be answered, &c. And the aforesaid Robert Calvin saith, that the aforesaid plea, by the aforesaid Richard and Nicholas above pleaded, is insufficient in law to bar him the said Robert from having an answer to his writ aforesaid; and that the said Robert to the said plea in manner and form aforesaid pleaded, needeth not, nor by the law of the land is bound to answer; and this he is ready to verify, and hereof prayeth judgment; and that the said Richard and Nicholas to the aforesaid writ of the said Robert may answer. And the said Richard and Nicholas, forasmuch as they have above alleged sufficient matter-in law to bar him the said Robert from having an answer to his said writ, which they are ready to verify; which matter the aforesaid Robert doth not gainsay, nor to the same doth in any ways answer, but the said averment altogether refuseth to admit as before pray judgment, if the aforesaid Robert ought to be answered to his said writ, &c. And because the Court of the lord the King here are not yet advised of giving their judgment of and upon the premises, day thereof is given to the parties aforesaid; before the lord the King at Westminster until Monday next after eight days of St. Hilary, to hear their Judgment thereof, because the Court of the lord the King here thereof are not yet, &c;. And the assize aforesaid remains to be taken before the said lord the King, until the same Monday there, &c. And the sheriff to distrain the recognitors of the assize aforesaid: and in the interim to cause a view, &c; at which day, before the lord the King at Westminster, come as well the aforesaid Robert Calvin, by his guardians aforesaid, as the aforesaid Richard Smith and Nicholas Smith by their attorney aforesaid; and because

7 Coke Report 2 a, 77 ER p379

the Court of the lord the King [7-Coke-2 a] here of giving their judgment of and upon the premises is not yet advised, day thereof is given to the parties aforesaid before the lord the King at Westminster, until Monday next after the morrow of the Ascension of our Lord, to hear their judgment 3 because the Court of the lord the King here are not yet, &c. And the assize aforesaid remains further to be taken, until the same Monday there, &c. 3 and the sheriff, as before, to distrain the recognitors of the assize aforesaid, and in the interim to cause a view, &c. At which day, before the lord the King at Westminster, come as well the aforesaid Robert Calvin by his guardians aforesaid, as the aforesaid Richard Smith and Nicholas Smith, by their attorney aforesaid, &c; and because the Court of the lord the King here, &c.

[2 a] THE CASE

A man born in Scotland after the accession of King James the First to the English throne, and during his reign, may hold lands in England. S.C. Howel's State Trials, Vol. H. p. 559.

The question of this case as to matter in law was, whether Robert Calvin the plaintiff (being born in Scotland since the Crown of England descended to His Majesty) be an alien born, and consequently disabled to bring any real or personal (a) action for any lands within the realm of England. After this case had been argued in the 'Court of King's Bench, at the Bar, by the counsel learned of either party, the Judges of that Court, upon conference and consideration of the weight and importance thereof, adjourned the same (according to the ancient and ordinary course and order of the law) into the (b) Exchequer Chamber, to be argued openly there; first by the counsel learned of either party, and then by all the Judges of England; where afterwards the case was argued by Bacon, Solicitor-General, on the part of the plaintiff, and by Laur. Hide for the defendant; and afterward by Hobart, Attorney-General, for the plaintiff, and by Serjeant Hutton for the defendant; and, in Easter term last, the case was argued by Heron, puisne Baron of the Exchequer, and Foster, puisne Judge of the Court of Common Pleas; and, on the second

day appointed for this case, by Crook, puisne Judge of the King's Bench, and Altham, Baron of the Exchequer; the third day by Snigge, Baron of the Exchequer, and Williams, one of the Judges of the King's Bench; the fourth day by Daniel, one of the Judges of the Court of Common Pleas, and by Yelverton, one of the Judges of the King's Bench: and, in Trinity term following, by Warburton, one of the Judges of the Common Pleas, and Fenner, one of the Judges of the King's Bench; and after by Walmesley, one of the Judges of the Common Pleas, and Tanfield, Chief Baron; and, at two several days in the same term, Coke, Chief Justice of the Common Pleas, Fleming, Chief Justice of the King's Bench, and Sir Thomas Egerton, Lord Ellesmere, Lord Chancellor of England, argued the case (the like plea in disability [7-Coke-2 b] of Robert Calvin's person being pleaded *mutatis mutandis* in the Chancery in a suit there for evidence concerning lands of inheritance; and, by the Lord Chancellor, adjourned also into the Exchequer-Chamber, to the end that one rule might over-rule both the said cases), And first (for that I intend to make as summary a report as I can) I will at the first set down such arguments and objections as were made and drawn out of this short record against the plaintiff by those that argued for the defendants. It was observed, that in this plea there were four nouns, *quatuor nomina*, which were called *nomina operative*, because from them all the said arguments and objections on the part of the defendants were drawn; that is to say 1. *Ligeantia* (which is twice repeated in the plea; for it is said, *infra ligeantiam domini Regis regni sui Scot'*, *et extra ligeantiam domini Regis regni sui Angl'*). 2. *Regnum* (which also appeareth to be twice mentioned, *viz. regnum Angl'*, and *regnum Scot'*). 3. *Leges* (which are twice alleged, *viz. leges Angl'*, and *leges Scot'*, two several and dis-

7 Coke Report 3 a, 77 ER p380

*tinct laws*). 4. *Alienigena* (which is the conclusion of all, *viz. that Robert Calvin is alienigena*).

1. *Ligeantia*. By the first it appeareth, that the defendants do make two ligeances, one of England, and another of Scotland; and 'from these several ligeances two arguments were framed, which briefly may be concluded thus: Whosoever is born *infra ligeantiam*, within the ligeance of King James of his kingdom of Scotland, is *alienigena*, an alien born, as to the kingdom of England: but Robert Calvin was born at Edinburgh, within the ligeance of the King of his kingdom of Scotland; therefore Robert Calvin is *alienigena*, an alien born, as to the kingdom of England. 2. Whosoever is born *extra ligeantiam*, out of the ligeance of King James of his kingdom of England, is an alien as to the kingdom of England: but the plaintiff was born out of the ligeance of the King of his kingdom of England; therefore the plaintiff is an alien, &c. Both these arguments are drawn from the very words of the plea, *viz. quod præd' Robertus est alienigena, natus 5 Nov anno regni domini Regis nunc Angl' &c. tertio apud Edenburg infra regnum Scot' ac infra ligeantiam, dicti domini Regis dicti regni sui Scot', ac extra ligeantiam dicti domini Regis regni sui Angl'*.

2. *Regna*. From the several kingdoms, *viz. regnum, Angl' and regnum, Scot'* three arguments were drawn. 1. *Quando (a) duo jura (imo duo regna) concurrunt in una persona, cequum est ac si essent in diversis*: but in the King's person there concur two distinct and several kingdoms; therefore it is all one as if they were in divers persons, [7-Coke-3 a] and consequently the plaintiff is an alien, as all the antenati are, for that they were born under the ligeance of another King. 2. Whatsoever is due to the King's several politic capacities of the several kingdoms is several and divided: but ligeance of each nation is due to the King's several politic capacities of the several kingdoms; ergo, the ligeance of each nation is several and divided, and consequently the plaintiff is an alien, for that they that are born under several ligeances are aliens one to another. 3. Where the King hath several kingdoms by several titles and descents, there also are the ligeances several: but the King hath these two kingdoms by several titles and descents; therefore the ligeances are several. These three arguments are collected also from the words of the plea before remembered.

3. *Leges*. From the several and distinct laws of either kingdom, they did reason thus: 1. Every subject that is born out of the extent and reach of the laws of England, cannot by judgment of those laws be a natural subject to the King, in respect of his kingdom of England: but the plaintiff was born at Edinburgh, out of the extent and reach of the laws of England; therefore the plaintiff by the judgment of the laws of England cannot be a natural subject to the King, as of his kingdom of England. 2. That subject, that is not at the time and in the place of his birth inheritable to the laws of England, cannot be inheritable or partaker of the benefits and privileges given by the laws of England: but the plaintiff at the time, and in the place of his birth was not inheritable to the laws of England, (but only to the laws of Scotland;) therefore he is not inheritable or to be partaker of the benefits or privileges of the laws of England. 3. Whatsoever appeareth to be out of the jurisdiction of the laws of England, cannot be tried by the same laws: but the plaintiff's birth at Edinburgh is out of the jurisdiction of the laws of England; therefore the same cannot be tried by the laws of England. Which three arguments were drawn from these words of the plea, viz. *Quodque tempore nativitatis præd' Roberti Calvin, ac diu antea, et continu? postea, præd' regnum, Scot' per jura, leges, et statuta ejusdem regni propria, et non per jura, leges, seu statula hujus regni Angl' regulat' et gubernat fuit, et adhuc est.*

4. *Alienigena*. From this word *alienigena* they argued thus: every subject that is alien' gentis (i, e.) alien' ligeant', est *alienigena*: but such a one is the plaintiff; therefore, &c. And to these nine arguments all that was spoken learnedly and at large by those that argued against the plaintiff may be reduced.

[7-Coke-3 b] But it was resolved by the Lord Chancellor and twelve Judges, viz. the two Chief Justices, the Chief Baron, Justice Fenner, Warberton, Yelverton, Daniel, Williams, Baron Snigge, Baron Altham, Justice Croke, and Baron Heron, that the

7 Coke Report 4 a, 77 ER p381

plaintiff was no alien, and consequently that he ought to be answered in this assise by the defendants.

This case was as elaborately, substantially, and judicially argued by the Lord Chancellor, and by my brethren the Judges, as I ever read or heard of any; and so in mine opinion the weight and consequence of the cause, both in *præsenti et perpetuis futuris temporibus* justly deserved, for though it was one of the shortest and least that ever we argued in this Court, yet was it the longest and weightiest that ever was argued in any Court, the shortest in syllables, and the longest in substance; the least for the value (and yet not tending to the right of that least) but the weightiest for the consequent, both for the present, and for all posterity. And therefore it was said, that those that had written de *fossilibus* did observe, that gold bidden in the bowels of the earth, was in respect of the mass of the whole earth, *præ* in mango; but of this short plea it might be truly said (which is more strange) that here was *magnum in Parco*. And in the arguments of those that argued for the plaintiff, I specially noted, that albeit they spake according to their own heart, yet they spake not out of their own head and invention: wherein they followed the counsel given in God's book, *interroga pristinam generationem* (for out of the old fields must come the new corn) *et diligenter investiga patrum memoriam*, and diligently search out the judgments of our forefathers, and that for divers reasons: first on our own part, *Hesterni enim sumus et ignoramus, et vita nostra sicut umbra super terram*; for we are but of yesterday, (and therefore had need of the wisdom of those that were before us) and had been ignorant (if we had not received light and knowledge from our forefathers) and our days upon the earth are but as a shadow, in respect of the old ancient days and times past, wherein the laws have been by the wisdom of the most excellent men, in many successions of ages, by long and continual experience, (the trial of right and truth) fined and refined, which no one man, (being of so short a time) albeit he had in his head the wisdom of all the men in the world, in any one age could ever have effected or attained unto. And therefore it is *optima regula, qua nulla est verior aut firmior in jure*,

neminem oportet esse sapientiores legibus: no man ought to [7-Coke-4 a] take upon him to be wiser than the laws. Secondly, in respect of our forefathers: ipsi (saith the text) docebunt te, et loquentur tibi, et ex corde suo preferent eloquentia, they shall teach thee, and tell thee, and shall utter the words of their heart, without all equivocation or mental reservation; they (I say) that cannot be daunted with fear of any power above them, nor be dazzled with the applause of the popular about them, nor fretted with any discontentment (the matter of opposition and contradiction) within them, but shall speak the words of their heart, without all affection or infection whatsoever.

Also in their arguments of this cause concerning an alien, they told no strange histories, cited no foreign laws, produced no alien precedents, and that for two causes; the one, for that the laws of England are so copious in this point, as, God willing, by the report of this case shall appear; the other, lest their arguments concerning an alien born should become foreign, strange, and an alien to the state of the question, which being quæstio juris concerning freehold and inheritance in England, is only to be decided by the laws of this realm. And albeit I concurred with those that adjudged the plaintiff to be no alien, yet do I find a mere stranger in this case, such a one as the eye of the law (our books and book-cases) never saw, as the ears of the law (our reporters) never heard of, nor the mouth of the law (for judex est lex loquens) the Judges our forefathers of the law never tasted: I say, such a one, as the stomach of the law, our exquisite and perfect records of pleadings, entries, and judgments, (that make equal and true distribution of all cases in question) never digested. In a word, this little plea is a great stranger to the laws of England, as shall manifestly appear by the resolution of this case. And now that I bay taken upon me to make a report of their arguments, I ought to do the same as truly, fully, and sincerely as possibly I can. Howbeit, seeing that almost every Judge had in the course of his argument a peculiar method, and I must only hold myself to one, I shall give no just offence to any, if I challenge that which of right is due to every reporter, that is, to reduce the sum and effect of all to such a method, as, upon consideration had of all the arguments, the reporter himself thinketh to be fittest and clearest for the right understanding of the true reasons and causes of the judgment and resolution of the case in question.

#### 7 Coke Report 4 b, 77 ER p382

In this case five things did fall into consideration. 1. Ligeantia. 2. Leges. 3. Regna. 4. Alienigena. 5. Which legal inconveniences would ensue on either side.

[7-Coke-4 b] 1. Concerning ligeance: 1. It was resolved that ligeance was: 2. How many kinds of ligeances there were: 3. Where ligeance was due: 4. To whom it was due: and last, how it was due.

2. For the laws: 1. That ligeance or obedience of the subject to the Sovereign is due by the law of nature: 2. That this law of nature is part of the laws of England:

3. That the law of nature was before any judicial or municipal law in the world;.

4. That the law of nature is immutable, and cannot be changed.

3. As touching the kingdoms, how far forth by the act of law the union is already made, and wherein the kingdoms do yet remain separate and divided.

4. of alienigena, an alien born: 1. What an alien born is in law: 2. The division and diversity of aliens: 3. Incidents to every alien: 4. Authorities in law: 5. Demonstrative conclusions upon the premises, that the plaintiff can be no alien.

5. Upon due consideration had of the consequent of this case: what inconveniences legal should follow on either party.

And these several parts, I will, in this report, pursue in such order as they have been propounded; and, first, de, ligeantia.

1. (a) Ligeance is a true and faithful obedience of the subject due to his Sovereign. - This ligeance and obedience is an incident inseparable to every subject: for as soon as he is born he oweth by birth-right ligeance and obedience to his Sovereign. Ligeantia est vinculum fidei; and ligeantia est quasi legis essentia. Ligeantia est ligamentum, quasi

ligatio mentium: quia sicut ligamentum est connexio articulorum et juncturarum, &c. As the ligatures or strings do knit together the joints of all the parts of the body, so doth ligeance join together the Sovereign and all his subjects, quasi uno ligamine. Glanville, who wrote in the reign of H. 2. lib. 9. cap. 4. speaking of the connexion which ought to be between the lord and tenant that holdeth by hone saith, that *mutua debet esse domini et fide litatis connexion ita quod quantum debet omino ex homagio, tantum illi debet dominus ex dominio, præter solam reverentiam*, and the lord, (saith he) ought to defend his tenant. But between the Sovereign and the subject there is without comparison a higher and greater connexion: for as the subject oweth to the King his true and faithful ligeance and obedience, so the Sovereign is to govern and protect his subjects, [7-Coke-5 a] *regere et firetegere subditos*: so as between the Sovereign and subject there is duplex et reciprocum ligamen; quia sicut subditus regi tenetur ad obedientiam, ita rex subdito tenetur ad protectionem: merito igitur ligeantia dicitur a ligando, quia continet in se duplex ligamen. And therefore it is holden in 20 H. 7. 8. a. that there is a liege or ligeance between the King and the subject. And Fortescue, cap. 13. Rex (b) *ad tutelam legis corporum et bonorum subditorum erectus est*. And in the Acts of Parliament of IO R. 2. cap. 5. and 11 R. 2. cap. 1. 14 H. 8. cap. 2. &c. subjects are called liege people; and in the Acts of Parliament in 34 H. 8. cap. 1. and 35 H. 8. cap. 3. &c. the King is called the liege lord of his subjects. And with this agreeth M. Skeene in his book *De Expositione Verborum*, (which book was cited by one of the Judges which argued against the plaintiff) ligeance is the mutual bond and obligation between the King and his subjects, whereby subjects are called his liege subjects, because they are bound to obey and serve him; and he is called their liege lord, because he should maintain and defend them. Whereby it appeareth, that in this point the law of England and of Scotland is all one. Therefore it is truly said that *protectio trahit subjectionem, et subjectio protectionem*. And hereby it plainly appeareth, that ligeance doth not begin by the oath in the leet; for many men owe true ligeance that never were sworn in a leet, and the swearing in a leet maketh no (c) denization, as the book is adjudged in 14 H. 4. fol. 19. b. This word ligeance is well expressed by divers several names or synonyma which we find in our books. Sometimes it is called the obedience or obeisance of the subject to the King, *obedientia*

7 Coke Report 5 b, 77 ER p383

Regi, 9 E. 4. 7. b. 9 E. 4. 6. (d) 2 R. 3. 2. a. in the Book of Entries, *Ejectione Firm'* 7. 14 H. 6. cap. 2. 22 H. 8. cap. 8. &c. Sometimes he is called a natural liege man that is born under the power of the King, *sub potestate Regis*, 4 H. 3. (e) tit. Dower. Vide the statute of 11 E. 3. c. 2. Sometimes ligeance is called faith, *fides, ad fidem Regis*, &c. Bracton, who wrote in the reign of H. 3. lib. 5. *Tractat' de Exception'*, cap. 24. fol. 427. *Est etiam alia exceptio quæ competit ex person, quærenti,, proper defectum nationis, ut si quis alienigena qui fuit ad fidem Regis Franc'*, &c. And Fleta (which book was made in the reign of E. 1.) agreeth therewith; for 1. 6. C. 47. *de except' ex omissione Participis*, it is said, *vel decere potuit, quod nihil juris clamare poterit tanquam paraticeps eo quod est ad fidem Regis Franciæ, quia alienigenæ repelli debent in Angl' ab agendo, donec fuerunt ad fidem Reg' Angl'*. Vide 25 E. 3. *de natis ultra mare*, faith and ligeance of the King of England; and Litt lib. 2. cap. *Homage*, (b) saving the faith that I owe to our Sovereign Lord the King, and Glanv. 1. 9. c. 1. *Salva fide debita, dom' Regi e- hæredibus suis*. Sometimes ligeance is [7-Coke-5 b] called ligealty, 22 Ass pl. 25. By all which it evidently appeareth, that they that are born under the obedience, power, faith, ligealty, or ligeance of the King, are natural subjects, and no aliens. So, as seeing now it doth appear what ligeance is, it followeth in order, that we speak of the several kinds of ligeance. But herein we need to be very wary, for this caveat the law giveth, *ubi lex non distinguit nec nos distinguere debemus*; and certainly, *lex non distinguit*, but where *omnia membra dividuntia*, are to be found out and proved by the law itself.

2. There is found in the law four kinds of ligeances; the first is, *ligeantia naturalis, absoluta pura, et indefinite*, and this originally is due by nature and birth-right, and is

called *alta ligeantia*, and he that oweth this is called *subditus natus*. The second is called *ligeantia acquisita*, not by nature but by acquisition or denization, being called a denizen, or rather *donaizon*, because he is *subditus datus*. The third is, *ligeantia localis*, wrought by the law; and that is when an alien that is in amity cometh into England, because as long as he is within England, he is within the King's protection; therefore so long as he is here, he oweth unto the King a local obedience or ligeance, for that the one (as it hath been said) draweth the other. The fourth is a legal obedience, or ligeance which is called legal, because the municipal laws of this realm have prescribed the order and form of it; and this to be done upon oath at the torn of the leet. The first, that is, ligeance natural, &c. appeareth by the said Acts of Parliament, wherein the King is called natural liege lord, and his people natural liege subjects; this also doth appear in the indictments of treason (which of all other things are the most curiously and certainly indicted and penned) for in the indictment of the Lord Dacre, in 26 H. 8. it is said *præd' Dominus Dacre debitum fidei et ligeant suæ, quod præfato, domino Regi naturaliter et de jure impendere debuit, minime curans, &c.* And Reginald Pool was indicted in 30 H. 8. for committing treason *contradom' Regem supremum et naturalem dominum suum*. And to this end were cited the indictment of Edward Duke of Somerset in 5 E. 6. and many others both of ancient and later times. But in the indictment of treason of John Dethick in 2 and 3 Phil and Mar it is said, *quod præd' Johannes machinans; &c. prædict' dominum Philippum et dominam Mariam supremos dominos suos, and omitted (naturalis) because King Philip was not his natural liege lord*. And of this point more shall be said when we speak of local obedience. The second is *ligeant' acquisita*, or denization; and this in the books and records of the law appeareth to be threefold: 1. Absolute, as the common denizations be, to them and their [7-Coke-6 a] heirs, without any limitation or restraint: 2. Limited, as when the King doth grant letters of denization to an alien, and to the heirs (a) males of his body, as it appeareth in 9 E. 4. fol. 7, 8. in Baggot's case: or to an alien for term of his life, as was granted to J. Reynel, 11 H. 6. 3. It may be granted upon (b) condition, for (c) *cujus est dare, ejus est disponere*, whereof I have seen divers precedents.

7 Coke Report 6 b, 77 ER p384

And this denization of an alien may be effected three manner of way as it was in 3 A. 6. 55. in dower: by letters patent, as the usual conquest, as if the King and his subjects should conquer another kin as well *antenati* as *postnati*, as well, they which fought in the field remained at home, for defence of their country, or employed denizens of the kingdom or dominion conquered. of which point hereafter.

3. Concerning the local obedience it is observable, that as there on the King's part, so there is a (d) local ligeance of the sub this appeareth in 4 Mar. Br. 32. (e) and 3 and 4 Ail and Mar. Dy Frenchman, being in amity with the King, came into England, and subjects of this realm in treason against the King and Queen, a concluded (f) *contraligeant' suæ debitum*; for he owed to the King that is, so long as he was within the King's protection; which *Loa* but momentary and uncertain, is yet strong enough to make a nat. he hath issue here, that issue is (g) a natural born subject; a *fortiori* under the natural and absolute ligeance of the King (which, as it *alta ligeantia*) as the plaintiff in the case in question was, ought to subject; for *localis ligeantia, est ligeantia intima et minima, et maxim? incerta*. And it is to be observed, that it is *nec cælum, nec solum*, neither the soil, but *ligeantia* and *obedientia* that make the subject born; for come into the realm, and possess town or fort, and have issue the subject to the King of England, though he be born upon his meridian, for that he was not born under the ligeance of a subject protection of the King. And concerning this local obedience, a pre Hilar. 36 Eliz when Stephano Ferrara de Gama, and Emanuel Lewis Tinoco, two Portuguese born, coming to England under Queen Elizabeth's safe conduct, and living here under her protection, joined with Doctor Lopez in treason within [7-Coke-6 b] this realm against Her Majesty; and in this case two points were resolve First, that their indictment ought to begin, that they intended *trea Reginam. &c. omitting these words (naturalem domin suam)* and ought

(a) ligeant' suæ debitum. But if an (b) alien enemy come to invade I taken in war, he cannot be indicted of treason (B); for the indict cannot conclude contraligeant suæ debitum, for he never was in the protection of owed any manner of ligeance unto him, but malice and enmity, and be put to death by martial law. And so it was in anno 15 H. 7. i case, who being an alien born in Flanders, feigned himself to be a Edward the Fourth, and invaded this realm with great power, with upon him the dignity Royal: but being taken in the war, it was justices, that he could not be punished by the common law, but be and marshal (who had special commission under the Great Seal to E the same according to martial law) he had sentence to be quartered, which was executed accordingly. And this appeareth Griffith Attorney-General, by an extract out of the book of Hobart, to King H. 7.

4. Now are we to speak of legal ligeance, which in our books viz. 7 E. 2. Tit. Avowry 211. 4 E. 3. fol. 42. 13 E. 3. tit. Avowry 120, &c. is called suit Royal,

7 Coke Report 7 a, 77 ER p385

because that the ligeance of the subject is only due unto the King. This oath of ligeance appeareth in Britton, who wrote in anno 5 E. 1. cap. 29. (and is yet commonly in use to this day in every leet) and in our books; the effect whereof is: "You shall swear, that from this day forward, you shall be true and faithful to our Sovereign Lord King James and his heirs, and truth and faith shall bear of life and memeber and terrence honour, and you shall neither know nor hear of any ill or damage intended unto him that you shall not defend. So help you Almighty God." The substance and effect hereof is, as hath been said, due by the law of nature, ex institutione naturæ, as hereafter shall appear: the form and addition of the oath is, ex provisione hominis. In this oath of ligeance five things wre observed. 1. That for the time it is indefinite, and without limit, "from this day forward." Secondly, two excellent qualities are required, that is, to be "true and faithful." 3. To whom, "to our Sovereign Lord the King and his heirs:" (and albeit Britton doth say, to the K. of Eng. that is spoken proper excellentiam, to design the person, and not [7-Coke-7 a] to confine the ligeance; for a subject doth not swear his ligeance to the King, only as King of England, and not to him as King of Scotland, or of Ireland, &c. but generally to the King). 4. In what manner; "and faith and troth shall bear, &c. of life and memeber," that is, until the letting out of th elast drop of our dearest heart's blood. 5. Where and in what places ought these things to be done, in all places whatsoever, for, "you shall neither know nor hear of any ill or damage, &c." that you shall not defend, &c. so as natural ligeance is not circumscribed within any place. It is holden 12 H. 7. 18. b. that he that is sworn in the leet, is worn to the King for his ligeance, that is, to be true and faithful to the King; and if he be once sworn for his ligeance, he shall not be sworn again during his life. And all letters patent of denization be, that the patentee shall behave himself tanquam verus et fidelis ligeus domini Regis. And this oath of ligeance at the torn and leet was first instituted by King Arthur; for so I read, Inter leges Sancti Edwardi Regis ante conquestum 3 cap. 35. Et quod omnes principes et comites, procures, milites et liberi homines debent jurare, &c. in Folkemote, et similiter omnes procures regni, et milites et liberi homines universi totius regni Britann' facere debent inpleno Folkemote fidelitatem domino Regi, &c. Hanc legem invenit Arthurus Rex Saracenot et inimicos a regno, &c. et hujus legis autoritate Etheldredus Rex uno et eodem die per universum rregnum Danos occidit. Bide Lambert inter leges Regis Edwardi, \* &c. fol. 135 et 136. By this it appeareth, when and from whom this legal ligeance had his first institution within this realm. Ligeantia, in the case in question, is meant and intended of the first kind of ligeance, that is, of ligeance natural, absolute, &c. due by nature and birth-right. But if the plaintiff's father be made a denizen, and purchase lands in England to him and his heirs, and die seised, this land shall never descend to the plaintiff, for that the King by his letters patent may make a denizen, but cannot naturalize him to allpurposes, as an Act of Parliament may do; neither can letters patent make any inheritable in this case, that by the common law cannot inherit. And herewith agreeth 36 H. 6. tit. Denizen Br. 9.

Homage in our book is two-fold, that is to say, homagium ligeum; and that is as

much as ligeance, of which Bracton speaketh, 1. 2. c. 35. f. 79. *Soli Regi debet sine dominio seu servitio*, [7-Coke-7 b] and there is homagium feodale, which hath his original by tenure. In Fitz. Nat. Brev. 269. there is a writ for respiting of this later himage which is due *ratione feodi sive tenuræ: sciatis quod respectuamus homagium nobis de terr' et tenementis quæ tenenter de nobis in capite debet'*. But homagium ligeum, i. e. ligeantia, is inherent and inseparable, and cannot be respited.

3. Now are we come to (and almost past) the consideration of this circumstance, where natural ligeance should be due: for by that which hath been said, it appeareth, that ligeance, and faith and truth which are her members and parts, are qualities of the mind and soul of man, and cannot be circumscribed within the predicament of *ubi*, for that were to confound predicaments, and to go about to drive (an absurd and impossible thing) the predicament of quality into the predicament of *ubi*. *Non respondetur ad hanc quæstionem, ubi est?* to say, *Berus et fidelis subditus est; sed ad hand quætionem, qualis est? Recte et apte respondetur, verus et fidelis ligeus, &c. est.* But yet

7 Coke Report 8 a, 77 ER p386

for the greater illustration of the matter, the point was handled by itself, and that ligeance of the subject was of as great an extent and latitude, as the Royal power and protection of the King, et ? converso. It appeareth by the stat. of 11 H. 7. cap. 1. and 2 E. 6. cap. 2. that the subjects of England are bound by their ligeance to go with the King, &c. in his wars, as well within the realm, &c. as without. And therefore we daily see, that when either Ireland, or any other of His Majesty's dominions, be infested with invasion or insurrection, the King of England sendeth his subject out of England, and his subjects out of Scotland, also into Ireland, for the withstanding or suppressing of the same, to the end his rebels may feel the swords of either nation. And so may his subjects of Guernsey, Jersey, Isle of Man, &c. be commanded to make their swords good against either rebel or enemy, as occasion shall be offered; whereas if natural ligeance of the subjects of England should be local, that is, confined within the realm of England or Scotland, &c. then were not they bound to go out of the continent of the realm of England or Scotland, &c. And the opinion of Thirninge in 7 H. 4. tit. Protect' 100. is thus to be understood, that an English subject is not compellable to go out of the realm without wages, according to the statutes of 1 E. 3. c. 7. 18 E. 3. c. 8. 18 H. 6. c. 19, &c. 7 H. 7. c. 1. 3 H. 8. c. 5, &c. In ann. 25 E. 1. Bigot Earl of Norfolk and Suffolk, and Earl Marshal of England, and Bohun Earl of Hereford and High constble of England, did exhibit a petition to the King in French which I have seen anciently recorded) on [7-Coke-8 a] the behalf of the commons of England, concerning how and in what sort they were to be employed in His Majesty's wars out of the realm of England; and the record saith that, *post multas et varias altercationes*, it was resolved, they ought to go but in such manner and formas after was declared by the said statutes, which seem to be but declarative of the common law. And this doth plentifully and namifestly appear in our books, being truly and rightly understood. In 3 H. 6. tit. Protection 2. one had the benefit of a ptection, for that he was sent into the King's wars in comitiva of the protector; and it appeareth by the record, and by the chronicles also, that this employment was into France; the greatest part thereof then being under the King's actual obedience, so as the subjects of England were employed into France for the defence and safety thereof: in which case it was observed, that seeing the protector, who was a prorex, went, the same was adjudged a voyage Royal, 8 H. 6. fol. 16. b. the Lord Talbot went with a company of Englishmen into France, then also being for the greatest part under the actual obedience of the King, who had the benefit of their protectins allowed unto them. And here were observed the words of the writ in the Register, fol 88. where it appeareth, that men were employed in the King's wars out of the realm *per præceptum nostrum*, and the usual words of the writ of protection be *in obsequio nostro*. \*32 H. 6. fol. 4. a. it appeareth, that Englishmen were pressed into Guyenne. 44 E. 3. 12. a. into Gascoyne with the Duke of Lancaster, 17 H. 6. tit. Protection, into ll Gascoyne with the Earl of Huntington, steward of Guienne, 11 and

12 H. 4. 7. into (a) Ireland, and out of this realm with the Duke of Gloucester and the Lord Knolles: vide (b) 19 H. 6. 35. b. And it appeareth in 19 Ed. 2. tit. Avowry 224. 26 Ass. 66. 7 H. 4. 19, &c. that there was forinsecum servitium foreign service, which Bracton, fol. 36. calleth regale servitium; and in Fitz. N. B. 28. that the king may send men to seve him in his wars beyond the sea. But thus much (if it be not in so plain a case too much) shall suffice for this point for the King's power, to command the sevice of his subjects in his wars out of the realm, whereupon it was concluded, that the ligeance of a natural-born subject was not local, and confined only to England. Now let us see what the law saith in time of peace, concerning the King's protection and power of command, as well without the realm, as within, that his subjects in all places may be protected from violence, and that justice may equally be administered to all his subjects.

[7-Coke-8 b] In the Register, fol. 25 b. Rex universis et singulis admirall', castellan', custodibus

7 Coke Report 9 a, 77 ER p387

castrorum, villar', et aliorum fortalitionum præpositis, vicecom' majoribus, custumariis, custodib' portuum, et alior' locor' maritimor' ballivis, ministr', et aliis fidel' suis, tam in transmarinis quam in cismarinis partib' ad quos, &c. sallutem. Sciatis, quod suscepimus in protectionem et defension' nostram, necnon ad salvam et securam gardiam nostram W. veniendo in regnum nostrum Angl', et potestatem nostram, tam per terram quam per mare cum uno valetto suo, ac res ac bona sua quæcunque ad tractand' cum dilecto nostro et fideli L. pro redemptione prisonarii ipsius L. infra regnum et potestatem nostram præd' per sex menses morando et exinde ad propria redeundo. Et ideo, &c. quod ipsum W. cum valetto, rebus et bonis suis præd' veniendo in regn' et potestat' nostram præd' tam per terr' quam per mare ibid' ut prædict' est ex caus, antedict, morando, et exinde ad propria redeundo, mauteneatis, protegatis, et defendatis; non inferentes, &c. per sex menses duratur'. T. &c. In which writ three things are to be observed. 1. That the King hath fidem et fideles in partib' transmarinis. 2. That he hath protection' in partib' transmarinis. 3. That he hath potestatem in partibus transmarinis. In the Register fo. 26. Rex universis et singulis admirallis, castellanis, custodibus castrorum, villaru, et aliorum fortalitionum præpositis, vicecom majoribus, custumariis, custodib' portuum, et alior' locor' maritimorum ballivis, ministris, et aliis fidelibus suis, tam in transmarinis quam in cismarinis partibus ad quos, &c. salutem. Sciatis quod suscepimus in protectionem et defensionem nostram, necnon in salvum et securum conductum nostr' I. valettum P. et L. Burgensium de Lyons obsidum nostrorum, qui de licenti, nostr, ad partes transmarinas profecturus est, pro finantia magistrorum suorum prædict' obtinenda vel defendenda, eundo ad partes prædictas ibidem morando, et exinde in Angl' redeundo. Et ideo vobis mandamus, quod eidem I. eundo ad partes præd' ibidem morando, et exinde in Angl' redeundo, ut præd' est, in person., bonis, aut revus suis, non inferatis, seu quantum in vobi sedit ab aliis inferri permittatis injuriam, molestiam, &c. aut gravamen. Sed eum potius salvum et securum conductum, cum per loca passus, seu districtus vestros transierit, et super hoc requisiti fueritis, suis sumptibus habere faciatis. Et si quid eis forisfactum fuerit, &c. reformari faciatis. In cujus, &c. per tres ann' durat' T. &c. And certainly this was, when Lyons in France (bordering upon Burgundy, an ancient friend to England), was under the actual obedience of King Henry VI. For the King commanded fidelibus suis, his faithful magistrates there, [7-Coke-9 a] that if any injury were there done, it should be by them reformed and redressed, and that they should protect the party in his person and goods in peace. In the Register, fol. 26. two other writs: Rex omnibus seneschallis, majoribus, juratis, paribus præpositis, ballivis et fidelibus suis in ducatu Aquitaniæ ad quos, &c. salutem. Quia dilecti nobis T. et A. cives civitat' Burdegal' coram nobis in Cancellar' nost' Angl' et Aquitan' jura sua prosequentes, et metuentes ex verisimilibus conjecturis per quosdam sibi comminantes tam in corpore quam in rebus suis, sibi posse grave damnum inferri, supplicaverunt nobis sibi de protectione regia providere: nos volentes dictos T. et A. ab oppressionibus indebitis præservare,

suscepimus ipsos T. et A. res ac justas possessiones et bona sua quaecunque in protectionem et salvam gardiam nostram specialem. Et vobis et cuilibet vestrum injungimus et mandamus, quod ipsos T. et A. familias, res ac bona sua quaecunque a violentiis et gravaminibus indebitis defendatis, et ipsos in justis possessionibus suis manuteneatis. Et si quid in præjudicium hujus protectionis et salvæ gardiæ nostræ attentatum inveneritis, ad statum debitum reducat. Et ne quis se possit per ignorantiam excusare præsentem protectionem et salvam gardiam nostram faciatis in locis de quibus requisiti fueritis infra district' vestrum publice intimari, inhibentes omnibus et singulis sub pænis gravibus, ne dictis A. et T. seu famulis suis in personis seu rebus suis, injuriam molestiam, damnum aliquod inferant seu gravamen: et penocellas nostras in locis et bonis ipsorum T. et A. in signum protectionis et sal' gard' memorat', cum super hoc requisiti fueritis, apponatis. In cujus, &c. dat' in palatio nostro Westm' sub Magni Sigilli testimonio, sexto die Augusti anno 44 E. 3. - Rex universis et singulis seneschallis, constabular' castellanis, præposit', minist', et omnib' ballivis et fidelibus suis in dominio nostro Aquitan' constitutis ad quos, &c. salut'. Volentes G. et R. uxor ejus favore prosequi gratiose, ipsos G. et R. homines et familias suas ac justas possessiones, et bona sua quaecunque, suscepimus in protectionem et defensionem nostram, necnon in salvam gardiam nostram specialem. Et ideo vobis et cuilibet vestrum injungimus et mandamus, quod ipsos G. et R. eorum homines, familias suas, ac justas possessiones et bona sua quaecunque manuteneatis, protegatis, et defendatis: non inferentes eis seu quantum in vobis est ab aliis inferri permittentes, injuriam, molestiam, damnum, violentiam, impedi-

7 Coke Report 9 b, 77 ER p388

mentum aliquod seu gravamen. Et si quid eis forisfact', injuriatum vel contra eos indebite attentatum fuerit, id eis sine dilatione corrigi, et ad statum debitum reduci faciatis, prout ad vos et quemlibet vestrum noveritis pertinere: penocellas super domibus suis in signum duratur' T. &c. [7-Coke-9 b] By all which it is manifest, that the protection and government of the King is general over all his dominions and kingdoms, as well in time of peace by justice, as in time of war by the sword, and that all be at his command, and under his obedience. Now seeing power and protection draweth ligeance, it followeth, that seeing the King's power, command, and protection extendeth out of England, that ligeance cannot be local, or confined within the bounds thereof. He that is abjured the realm, Qui abjurat regnum amittit regnum. sed non Regem, amittit patriam, sed non patrem patriæ: for notwithstanding the abjuration, he oweth the King his ligeance, and he remaineth within the King's protection; for the King may pardon and restore him to his country again. So seeing that ligeance is a quality of the mind, and not confined within any place; it followeth, that the plea that doth confine the ligeance of the plaintiff to the kingdom of Scotland, infra ligeantiam Regis regni sui Scotiæ, et extra ligeantiam Regis regni sui Angliæ, whereby the defendants do make one local ligeance for the natural subjects of England, and another local ligeance for the natural subjects of Scotland, is utterly insufficient, and against the nature and quality of natural lineage, as often it hath been said. And Coke, Chief Justice of the Court of common Pleas, cited a ruled case out of Hingham's Reports, tempore E. 1. which in his argument he shewed in Court written in parchment, in an ancient hand of that time. Constance de N. brought a writ of ayel against Roger de Cobledike and others. named in the writ, and counted that from the seisin of Roger her grandfather it descended to Gilbert his son, and from Gilbert to Constance, as daughter and heir. Sutton dit, Sir, el ne doit este responde, pur ceo que el est Francois et nient de la ligeance ne a la foy Denglitterre, et demand judgement si el doit action aver: that is, she is not to be answered, for that she is a French woman, and not of the ligeance, nor of the faith of England, and demanded judgment, if she this action ought to have. Bereford (then Chief Justice of the court of Common Pleas) by the rule of the Court disalloweth the plea, for that it was too short, in that it referred ligeance and faith to England, and not to the King: and thereupon Sutton saith as followeth: Sir, nous voilomous averre, que el ne est my de la ligeance Denglitterre, ne a la foy le Roy et

demand jugement, et si vous agardes que el doit este responde, nous dirromus assets: that is, Sir, we will aver, that she is not of the ligeance of England, nor of the faith of the King, and demand judgment, &c; [7-Coke-10 a] which latter words of the plea (nor of the faith of the King) referred faith to the King indefinitely and generally, and restrained not the same to England, and thereupon the plea was allowed for good, according to the rule of the Court: for the book saith, that afterward the plaintiff desired leave to depart from her writ. The rule of that case of Cobledike, did (as Coke, Chief Justice, said) over-rule this case of Calvin, in the very point now in question; for that the plea in this case doth not refer faith or ligeance to the King indefinitely and generally, but limiteth and restraineth faith and ligeance to the kingdom: *Extra ligeantiam Regis regni sui Angliæ*, out of the ligeance of the King of his kingdom of Englan; which afterwards the Lord Chancellor and the Chief Justice of the King's Bench, having copies of the said ancient report, affirmed in their arguments. So as this point was thus concluded, *Quod ligeantia naturalis nullis claustris coercetur nullis metis refrænatur, nullis finibus premitur*.

4 and 5. By that which hath been said, it appeareth, that this legeance is due only to the King; so as therein the question is not now, *cui*, sed *quomodo debetur*. It is true, that the King hath two capacities in him: one a natural body, being descended of the blood Royal of the realm; and this body is of the creation of Almighty God, and is subject to death, infirmity, and such like; the other is a ll politic body or capacity, so called, because it is framed by the policy of man (and in 21 E. 4. 39. b. is called a mysticall body;) and in this capacity the King is esteemed to be immortal, invisible, not subject to death, infirmity, infancy, (a) nonage, &c. Pl. Com. in the case of The

7 Coke Report 10 b, 77 ER p389

Lord Barkley, 238. and in the case of The Duchy 213. 6 E. 3. 291. and 26 Ass pl. 54. Now, seeing the King hath but one person, and several capacities, and one politic capacity for the realm of England, and another for the realm of Scotland, it is necessary to be considered, to which capacity ligeance is due. And it was resolved, that it was due to the natural person of the King (which is ever accompanied with the politic capacity, and the politic capacity as it were appropriated to the natural capacity), and it is not due to the politic capacity only, that is, to his Crown or 'kingdom distinct from his natural capacity, and that for divers reasons. First- every subject (as it hath been affirmed by those that argued against the plaintiff) is presumed by law to be sworn to the King, which is to his natural person, and likewise the King is sworn to his subjects, (as it appeareth in Bracton, lib. 3. de Actionibus, cap. 9. fol. 107) which oath he taketh in his natural [1 0 b] person: for the politic capacity is invisible and immortal; nay, the politic body hath no soul, for it is framed by the policy of man. 2. In all indictments of treason, when any do intend or compass mortem et destructionem domini Regis (which must needs be understood of his natural body, for his politic body is immortal, and not subject to death,) the indictment concludeth, *contra (a) ligeantice suæ debitum*; ergo, the ligeance is due to the natural body. Vide Fit. Justice of Peace 53. and Pl. Corn. 384. in The Earl of Leicester's case. 3. It is true, that the King in genere dieth not but, no question, in individuo he dieth: as for example, H. 8. E. 6. &c. and Queen Eliz died, otherwise you- should have many Kings at once. In 2 and 3 Ph. and Mar. Dyer 228. (b) one Constable dispersed divers bills in the streets in the night, in which it was written, that King E. 6. was alive, and in France, &c.: and in Coleman-street in London, he pointed to a young man, and said, that he was King Edward the Sixth. And this being spoken de individuo (and accompanied with other circumstances) was resolved to be high treason; for the which Constable was attainted and executed. 4 A (c) body politic (being invisible) can as a body politic neither make or take homage: Vide 33 H. 8. tit. Fealty, Brook 15. 5. In fide, in faith or ligeance nothing ought to be feigned, but ought to be *exfidenonfici*. 6. The King holdeth the kingdoi of England by birthright inherent, by descent from the blood Royal, whereupon succession doth attend; and therefore it is usually said, to the King, his heirs, and successors, wherein heirs is' first named, and successors is attendant upon heirs. And yet in our

ancient books succession and successor are taken for hereditance and heirs. Bract. U. 2. de Acquirendo Rerum Dominio c. 29. -Et sciend' est quod hæreditas est successio in universum jus quod defunctus antecessor habuit, ex causd quacunque acquisitionis vel successionis, et alibi affinitatis jure nulla successio permitlitur. But the title is by descent; by Queen Elizabeth's death the Crown and kingdom of England descended to His Majesty, and he was fully and absolutely thereby King, without any essential, ceremony or act to be done ex postfacto: for coronation is but a Royal ornament and solemnization of the Royal descent, but no part of the title. In the first year of His Majesty's reign, before His Majesty's coronation, Watson (d) and Clerk;, se inar in priests, and others, were of opinion, that His Majesty was no complete and absolute King before his coronation, but that coronation did add a confirmation-and perfection to the descent; and therefore (observe their damnable and damned consequent) that they by (11 a) strength and power might before his coronation take him and his Royal issue into their possession, keep him prisoner in the Tower, remove such counsellors and great officers as pleased them, and constitute others in their places, &c. And that these and other (acts) of like nature could not be treason against His Majesty, before he were a crowned King. But it was clearly resolved by all the Judges of England, that presently by the descent His Majesty was completely and absolutely King, without any essential ceremony or act to be done ex post facto, and that (e) coronation was but a Royal ornament, and outward solemnization of the descent.

7 Coke Report 11 b, 77 ER p390

And this appeareth evidently by infinite precedents and book case example in a case so clear for all) King Henry VI. was not crowned u his reign, and yet divers men before his coronation were attain felony, &c. and he was as absolute and complete a King, both for ma as for grants, &c. before his coronation, as he was after, as it appear of 1, 2, 3, 4, 5, 6, and 7 years of the same King. And the like for many other Kings of this realm, which for brevity in a case so which it manifestly appeareth, that by the laws of England there regnum within the same. If the King be seised of land by a d dieth seised, this descent shall toll the entry of him that right by 9 (a) E. 4. 51. But if the next King had it by succession, that no entity, as it appeareth by Littleton, fol. 97. If a disseisor of an land to the King who dieth seised, this descent taketh away the e as it is said in 34 H. 6. fol. 34. (b) 45. lib. Ass pl. 6. Plow. Co case was; K. H. 3. gave a manor to his brother the Earl of Co what time the same was a fee-simple conditional) K. H. 3. died, Statute of Donis Conditional' (having no issue) by deed exchange warranty for other lands in fee, and died without issue, and assets descended upon his nephew King Edward I; and it was a warranty and assets, which descended upon the natural person of him of the possibility of reverter. In the reign of Ed. 2. the Sp and the son, to cover the treason hatched in their hearts, invented damned opinion, that homage and oath of ligeance was more by re Crown (that is, of his politic capacity) than by reason of the person o upon which opinion they inferred execrable and detestable conseq King do not demean himself by reason in the right of his CroWD, bi by oath to remove the King. 2. Seeing that the King could not b of law that ought to be done by the sword. 3. That his lieges b in aid of him, and in default of him. All which were condemned b one in the reign of Ed. 2. called -Exilium Hugonis le Spencer, and th Ed. 3. c. 1. Bracton, lib. 2. de Acquirendo Rerum Dominio, c. 24. f. enim Corona Regis facere justitiam et judic' et tenere pacem, et sine quib non potest nee tenere; hujusmodi autem jura sive jurisdictiones ad pers transferri non polerunt, nee a privatd, persond possideri, nee users nee hoc datum fuit ei desuper, sicut jurisdictio delegata delegari non pole remaneat cum ipso Rege. Et lib. 3. De Actionibus, cap. 9. fol 107. Separare autem debet Rex, cum sit Dei vicarius in terra, jus ab injuria, æquam ab iniquo, ut honeste vivant, et quod nullus alium 16edat, et quod unicuique quod suum contributione reddatur. In respect whereof one saith, that Corona est quasi cor menta sunt misericordia et justicia. And therefore a King's Crown of the laws, where justice, &c. is administered; for so saith P. v. Coronam dicimus legis judicium esse, proplerea quod

cerlis est vinculis com nostra veluli religata coercetur. Therefore if you take that which is signified by the Crown, that is, to do justice and judgment, to maintain the peace of the land, &c. to separate right from wrong, and the good from the ill: that is to be U capacity of the King, that in rei veritate hath capacity, and is ad with endowments as well of the soul as of the body, and thereby and judgment according to right and equity, and to maintain the find out and discern the truth, and not of the invisible and immo hath no such endowments; for of itself it hath neither soul nor b divers books and Acts of Parliament speak of the ligeance of England as 31 E. 3. tit. Cosinage 5. 52 Ed. 3. 2. 13 E. 3. tit. Brief 677. 25 Ed. 3. Stat. de Natis Ultra

7 Coke Report 12 a, 77 ER p391

Mare. All these and other speaking briefly in a vulgar manner (for (a) loquendum ut vulgus) and not pleading (for sentiendum ut docti) are to be understood of the ligeance due by the people of England to the King; for no man will affirm, that England itself, taking it for the continent thereof, doth owe any [7-Coke-12 a] ligeance or faith, or that any faith or ligeance should be due to it: but it manifestly appeareth, that the ligeance or faith of the subject is proprium quod arto modo to the King, omni soli et semper. And oftentimes in the reports of our book cases, and in Acts of Parliament also, the Crown or kingdom is taken for the King himself, as in Fitzh. Natur. Brey fol. 5. Tenure in capite is a tenure of the Crown, and is a seignory in gross, that is of the person (C) of the King: and so is 30 H. 8. Dyer fol. 44, 45. a tenure in chief, as of the Crown, is merely the tenure of the person of the King and therewith agreeth 28 H. 8. tit. Tenure 65. Br. The statute, of 4 H. 5. cap ultimo gave priors aliens, which were conventual to the King and his heirs, by which gift saith U H. 6. 34. the same were annexed to the Crown. And in the said Act of 2 Ed. 3. whereas it is said in the beginning, within the ligeance of England, it is twice afterwards said in the said Act within the ligeance of the King, and yet all one ligeance due to the King. So in 42 Ed. 3. fol. 2. where it is first said, the ligeance of England, it is afterwards in the same case called the ligeance of the King; wherein though they used several manner and phrases of speech, yet they intended one and the same ligeance. So in our usual commission of assise, of gaol delivery, of oyer and terminer, of the peace, &c. power is given to execute justice, secundum legem et consuetudinem regni nostri Angliæ; and yet Littleton, lib. 2. in his chapter of Villenage, fol. 43. in disabling of a man that is attainted in a præmunire saith, that the same is the King's law; and so doth the register in the writ of adjura, regia style the same.

The reasons and cause wherefore by the policy of the law the King is a body politic, are three, viz. 1. causa majestatis, 2. causa necessitates, and 3. causa utilitatis. First, causa majestatis, the King cannot give or take but by matter of record for the dignity of his person. Secondly, causa necessitatis, as to avoid the (a) attainder of him that hath right to the crown, as it appeareth in 1 H. 7. 4. lest in the interim there should be an (b) interregnum, which the law will not suffer. Also by force of this politic capacity, though the (c) King be within age, yet may he make leases and other grants (D), and the same shall bind him; otherwise his revenue should decay, and the King should not be able to reward service, &c. Lastly, causa utilitatis, as when lands and possessions descend from his collateral ancestors, being subjects, as from the Earl [7-Coke-12 b] of March, &c. to the King, now is the King seised of the same inure Coronæ, in his politic capacity; for which cause the same shall go with the Crown; and there, albeit Queen Elizabeth was of the half blood to Queen Mary, yet she in her body politic enjoyed all those fee-simple lands, as by the law she ought, and no collateral cousin of the whole blood to Queen Mary ought to have the same. And these are the causes wherefore by the policy of the law the King is made a body politic: so as for these special purposes the law make him a body politic, immortal and invisible, whereunto our liegance cannot appertain. But to conclude this point, our liegance is to our natural liege Sovereign, descended of the blood royal of the Kings of this realm. And thus much of this general part de ligeantid, now followeth the Second Part, De Legibus, wherein these parts were considered first that the liegance

or faith of the subject is due unto the King by the law of nature: secondly, that the law of nature is part of the law of England: thirdly, that

7 Coke Report 13 a, 77 ER p392

the law of nature was before any judicial or municipal law: fourthly nature is immutable.

The law of nature is that which God at the time of creation of infused into his heart, for his preservation and direction; and this is *lex æterna*, the moral law, called also the law of nature. And by this law, written God in the heart of man, were the people of God a long time gone law was written by Moses, who was the first reporter or writer of The Apostle in the second chapter to the Romans saith, *Cum enim gentes quæ elegend non habent naturaliter ea quæ legissunt faciunt*. And this is within the moral law, *honora patrem*, which doubtless doth extend to him that is *pater patriæ*. And these be the words of the Great Divine, *Hoc Deus in Sacris Scripturis jubet, hoc ut quilibet subditus obediat superior* and Aristotle, nature's secretary, lib. 1. Cap. 5. that *jus naturale est, quod apud omnes homines eandem habet potentiam*. agree Bracton, lib. 1. cap. 5. and Fortescue, cap. 8. 12. 13. and Student, cap. 2. and 4. And the reason hereof is, for that God a [7-Coke-13 a] to all, and therefore the law of God and nature is one to al nature is the faith, ligeance, and obedience of the subject due to superior. And Aristotle 1. *Politicorum* proveth, that to command nature, and that magistracy is of nature: for whatsoever is necessary for the preservation of the society of man is due by the law of nature and government are necessary and profitable for the preservation man; therefore magistracy and government are of nature. And erewith accordeth Tully, lib. 3. *De legibus, sine imperio nee domus ulla, nec civilas, nec universum genus stare, nec ipse denique mundus potest*. This law indeed is the eternal law of the Creator, infused into the heart of the time of his creation, was two thousand years before any laws written judicial or municipal laws. And certain it is, that before judicial were made, Kings did decide causes according to natural equity, an any rule or formality of law, but did dare *Jura*. And this appeareth by Fortescue, cap. 12 and 13. and by Virgil that philosophical poet, 7th *Aeneid*.

*Hoc Priami gestamen erat, cumjura, vocatis*

More claret populism

And 5th *AEneid*.

- *Gandet regno Trojanus Acestes, Indicitlue forum et partibus dat jura vocatis*.

And Pomponius, lib. 2. cap. *De Origine Juris*, affirmeth the Superbus's time there was no civil law written, and that Papirius observations into writing, which was called *Jus Civile Papirianum* wherefore laws were made and published, appeareth in Fortescue, Tully, lib. 2. *officiorum*: at *cum jus æquabile ab uno viro homines non consequerentur, inventi sunt leges*. Now it appeareth by demonstrative reason faith, and obedience of the subject to the Sovereign, was before judicial laws. 1. For that government and subjection were long before any municipal or judicial laws. 2. For that it had been in vain to have prescribed to such as owed obedience, faith, and ligeance before, in respect w' bound to obey and observe them: *Frustra, enim [7-Coke-13 b] feruntur leges nisi subditis et obedientibus*. Seeing then that faith, obedience, and ligeance are due by the law of nature, it followeth that the same cannot be changed or taken away; or municipal laws have inflicted and imposed in several places, or divers and several punishments and penalties, for breach or not observance of the law of nature, (for that law only consisted in commanding or prohibit certain punishment or penalty), yet the very law of nature itself never was nor could be (a) altered or changed. And therefore it is certainly true, that (b) *jura naturalia*

7 Coke Report 14 a, 77 ER p393

*sunt immutabilia*. And herewith agreeth Bracton, lib. 1. cap. 5. and Doctor and Student, cap. 5 and 6. And this appeareth plainly and plentifully in our books.

If a man hath a ward (e) by reason of a seigniory, and is outlawed, he forfeiteth the wardship to the King: but if a man hath the wardship of his own son or daughter,

which is his heir apparent, and is outlawed, be doth not (a) forfeit this wardship; for nature hath annexed it to the person of the father, as it appeareth in 33 H. 6. 55. b. -*Et bonus Rex nihil a bono patre differt, et patria dicitur a patre, quia habet communes patrem, qui est pater patriæ.* In the same manner, *maris et fæminæ conjunctio est de jure naturæ*, as Bracton, in the same book and chapter, and St. Germin in his book of the Doctor and Student, cap. 5. do hold. Now, if he that is attainted of treason or felony, be slain by one that hath no authority, or executed by him that hath authority, but pursueth not his warrant, in this case his eldest son can have no appeal (F), for he must bring his appeal as heir, which being *ex provisione hominis*, he loseth it by the attainder of his father; but his (b) wife (if any he have) shall have an appeal, because she is to have her appeal as wife, which she remaineth notwithstanding the attainder, because *maris et fæminæ conjunctio* is *de jure naturæ*, and therefore (it being to be intended of true and right matrimony) is indissoluble; and this is proved by the book in 33 H. 6. 57. So if there be mother and daughter, and the daughter is attainted of felony, now cannot she be heir to her mother for the cause aforesaid; yet after her attainder, if she kill her mother, this is, parricide and petit treason; for yet she remaineth her daughter, for that is of nature, and herewith agreeth 21 E. 3. 17. b. If a man be attainted of felony or treason, he hath lost the King's legal protection, for he is thereby utterly disabled to sue any action real or personal (which is a greater disability than an alien in league hath) and yet such a person so attainted hath not lost that [7-Coke-14 a] protection which by the law of nature is given to this King, for that is *indelebitis et immutabilis*, and therefore the King may protect and pardon him, and if any man kill him without warrant, he shall be punished by the law as a manslayer, and thereunto accordeth 4 Ed. 4. and 35 H. 6. 57. 2 Ass pl. 3. By the statute of 25 Ed. 3. cap. 22. a man attainted in a premunire, is by express words out of the King's protection generally; and yet this extendeth only to legal protection, as it appeareth by Littleton, fol. 43. for the Parliament could not take away that protection which the law of nature giveth unto him; and therefore notwithstanding that statute, the King may protect and pardon him. And though by that statute it was farther enacted, that it should be done with him as with an enemy, by which words any man, might have slain such a person (as it is holden in 24 H. 8. tit. Coron. Br. 197.) until the statute made anno 5 Eliz cap. 1. yet the King might protect and pardon him. A man outlawed is out of the benefit of the municipal law; for so saith Fitz. N. B. 161. a. *utlagatis est quasi extra legem positus*; and Bract. 1. 3. tract. 2. c. 11. saith, that *ea put geret lupinum*; and yet is he not out either of his natural ligeance, or of the King's. natural protection; for neither of them is tied to municipal laws, but is due by the law of nature, which (as hath been said) was long before any judicial or municipal laws. And therefore if a man were outlawed for felony yet was he within the King's natural protection, for no man but the sheriff could execute him, as it is adjudged in, 2 lib. Ass pl. 3. Every subject is by his natural ligeance bound to obey and serve his sovereign, &c. It is enacted by the Parliament of 23 H. 6. that no man should serve the King as sheriff of any county, above one year, and that notwithstanding any clause of non obstante to the contrary, that is to say, notwithstanding that the King should expressly dispense with the said statute: howbeit it is agreed in 2 H. 7. that, against the express purview of that Act, the King may, by a special non obstante dispense with that Act, for that the Act could not bar the King of the service of his subject, which the law of nature did give unto him. By these and many other cases that might be cited out of our books, it appeareth, how plentiful the authorities of

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our laws be in this matter. Wherefore to conclude this point (and to exclude all that hath been or could be objected against it) if the obedience and ligeance of the subject to his sovereign be due by the law of nature, if that law be parcel of the laws, as well of England, as of all other nations, and is immutable, and that postnati and we of England are united by birthright, [7-Coke-14 b] in obedience and ligeance (which is the true cause of natural subjection) by the law of nature; it followeth that Calvin the plaintiff being

born under one ligeance to one King, cannot be an alien born; and there is great reason, that the law of nature should direct this case, wherein five natural operations are remarkable: first the King hath the Crown of England by birthright; being naturally procreated of the blood royal of this realm: secondly, Calvin the plaintiff naturalized by procreation and birth-right, since the descent of the Crown of England: thirdly, ligeance and obedience of the subject to the sovereign, due by the law of nature: fourthly, protection and government due by the law of nature: fifthly, this case, in the opinion of divers, was more doubtful in the beginning, but the further it proceeded, the clearer and stronger it grew; and therefore the doubt grew from some violent passion, and not from any reason grounded upon the law of nature, quia quanto magis violentus motus (qui fit contranaturam) appropinquat ad suum finem, tanto debiliores et tardiores sunt ejus motus; sed naturalis motus, quanto magis appropinquat ad suum finem, tanto fortiores et velociores sunt ejus motus. Hereby it appeareth how weak the objection grounded upon the rule of (a) quanto du jura concurrunt in, und, persond, &c. is: for that rule holdeth not in personal things, that is, when two persons are necessarily and inevitably required by law, as in the case of an alien born there is; and therefore no man will say that now the King of England can make war or league with the King of Scotland, et sic de cæteris; and so in case of an alien born, you must of necessity have two several ligeances to two several persons. And to conclude this point concerning laws, non adservatur diversitas regnor sed regnant', non patriarum, sed patrum patriar', non coronarum, sed coronatorum, non regum municipalium, sed regum majestatum. And therefore thus were directly and clearly answered as well the objections drawn from the severalty of the kingdoms, seeing there is but one head of both, and the postnati and us joined in ligeance to that one head, which is copula et tanquam oculus of this case; as also the distinction of the laws, seeing that ligeance of the subjects of both kingdoms, is due to their sovereign by one law, and that is the law of nature.

For the third, it is first to be understood, that as the law hath wrought four unions, so the law doth still make four separations: The first union is of both kingdoms under one natural liege Sovereign King, and so acknowledged by the Act of [7-Coke-15 a] Parliament of recognition. The 2d. is an union of ligeance and obedience of the subjects of both kingdoms, due by the law of nature to their sovereign: and this union doth suffice to rule and overrule the case in question: and this in substance is but a uniting of the hearts of the subjects of both kingdoms one to another, under one head and sovereign. The 3d. union is an union of protection of both kingdoms, equally belonging to the subjects of either of them: and therefore the two first arguments or objections drawn from two supposed several ligeances were fallacious, for they did disjungere conjungenda. The 4th union and conjunction is of the three lions of England, and that one of Scotland, united and quartered in one escutcheon.

Concerning the separations yet remaining: 1. England and Scotland remain several and distinct kingdoms. 2. They are governed by several judicial or municipal laws. 3. They have several distinct and separate Parliaments. 4. Each kingdom hath several nobilities: for albeit a postnatus in Scotland, or any of his posterity, be the heir of a nobleman of Scotland, and by his birth is legitimated in England, yet he is none of the (a) peers or nobility of England; for his natural ligeance and obedience, due by the law of nature, maketh him a subject and no alien within England: but that subjection maketh him not noble within England; for that nobility had his original by the King's creation, and not of nature. And this is manifested by express authorities, grounded upon excellent reasons in our books. If

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baron, viscount, earl, marquis, or duke of England, bring any action, real or personal, and the defendant pleadeth in abatement of the writ that he is no baron, viscount, earl, &c. and thereupon the demandant or plaintiff taketh issue; this issue shall not be tried by jury, but by the (a) record (G) of Parliament, whether he or his ancestor, whose heir he is, were

called to serve there as a peer, and one of the nobility of the realm. And so are our books adjudged in 22 Ass. 24-. 48 Edw. 3. 30. 35 H. 6. 40. 20 Eliz. Dyer. 360. Vide in the Sixth Part of my Reports, in The Countess of Rutland's case. So as the man, that is not de jure a peer, or one of the nobility, to serve in the Upper House of the Parliament of England, is not in the legal proceedings of law accounted noble within England. And therefore if a countee of France or Spain, or any other foreign kingdom, should come into England, he should not here sue, or be sued by the name of countee, &c. for that he is none of the nobles that are members of the [7-Coke-15 b] Upper House of the Parliament of England; and herewith agree the book-cases of (b) 20 Ed. 4. 6. a. b. and 11 Ed. 3. tit. Bre. 473. like law it is, and for the same reason, of an earl or baron of Ireland, he is not any peer, or of the nobility of this realm: and herewith agreeth the book in 8 R. tit. (c) Proces pl. Ultim'; where in an action of debt, process of outlawry was awarded against the Earl of Ormond in Ireland; which ought not to have been, if he had been noble here. Vide Dyer (d) 20 Eliz. 360.

But yet there is a diversity in our books worthy of observation; for the highest and lowest dignities are universal: for if a King of a foreign nation come into England, by the leave of the King of this realm (as it ought to be) in this case he shall sue and be sued by the name of a King; and herewith agreeth 11 E. 3. tit. Br. (e) 473. where the case was, that Alice, which was the wife of R. de O. brought a writ of dower against John Earl of Richmond, and the writ was præcip. Johann' Comiti Richmondite custodi terr' et hæredis of William the son of R. de O. the tenant pleaded that he is duke of Britain, not named duke, judgment of the writ? But it is ruled that the writ was good; for that the dukedom of Britain was not within the realm of England. But there it is said, that if a man bring a writ against Edward (f) Baliol, and name him not King of Scotland, the writ shall abate for the cause aforesaid. And hereof there is a notable precedent in Fleta, lib. 2. cap. 3. see. 9. where treating of the jurisdiction of the King's Court of Marshalsea it is said et hæc omnia ex officio suo licite facere poterit (ss seneschal' aul' hospitii Regis) non obstante alicujus libertate, etiam in alieno regno dum tamen reus in hospitio Regis poterit inveniri secundum quod contigit Paris. anno 14 Ed. 1. de Engelramo de Nogent capto in hospitio Regi 3 Angl' (ipso rege tunc apud Parisiam existente) cum discis argenti furatis recenter su er facto, rege Franc' tunc presentee et unde licet Curia Regis Franc' de præd' latrone per castellanum, Paris petita fuerit, habitis hinc et inde tractatibus in Consilio Regis Franc', tandem consideratumfitit; quod Rex Angl' illa regia prærogativa, et hospitii sui privilegio uteretur, et ganderet, qui coram Roberto Fitz-John milite tunc hospitii Regis Angl' seneschallo de latrocinio convidus, per considerationem, ejus cur, fuit (a) suspensus in patibulo sancti Germani de pratis. Which proveth, that though the King be in a foreign kingdom, yet he is judged in law a King there. The other part of the said diversity is proved by the book-ease in 20 (b) E. 4. fol. 6. a. b. where, in a writ of debt brought by Sir J. Douglas, Knight, against Elizabeth Molford, the defendant, demanded judgment of the writ; for that [7-Coke-16 a] the plaintiff was an earl of Scotland (H), but not of England; and that our

7 Coke Report 16 b, 77 ER p396

Sovereign Lord the King had granted unto him safe conduct, not named by his name of dignity, judgment of the writ, &c. And there Justice Littleton giveth the rule: the plaintiff(saith be) is an earl in Scotland, but not in England; and if our Sovereign Lord the King grant to a duke of France a safe conduct to merchandize, and enter into his realm, if the duke cometh and bringeth merchandize into this land, and is to sue art action here he ought not to name himself duke; for he is not a duke in this land, but only in France. And these be the very words of that book-case; out of which I collect three things. First, that the plaintiff was named by the name of a knight, wheresoever be received that degree of dignity. Vide (c) 7 H. 6. 14 b. accord. 2. That an earl of another nation or kingdom is no earl (to be so named in legal proceedings) within this realm: and herewith agreeth the book of (d) 11 Ed. 3. The Earl of Richmond's case before recited. 3. That albeit the King

by his letters patent of safe conduct do name him duke, yet that appellation maketh him no duke, to sue or to be sued by that name within England: so as the law in these points (apparent in our books) being observed and rightly understood, it appeareth how causeless their fear was that the adjudging of the plaintiff to be no alien should make a confusion of the nobilities of either kingdom.

Now are we in order come to the fourth noun (which is the fourth general part), alienigena; wherein six things did fall into consideration. 1. Who was alienigena, an alien born by the laws of England. 2. How many kinds of aliens born there were. 3. What incidents belonged to an alien born. 4. The reason why an alien is not capable of inheritance or freehold within England. 5. Examples, resolutions, or judgments reported in our books in all successions of ages, proving the plaintiff to be no alien. 6. Demonstrative conclusions upon the premises, approving the same.

1. An alien is a subject that is born out of the ligeance of the King, and under the ligeance of another; and can have no real or personal action for or concerning land: but in every such action the tenant or defendant may plead that he was born in such a country which is not within ligeance of the King; and demand Judgment, if he shall be answered. And this is in effect the description which Littleton himself maketh, lib. 2. cap. 14. Villen. fol. 43. Alienigena est alienæ gentis seu alienæ ligeantice, qui etiam [7-Coke-16 b] dicitur peregrinus, alienus, exoticus, extraneos, &c. Extraneus est subditus, qui extra terram, i. e. potestatem Regis natus est. And the usual and right pleading of an alien born doth lively and truly describe and express what be 1s. And therein two things are to be observed. 1. That the most usual and best pleading in this case, is, both exclusive and inclusive, viz. extra ligeantiam domini Regis, &c. et infra ligeantiam alterius Regis, as it appeareth in (a) 9 Ed. 4. 7. b. Book of Entries, fol. 244, &c. which cannot possibly be pleaded in this case, for two causes. 1. For that one King is sovereign of both kingdoms. 2. One ligeance is due by both to one sovereign; and in case of an alien there must of necessity be several Kings and several ligeances. Secondly, no pleading was ever extra regnum, or extra legem, which are circumscribed to place, but extra ligeantiam, which (as it hath been said) is not local or tied to any place.

It appeareth by Bracton, lib. 3. tract. 2. c. 15. fol. 134. that (b) Canutus the Danish King, having settled himself in this kingdom in peace, kept notwithstanding (for the better continuance thereof) great armies within this realm. The peers and nobles of England, distasting this government by arms and armies, odimus accipitrem quia semper vivit in armis, wisely and politically persuaded the King, that they would provide for the safety of him and his people, and yet his armies, carrying with them many inconveniencies, should be withdrawn: and therefore offered that they would consent to a law, that whosoever should kill an alien, and be apprehended, and could not acquit himself, he should be subject to justice: but if the manslayer fled, and could not be taken, then the town where the man was slain should forfeit sixty-six

7 Coke Report 17 a, 77 ER p397

marks unto the King; and if the town were not able to pay it, then the hundred should forfeit and pay the same unto the King's treasure: whereunto the King assented. This law was penned quicumque occiderit Francigenam, &c; not excluding other aliens, but putting Francigena, a Frenchman, for example, that others must be like unto him, in owing several ligeance to a several sovereign, that is, to be extra ligeantiam Regis Angl', and infra ligeantiam alterius Regis. And it appears before, out of Bracton and Fleta, that both of them use the same example (in describing of an alien) ad fidem Regis Franciæ. And it was holden, that except it could be proved that the party slain was an Englishman, that he should be taken for an alien: and this was called Englesherie, Englesheria, that is, a proof that the party slain was an Englishman. (Hereupon [7-Coke-17 a] Canutu's presently withdrew his armies, and within a while after lost his Crown, and the same was restored to his right owner.) The said law of Englesherie continued until 14 Ed. 3. cap. 4. and then the same was by Act of Parliament ousted and abolished. So amongst the laws of William

the First, (published by Master Lambert, fol. 125.) *omnis Francigena* (there put for example as before is said, to express what manner of person *alienigena* should be) *qui Tempore, Edvardi propinqua nostri fuit particeps legum et consuetudinem Anglorum* (that is made denize") *quod dicunt ad scot et lot persolvat secundum legem Anglorum.*

Every man is either *alienigena*, an alien born, or *subditus*, a subject born. Every alien is either a friend that is in league, &c. or an enemy that is in open war, &c. Every alien enemy is either *pro tempore*, temporary for a time, or *perpetuus*, perpetual, or *specialiter permissus*, permitted especially. Every subject is either *natus*, born, or *datus*, given or made: and of these briefly in their order. An alien friend, as at this time, a German, a Frenchman, a Spaniard, &c. (all the Kings and princes in Christendom being now in league with our sovereign: but a Scot being a subject, cannot be said to be a friend, nor Scotland to be *solum amici*) may by the common law have, acquire, and get within this realm, by gift, trade, or other lawful means, any treasure, or (a) goods personal whatsoever, as well as an Englishman, and may maintain any (b) action for the same: but (c) but lands within this realm, or houses (but for their necessary habitation only) alien friends cannot acquire, or get, nor maintain any action real or personal, for any land or house, unless the house be for their necessary habitation. For if they should be disabled to acquire and maintain these things, it were in effect to deny unto them trade and traffic, which is the life of every island. But if this alien become an enemy, (as all alien friends may) then is he utterly disabled to maintain any action, or get any thing within this realm. And this is to be understood of a temporary alien, that being an enemy may be a friend, or becoming a friend may be an enemy. But a perpetual enemy (though there be no wars by fire and sword between them) cannot maintain any action, or get any thing within this realm. All infidels are in law *perpetui* (d) *inimici*, perpetual enemies (for the law presumes not that they will be converted, that being *remota potentia*, a remote possibility) for between them, as with the devils, whose subjects they be, and the Christian, there is perpetual [7-Coke-17 b] hostility, and can be no (a) peace; for as the Apostle saith, 2 Cor. 6. 15. *Quæ autem conventio Christi ad Belial, aut quæ, pars fidei cum infidei*, and the law saith, *Judæo Christianum nullum serviat mancipium, nefas enim est quem, Christus redemit blasphemum, Christi in servitutis vinculis detinere.* Register 282. *Infideles sunt Christi et Christianorum inimici.* And herewith agreeth the book in 12 H. 8. fol. 4. where it is holden that a Pagan cannot have or maintain any action at all (I).

And upon this ground there is a diversity between a conquest of a kingdom of a

7 Coke Report 18 a, 77 ER p398

Christian King, and the conquest of a kingdom of an infidel; for if a King come to a Christian kingdom by conquest, seeing that he hath *vilæ et necis potestatem*, he may at his pleasure alter and change the laws of that kingdom: but until he doth make an alteration of those laws the ancient laws of that kingdom remain (K). But if a Christian King should conquer a kingdom of an infidel, and bring them under his subjection, there ipso facto the laws of the infidel are abrogated, for that they be not only against Christianity, but against the law of God and of nature, contained in the decalogue; and in that case, until certain laws be established amongst them, the King by himself, and such Judges as he shall appoint, shall judge them and their causes according to natural equity, in such sort as Kings in ancient time did with their kingdoms, before any certain municipal laws were given, as before hath been said. But if a King hath a kingdom by title of descent, there seeing by the laws of that kingdom he doth inherit the kingdom, he cannot change those laws of himself, without consent of Parliament. Also if a King hath a Christian kingdom by conquest, as King Henry the Second had Ireland, after King John had given unto them, being under his obedience and subjection, the laws of England for the government of that country, no succeeding King could alter the same without Parliament. And in that case, while the realm of England, and that of Ireland were governed by several laws, any that was born in Ireland was no alien to the realm of England. In which precedent of Ireland three things are to be observed. 1. That then there

had been two descents, one from Henry the Second to King Richard the First, and from Richard to King John, before the alteration of the laws. 2. That albeit Ireland was a distinct, dominion, yet the title thereof being by conquest, the same by judgment of law might by express words be bound by Act of the Parliament of England. 3. That albeit no[7-Coke-18 a] reservation were in King John's charter, yet by judgment of law a writ of error did lie in the King's Bench in England of an erroneous Judgment in the King's Bench of Ireland. Furthermore, in the case of a conquest of Christian kingdom, as well those that served in wars at the conquest as those that remained at home for the safety and peace of their country, and other the King's subjects, as well antenati as postnati, are capable of lands in the kingdom or country conquered, and may maintain any real action, and have the like privileges and benefits there, as they may have in England.

The third kind of enemy is, inimicus permissus, an enemy that cometh into the realm by the King's safe conduct, of which you may read in the Register, fol. 25. Book of Entries, Ejectione Firmæ, 7, 32 H. 6. 23. b. &c. Now what a subject born is, appeareth at large by that which hath been said de ligeantia: and so likewise de

(K) Memorandum 9th of August, 1722, it was said by the Master of the Rolls to have been determined by the Lords of the Privy Council, upon an appeal to the King in Council from the foreign plantations:-

1st. That if there be a new and uninhabited country found out by English subjects, as the law is the birthright of every subject, so wherever they go, they carry their law with them, and therefore such new found country is to be governed by the laws of England, though after such country is inhabited by the English, Acts of Parliament made in England, without naming the foreign plantations, will not bind them; for which reason it has been determined that the Statute of Frauds and Perjuries, which requires three witnesses, and that these should subscribe in the testator's presence in the case of a devise of a. land, does not bind Barbadoes: but that

2ndly. Where the King of England conquers a country, it is a different consideration; for there the conqueror, by saving the lives of the people conquered, gains a right and property in such people, in consequence of which he may impose upon them what law he pleases: but

3dly. Until such laws given by the conquering prince, the laws and customs of the conquered country shall hold place, unless where these are contrary to our religion, or enact any thing that is malum in se, or are silent; for in all such cases the laws of the conquering Country shall prevail. 2 Peere Williams, 75. et Vid. Collett v Lord Keith, 2 East 260. Blankard v Galdy, 4 Mod. 225. SC.2 Salk. 411. Attorney-General v. Stewart, 2 Meriv. 159.

7 Coke Report 18 b, 77 ER p399

subdito dato, of a donaison: for that is the right name, so called, because his legitimation is given unto him; for if you derive denizen from deins nee, one born within the obedience or ligeance of the King, then such a one should be all one with a naturalborn subject. And it appeareth before out of the laws of King W. 1. of what antiquity the making of denizens by the King of England hath been.

3. There be regularly (unless it be in special cases) three incidents to a subject born. 1. That the parents be under the actual obedience of the King. 2. That the place of his birth be within the King's dominion. And, 3. The time of his birth is chiefly to be considered; for he cannot be a subject born of one kingdom that was born under the ligeance of a King of another kingdom, albeit afterwards one kingdom descend to the King of the other. For the first, it is termed actual obedience, because, though the King of England hath absolute right to other kingdoms or dominions, as France, Aquitai, Normandy, &c. yet seeing the King is not in actual possession thereof, none born there since the Crown of England was out of actual possession thereof, are subjects to the King of England. 2. The place is observable, but so as many times ligeance or obedience without any place within the King's dominions may make a subject born, but any place

within the King's dominions may make a subject born, but any place within the King's dominions without obedience can never produce a natural subject. And therefore if any of the King's ambassadors in foreign nations, have children there of their wives, being English women, by the common laws of England they are natural-born subjects, and yet they are born out-of the King's dominions. But if enemies should come into any of the King's dominions, and surprise any castle or fort, and [7-Coke-18 b] possess the same by hostility, and have issue there, that issue is no subject to the King, though he be born within his dominions, for that he was not born under the King's ligeance or obedience. But the time of his (a) birth is of the essence of a subject born; for he cannot be a subject to the King of England, unless at the time of his birth he was under the ligeance and obedience of the King. And that is the reason that antenati in Scotland (for that at the time of their birth they were under the ligeance and obedience, of another King) are aliens born, in respect of the time of their birth.

4. It followeth next in course to set down the reasons wherefore an alien born is not capable of inheritance within England, and that he is not for three reasons. 1. The secrets of the realm might thereby be discovered. 2. The revenues of the realm (the sinews of war, and ornament of peace,) should be taken and enjoyed by strangers born. 3. It should tend to the destruction of the realm. Which three reasons do appear in the statute of 2 H. 5. cap and 4 H. 5. cap ultimo. But it may be demanded, wherein doth that destruction consist; whereunto it is answered; first, it tends to destruction tempore belli; for then strangers might fortify themselves in the heart of the realm, and be ready to set fire on the commonwealth, as was excellently shadowed by the Trojan horse in Virgil's Second Book of his Aneid, where a very few men in the heart of the city did more mischief in a few hours, than ten thousand men without the walls in ten years. Secondly tempore pacis for so might many aliens born get a great part of the inheritance and freehold of the realm, whereof there should follow a failure of justice (the supporter of the commonwealth) for that aliens born cannot be returned of juries (a) for the trial of issues between the King and the subject, or between subject and subject. And for this purpose, and many other, (see a charter worthy of observation) of King Ed. 3. written to Pope Clement, datum apud Westm 26. die Sept. ann regni nostri Franciæ 4 regni vero Angliæ 17.

5. Now are we to come to the examples, resolutions, and judgments of former times; wherein two things are to be observed, first, how many cases in our books do over-rule this case in question for ubi (b) eadem ratio ibi idem jus, et de similibus idem est judicium. 2. That for want of an express text of law in terminis terminantibus and of examples and precedents in like cases (as was objected by some) we are driven to determine the question by natural reason: for it was said, si cesset lex scripta id custodiri [7-Coke-19 a] oportet quod moribus et consuetudine inductum est, et si qua in re hoc decerit, recur-

7 Coke Report 20 a, 77 ER p400

rendum est ad rationem. But that receiveth a threefold answer: - First, That there is no such rule in the common or civil law: but the true rule of the civil law is, lex scripta si cesser, id custodiri oportet quod moribus et consuetudine inductum est, et si qua in re hoc defecerit, tunc id quod proximum et consequens ei est, et si id non appareat, tunc jus quo urbs Romana utitur, servari oportet.' Secondly, If the said imaginative rule be rightly and legally understood, it may stand for truth: for if you intend ratio for the legal and profound reason of such as by diligent study and long experience and observation are so learned in the laws of this realm, as out of the reason of the same they can rule the case in question, in that sense the said rule is true: but if it be intended of the reason of the wisest man that professeth not the laws of England, then (I say) the rule is absurd and dangerous; for (a) cuilibet in suit, arte perito est credendum et quod quisque (b) norit in hoc se exercent. Et omnes, prudentes illa admittere solent uce, probantur iis qui in suæ

parle bene versati sunt, Arist. 1. Topicorum cap. 6. Thirdly there be multitudes of examples, precedents, judgments, and resolutions in the laws of England, the true and unstrained reason whereof doth decide this question; for example the dukedom of Aquitaine, whereof Gascoign was parcel, and the earldom of Poitiers, came to King Henry the Second by the marriage of Eleanor, daughter and heir of William Duke of Aquitaine, and Earl of Poitiers, which descended to Rich. I. Hen. 3. Ed. I. Ed. 2. Ed. 3. &c. In 27 lib. (c) Ass pl. 48. in one case there appear two judgments and one resolution to be given by the Judges of both Benches in this case following. The possessions of the Prior of Chelsey in the time of war were seised into the King's hands, for that the prior was an alien born: the prior by petition of right sued to the King, and the effect of his petition was, that before he came Prior of Chelsey, he was Prior of Andover, and whilst he was prior there, his possessions of that priory were likewise seised for the same cause supposing that he was an alien born; whereupon he sued a former petition, and alleged that he was born in Gascoign within the ligeance of the King: which point being put in issue and found by jury to be true, it was adjudged that he should have restitution of his possessions generally without mentioning of advowsons. After which restitution, one of the [7-Coke-19 b] said advowsons became void, the prior presented, against whom the King brought a quare impedit, wherein the King was barred; and in this was contained in the latter petition. And the book saith, that the Earl of Arundel, and Sir Guy of B. came into the Court of Common Pleas, and demanded the opinion of the Judges of that Court concerning the said case, who resolved, that upon the matter aforesaid the King had no right to seize. In which case, amongst many notable points, this one appeareth to be adjudged and resolved, that a man born in Gascoign under the King's ligeance, was no alien born, as to lands and possessions within the realm of England, and yet England and Gascoign were several and distinct countries. 2. Inherited by several and distinct titles. 3. Governed by several and distinct municipal laws, as it appeareth amongst the records in the Tower, Rot. Vasc. 10. Ed. 1. Nam. 7. 4. Out of the extent of the Great Seal of England, and the jurisdiction of the Chancery of England. 5. The like objection might be made for default of trial, as hath been made against the plaintiff And where it was said that Gascoign was no kingdom, and therefore it was not to be matched to the case in hand, it was answered, that this difference was without a diversity as to the case in question; for if the plea in the case at the Bar be good, then without question the prior had been an alien; for it might have been said, (as it is in the case at the Bar) that he was born extra ligeantiam Regis regni sui Angliæ, et infra ligeantiam dominii sui Vasconice, and that they were several dominions, and governed by several laws: but then such a conceit was not hatched, that a King having several dominions should have several ligeances of his subjects. Secondly, it was answered, that Gascoign was sometime a kingdom, and likewise Millan, Burgundy, Bavaria, Bretagne, and others were, and now are become, dukedoms. Castile, Arragon, Portugal, Barcelona, &c. were sometime earldoms, afterwards dukedoms, and now kingdoms. Bohemia and Poland were

7 Coke Report 20 a, 77 ER p401

sometime dukedoms, and now kingdoms; and (omitting many other, and coming nearer home,) Ireland was before 32 H. 8. a lordship; and now is a kingdom, and yet the King of England was as absolute a prince and sovereign when he was Lord of Ireland, as now when he is styled King of the same. 10 Ed. 3. 41. an exchange was made between an Englishman and a Gascoign, of lands in England and in Gascoign; ergo, the Gascoign was no alien, for then had he not been capable of lands in England, 1 H. 4. 1. the King brought a writ of right of ward against one Sybil, whose husband was exiled into Gascoign; [7-Coke-20 a] ergo Gascoign is no parcel or member of England, for exilium est patrice privatio, natalis soli, mutatio legum nativarum amissio; 4 E. 3. 10 b. the King directed his writ out of Chancery under the Great Seal of England, to the Mayor of (a) Bordeaux, (a city in Gascoign) then being under the King's obedience, to certify, whether one that was outlawed here in England, was at that time in the King's service under him in obsequio

Regis: whereby it, appeareth that the King's writ did run into Gascoin, for it is the trial that the common law hath appointed in that case. But as to other cases, it is to be understood that there be two kinds of writs *brevia mandatoria et remedia*, *et brevia mandatoria et non remedia*: *brevia mandatoria et remedia*, as writs of right, of formedon, &c. of debt, trespass, &c. and shortly all writs real and personal, whereby the party wronged is to recover somewhat, and to be remedied for that wrong was offered unto him, are returnable or determinable in some Court of Justice within England, and to be served and executed by the sheriffs, or other ministers of justice within England, and these cannot by any means extend into any other kingdom, country, or nation, though that it be under the King's actual ligeance and obedience. But the other kind of writs that are mandatory, and not remedial, are not tied to any place, but do follow subjection and ligeance, in what country or nation soever the subject is, as the King's writ to command any of his subjects residing in any foreign country to return into any of the King's own dominions, *sub fide et ligeantia quibus nobis tenemini*. And so are the aforesaid mandatory writs cited out of the Register of protection for safety of body and goods, and requiring that if any injury be offered, that the same be redressed according to the laws and customs of that place. Vide *le Reg fol. 26. Stamford Prærog cap. 12. fol. 39.* saith, that men born in Gascoin are inheritable to lands in England. This doth also appear by divers Acts of Parliament: for by the whole Parliament, 39 E. 3. cap. 16. it is agreed, that the Gascoins are of the ligeance and subjection of the King. Vide 42 Ed. 3. cap. 2. and 28 H. 6. cap. 5. &c.

Guienne was another part of Aquitaine, and came by the same title; and those of Guienne were by Act of Parliament in 13 H. 4. not imprinted, *ex Rot. Parliament eodem anno*, adjudged and declared to be no aliens, but able to possess and purchase, &c. lands within this realm. And so doth Stamford take the law. *Prærog c. 12. f. 39.* [7-Coke-20 b] And thus much of the dukedom of Aquitaine, which (together with the earldom of Poitiers) came to King Henry the Second (as hath been said) by marriage, and continued in the actual possession of the Kings of England by ten descents, viz. from the first year of King Henry the Second, unto the two and thirtieth year of King Henry the Sixth, which was upon the very point of three hundred years, within which duchy there were (as some write) four archbishopries, 24 bishoprics, 15 earldoms, 202 baronies, and above a thousand captainships and bailliwicks; and in all this long time neither book case nor record can be found wherein any plea was offered to disable any of them that were born there, by foreign birth, but the contrary hereof directly appeareth by the said book case of (a) 27 lib. Ass. 48.

The Kings of England had sometimes Normandy under actual ligeance and obedience. The question is then, whether men born in Normandy, after one King had them both, were inheritable to lands in England; and it is evident by our books that they were: for so it appeareth by the declaratory Act of 17 Ed. 2. *de Prærog. Reg e. 12.* that they were inheritable to, and capable of lands in England; for the purview of that statute is *quod Rex habebit escaelas de terris Normannorum, &c.* Ergo Normans might have lands in England, *et hoc similiter intelligendum est, si aliqua hæreditas descendat alicui nato in partibus transmarinis, &c.* Whereby it appeareth,

7 Coke Report 21 a, 77 ER p402

that they were capable of lands within England by descent. And that this Act of 17 E. 2. was but a declaration of the common law, it appeareth both by Bracton who (as it hath been said) wrote in the reign of Henry the Third, lib. 3. tract. 2. c. 1. f. 116. and by Britton who wrote in 5 E. T. c. 18. that all such lands as any Norman had either by descent or purchase, escheated to the King for their treason, in revolting from their natural liege lord and sovereign. And therefore Stamford *Prærog cap. 12. fol. 39.* expounding the said statute of 17 E. 2. cap. 12. concludeth, that by that chapter it should appear (as, if he had said, it is apparent without question) that all men born in Normandy, Gascoin, Guienne, Anjou, and Britain, (whilst they were under actual disobedience) were

inheritable within this realm as well as Englishmen. And the reason thereof was, for that the were one ligeance due to one sovereign \* And so much (Omitting nine other authorities) for Normandy: saving I cannot let pass the isles of Guernsey and Jersey, parts and parcels of the dukedom of Normandy, yet remaining under the actual ligeance and obedience of the King, I think no man will doubt, but those that are [7-Coke-21 a] born in Guernsey and Jersey (though those isles are no parcel of the realm of England, but several dominions enjoyed by several titles, governed by several laws) are inheritable, and capable of any lands within the realm of England, 1 E. 3. fol. 7. Commission to determine the title of lands within the said isles, according to the laws of the isles; and Mich. 41 E. 3. in the Treasury, Quia negotium, præd' nec aliqua alia negotia de insulæ, præd' emergentia non debent terminari nisi secundum legem insulæ præd', &c. And the Register fol. 22. Rex fidelibus suis de Jernsey et Gersey. King William the First brought this dukedom of Normandy with him, which by five descents continued under the actual obedience of the Kings of England; and in or about the 6th year of King John, the Crown of England lost the actual possession thereof, until King Henry the Fifth recovered it again, and left it to King Henry the Sixth, who lost it in the 28th of his reign; wherein were (as some write) one archbishopric and six bishoprics, and an hundred strong towns and fortresses, besides those that were wasted in war. Maud the Empress, the only daughter and heir of Henry the First, took to her second husband Jeffrey Plantagenet, Earl of Anjou, Tourain, and Mayne, who had issue King H. 2. to whom the said earldom by just title descended, who, and the Kings that succeeded him, stiled themselves by the name of comes Andeguv', &c. until King E.3. became King of all France; and such as were born within that earldom, so long as it was under the actual obedience of the King of England, were no aliens, but natural-born subjects; and never any offer made, that we can find, to disable them for foreign birth. But leave we Normandy and Anjou, and speak we of the little, but yet ancient and absolute kingdom of the Isle of Man \*, as it appeareth by diverse ancient and authentic records; as taking one for many. Artold King of Man sued to King H. 3. to come into England to confer with him, and to perform certain things which were due to King H. 3. Thereupon King H. 3. 21 Decemb ann regn sui 34, at Winchester, by his letters patent' gave licence to Artold King of Man, as followeth: Rex omnibus salutem. Sciatis, quod licentiam, dedimus, &c. Artoldo Regi de Man veniendo ad nos in, Angl', ad loquend' nobise' et ad faciend' nobis quod facere debet; et ideo vobis mandamus quod ei Regi in veniendo ad nos iu Angl', vel ibi morando, vel inde redeundo nullum, faciat' ant fieri permittatis damnum, injur', molestiam, aut gravamen, vel etiam hominib' suis quos secure ducet et si aliquid eis forisfact' fuerit, id eis sine dilat faciat' emendari. - In cujus, &c. duratur' usque ad fast' S. Mich. Wherein [7-Coke-21 b] two things are to be observed; 1. That seeing that Artold King of Man sued for a licence in this case to the King, it proveth him an absolute Kizig'; for that a monarch or an absolute prince cannot come into England without licence of the King, but any subject being in league, may come into this realm without licence. 2. That the King in his licence doth style him by the name of a king. It was resolved in 11 H. 8. that where an office was found after the decease of Thomas Earl of Derby, and that he died seised,

7 Coke Report 22 a, 77 ER p403

&c. of the Isle of Man, that the said office was utterly void , for that the Isle of Man, Normandy, Gascoign, &c. were out of the power of the Chancery, and governed by several laws; and yet none will doubt, but those that are born within that isle are capable and inheritable of lands within the realm of England. Wales\* was some time a kingdom, as it appeareth by 19 H. 6. fol. 6. and by the Act of Parliament of 2 H. 5. c. 6. but whilst it was a kingdom, the same was holden, and within the fee, of the King of England; and this appeareth by our books, Fleta, lib. I. cap. 16. 1 E. 3. 14. 8 E. 3. 59. 13 E. 3. tit. Jurisdict'. 10 H. 4. 6. Plow. Com. 368. And in this respect in divers ancient charters, Kings of old time styled themselves in several manners, as King Edgar, Britanniae Ba(mXcy Etheldredus, totius Albio,'Dei providenti, Imperator; -Edredus Magn' Britann' Monarcha,

Which among many other of like nature I have seen. But by the statute of 12 E. 1. Wales was united and incorporated into England, and parcel of England in possession; and therefore it is ruled in 7 H. 4. f. 13. a. that no protection doth lie quia moratur in Wallia, because Wales is within the realm of England. And where it is recited in the Act of 27 H. 8. that Wales was ever parcel of the realm of England, it is true in this sense, viz. that before 12 E. 1. it was parcel in tenure, and since it is parcel of the body of the realm. And whosoever is born within the fee of the King of England, though it be in another kingdom, is a natural-born subject, and capable and inheritable of lands in England, as it appeareth in Plow. Com. 126. And therefore those that were born in Wales before 12 E. 1. whilst it was only holden of England, were capable and inheritable of lands in England.

Now come we to France and the members thereof, as Callice, Guynes, Tournay, &c. which descended to King Edward the Third, as son and heir to Isabel, daughter and heir to Philip le Beau, King of France. Certain it is, whilst [7-Coke-22 a] King Henry the Sixth had both England and the heart and greatest part of France under his actual ligeance and obedience (for he was crowned King of France in Paris), that they that were then born in those parts of France, that were under actual ligeance and obedience, were no aliens, but capable of and inheritable to lands in England. And that is proved by the writs in the register, fol. 26. cited before. But in the inrolment of letters patent of denization in the Exchequer, int' originalia, ann. 11 H. 6. with the Lord Treasurer's remembrancer was strongly urged and objected; for (it was said) thereby it appeareth, that King H. 6. in anno " of his reign, did make denizen one Reynel born in France; whereunto it was, answered, that it is proved by the said letters patent, that he was born in France before King Henry the Sixth had the actual possession of the Crown of France, so as he was antenatus; and this appeareth by the said letters patent whereby the King granteth, that Magister Johannes Beynel serviens noster, &c. infra regnum nostrum Franc' oriundus pro termino vilæ suæ sit ligeus noster, et eodem modo teneatur sicut verus et fidelis noster infra regnum Angl' oriundus, ac quod ipse terras infra regnum nostrum. Angl' seu alia dominia nostra perquirere possit et valeat. Now if that Reynel had been born since Henry the Sixth had the quiet possession of France (the King being crowned King of France about one year before), of necessity he must be an infant of very tender age, and then the King would never have called him his servant, nor made the patent (as thereby may be collected) for his service, nor have called him by the name of Magister Johannes Beynel: but without question he was antenatus, born before the King had the actual and real possession of that Crown.

Calais is a part of the kingdom of France, and never was parcel of the kingdom of England, and the Kings of England enjoyed Calais \* in and from the reign of King Edward the Third, until the loss thereof in Queen Mary's time, by the same title that they had to France. And it is evident by our books, that those that were born in Calais were capable and inheritable to lands in England, 42 E. 3. c. 10. Vide 21 H. 7.

7 Coke Report 22 b, 77 ER p404

33. b. 19 H. 6. 2 E. 4. 1. a. b. 39 H. 6. 39 a. 21 E. 4. 18 a. 28 H. 6. 3 b. By all which it is manifest, that Calais being parcel of France was under the actual obedience and commandment of the King, by consequent those that were born there were natural-born subjects, and no aliens. Calais from the reign of King Edward 3. until the fifth year of Queen Mary, remained under the actual obedience, of the King of England. [7-Coke-22 b] Guines also, another part of France, was under the like obedience to-King Henry the Sixth, as appeareth by 31 H. 6. fol. 4. And Tournay was under the obedience of Henry the Eighth, as it appeareth by 5 El. Dyer, fol. 224; for there it is resolved, that a bastard born at Tournay, whilst it was under the obedience of Henry the Eighth, was a natural subject, as an issue born within this realm by aliens. If then those that were born at Tournay, Calais, &c. whilst they were under the obedience of the King, were natural subjects, and no aliens, it followeth, that when the Kingdom of France (whereof those were parcels) was under the King's obedience, that those that were then born there were natural subjects

and no aliens.

Next followeth Ireland \*, which originally came to the Kings of England by Conquest: but who was the first conqueror thereof, hath been a question. I have seen a charter made by King Edgar in these words: -Ego Edgarus Anglorum Bao-O'EVg, omniumque insularum oceani, quæ Britanniam circumjacent, Imperator et Dominus, ratias ago ipsi Deo omnipotenti Regi meo, qui meum imperium ampliavit et exaltavit super regnum patrum meorum, &c. mihi Concessit jpropilia divinitas, cum Anglorum imperio omnia regna insularum oceani, et cum suis ferocissimis Regibus usque Norvegiam, maximam que partem Hibern', cum sud noblissim, civitate de Dublina, Anglorum regno subjugare, qua propter et ego Christi gloriam, et laudem in regno meo exaltare, et ejus servitium amplificare devotus disposui, &c. Yet for that it was wholly conquered in the reign of Henry the Second the honour of the conquest of Ireland is attributed to him, and his style was, Rex Angl' Dominus Hibern' Dux Normann' Dux Aquittan' et Comes Andegay', King of England, Lord of Ireland, Duke of Normandy, Duke of Aquitain, and Earl of Anjou\*. That Ireland is a dominion separate and divided from England, it is evident from our books, 20 H. 6. 8. Sir John Pilkington's case. 32 H. 6. 25. 20 Eliz. Dyer 360. Plow. Com. 360. And 2 R. 3. 12 a. Hibernia habet Parliamentum, et faciunt leges, et nostra statuta, non ligant eos, quia non militunt milites ad Parliamentum (which is to be understood, unless they be especially named) sed personæ eorum sunt subjecti Regis, sicut inhabitantes in Calesi., Gasconi., et Guyan. Wherein it is to be observed, that the Irishman (as to subjection) is compared to men born in Calais, Gascoin, and Guienne. Concerning their laws ex rotulis potentium de anno 11 Regis H. 3. there is a charter which that King made, beginning in these words, Rex, &c. Baronibus, militibus, et omnibus libera tenentibus L. salutem, satis ut credimus [7-Coke-23 a] vestra andivit discretion quod quando bono memoriæ (a) Johannes quondam Rex Anglj' pater noster venit in Hiberniam, ipse duxit secum, viros discretos et legis perilos, quorum communi consilio et ad instantiam Hibernensium statuul et precepit leges Anglicanas in Hibern' ita quod leges easdem, in scripturas redactas reliquit sub sigalo, suo ad Scaccarium Dublin'. So as now the laws of England became the proper laws of Ireland; and therefore, because they have Parliaments holden there whereat they have made divers particular laws concerning that dominion, as it appeareth in 20 H. 6. S. & 20 El. (b) Dyer 360. and for that they retain unto this day divers of their ancient customs, the book in 20 H. 6. 8. holdeth, that Ireland is governed by laws and customs, separate and diverse from the laws of England. A voyage royal may be made into Ireland. Vide (c) 11 H. 4. 7. a. & 7 (d) E. 4. 27. a. which proveth it a distinct dominion. And in anno 33 Reg. El. it was resolved by all the Judges of England in the case of (e) O' Burke an Irishman, who

7 Coke Report 23 b, 77 ER p405

had committed high treason in Ireland, that be, by the statute of 23 H. 8. c. 33. might be indicted, arraigned, and tried for the same in England, according to the purview of that statute: the words of which statute be, "That all treasons, &c. committed by any (f) person out of the realm of England shall be from henceforth enquired of, &c." and they all resolved (as afterwards they did also in Sir John Perrot's case) that Ireland was out of the realm of England, and that treasons committed there were to be tried within England by that statute. In the statute of 4 Hen. 7. cap. 24. of (g) Fines, provision is made for them that be out of this land; and it is holden in Plow. Com in Stowel's case 375, that he that is in Ireland is out of this land, and consequently within that proviso. Might not then the like plea be devised as well against any person born in Ireland, as (this is against Calvin that is a postnatus) in Scotland? For the Irishman is born extra ligeantiam Regis regni sui Angl', &c. which be verba operative in the plea: but all men know that they are natural-born subjects, and capable of and inheritable to lands in England. Lastly, to conclude this part with (h) Scotland itself: in ancient time part of (i) Scotland (besides Berwick) was within the power and ligeance of the King of England, as appeareth by our books (k) 42

E. 3. 2. b. The Lord Beaumont's case, 11 E. 3. c. 2, &c. and by precedents hereafter mentioned; and that part (though it were under the King of England's ligeance and obedience) yet was it governed by the laws of Scotland. [7-Coke-23 b] Ex rotulis Scotiæ, anno 11 Ed. 3. amongst the records in the Tower of London. Rex, &c. Constituimus Bich. Talebot Justiciarium, nostrum vilice Berwici super Twedam, ac omnium aliarum, terrarum nostrorum i n vartibus Scot', ad faciend' omnia et singula quæ ad officium justiciarii pertinent, secundum lege met consuetudinem regni Scot'. And after anno 26 E. 3. ex eodem rot. Rex Henrico de Percey, Ricarda de Nevil, &c. Volumus et vobis et alteri vestrum tenore præsentium Committimus et mandamus, quod homines nostri de Scot' ad pacem et obedientiam nostram existentes, legibus, libertatibus, et liberis consuetudinibus, quibus ipsi et antecessores sui tempore celebris memoriæ, Alexandri quondam Regis' Scot' rationabiliter usi fuerunt uti ut gaudere deberent, Prout in quibusdam indentures, de plenius dicitur contineri. And there is a writ in the Register 295 a. Dedimus potestatem recipendi ad fidem et pacem nostram homines de Galloway. Now the case in (a) 42 Ed. 3. 2. b. (which was within sixteen years of the said grant, concerning the laws in 26 E. 3.) ruleth it, that so many as were born in that part of Scotland that was under the ligeance of the King were no aliens, but inheritable to lands in England; yet was that part of Scotland in another kingdom, governed by several laws, &c. And if they were natural subjects in that case, when the King of England had but part of Scotland, what reason should there be why those that are born there, when the King hath all Scotland, should not be natural subjects, and no aliens? So, likewise, (b) Berwick is no part of England, nor governed by the laws of England; and yet they that have been born there, since they were under the obedience of on; King, are natural-born subjects, and no aliens, as it appeareth in 15 R. 2. cap. 7, &c. Vide (c) 19 H. 6. 35. b. & 39 H. 6. 39. a. And yet in all these cases and examples, if this new devised plea had been sufficient, they should have been all aliens, against so many judgments, resolutions, authorities, and judicial precedents in all successions of ages. There were sometimes in England, whilst the beptarchy lasted, seven several crowned Kings of seven several and distinct kingdoms; but in the end the West Saxons Lot the monarchy, and all the other Kings melted (as it were) the crowns to make one imperial diadem for the King of the West Saxons over all. Now when the whole was under the actual and real ligeance and obedience of one King, were any that were born in any of those several and distinct kingdoms aliens one to another? Certainly they being born under the obedience of one King

7 Coke Report 24 a, 77 ER p406

and sovereign were all natural-born subjects, and capable of and inheritable unto any lands in any of the said kingdoms.

[7-Coke-24 a] In the holy history reported by St. Luke, ex dictamine Spiritus Sancti, cap. 21 et 22 Act. Apostolorum, it is certain that St. Paul was a Jew, born in Tarsus, a famous city of Cilicia; for it appeareth in the said 21st chapter, ver. 39. by his own words, Ego homo sum quidem Judæus a Tarso Cilicice, non ignotæ civitatis municeps. And in the 22d. chapter, ver. 3. Ego sum vir Judæus natus Tarso, Cilicice, &c; and then made that excellent sermon there recorded, which, when the Jews heard, the text saith, ver. 22. Levaverunt vocem suam dicentes, Tolle de terra hujusmodi, non enim fas est eum vivere; vociferantibus autem eis et projicientibus vestimenta sua, et pulverum jactantibus in aerem, Claudius Lysias, the popular Tribune, to please this turbulent and profane multitude (though it were utterly against justice and common reason) the text saith Jussit Tribunus induci eum in castra; 2. flagellis ecedi, and 3. torqueri eum (quid ita?) ut sciret propter quam causain sic acclamarent; and when they had bound Paul with cords, ready to execute the Tribune's unjust commandment, the blessed Apostle (to avoid unlawful and sharp punishment) took hold of the law of a heathen emperor, and said to the Centurion standing by him, Si hominem Romanum et indemnatum licet vobis flagellare ?) Which when the Centurion heard, he went to the Tribune and said, Quid adurus es? Hic enim homo cives Romanus est. Then came the Tribune to Paul, and said

unto him, Dic milli si tu Romanus es? At ille dixit, etiam. And the Tribune answered, Ego multa summa civitatem hanc consequutus sum. But Paul, not meaning to conceal the dignity of his birthright, said, Ego autem et natus sum: as if he should have said to the Tribune, you have your freedom by purchase of money, and I (by a more noble means) by birthright and inheritance. Protinus ergo (saith the text) decesserunt ab illo qui illum torturi erant, Tribunus quoque timuit postquam rescivit, quia civis Romanus esset, et quia alligasset eum. So as hereby it is manifest that Paul was a Jew, born at Tarsus in Cilicia, in Asia Minor; and yet being born under the obedience of the Roman Emperor, he was by birth a citizen of Rome in Italy in Europe, that is, capable of and inheritable to all privileges and immunities of that city. But such a plea as is now imagined against Calvin might have made St. Paul an alien to Rome. For if the Emperor of Rome had several ligeances for every several kingdom and country under his obedience, then might it have been said against St. Paul, that he was extra [7-Coke-24 b] ligeantiam Imperatoris regni sui Italice, et infra' ligeantiam Imperatoris regni sui Cilicice, &c. But as St. Paul was Judæus patri, et Romanus privilegio, Judæus natione et Romanus jure nationum; so may Calvin say, that he is Scotus patria, et Anglus privilegio Scotus natione, et Anglus jure nationum.

Samaria in Syria was the chief city of the ten tribes - but it being usurped by the King of Syria, and the Jews taken prisoners, and carried away in captivity, was after inhabited by the Panyms. Now albeit Samaria of right belonged to Jewry, yet because the people of Samaria were not under actual obedience, by the judgment of the Chief Justice of the whole world they were adjudged alienigen 6e, aliens: for in the Evangelist St. Luke, c. 17. when Christ had cleansed the ten lepers, unus autem ex illis (saith the text) ut vidit quia mundatus esset, regressus est cum magn, voce magnificans Deum, et cecidit in faciem ante pedes ejus gratias agens, et hic erat Samaritanus. Et Jesus respondens dixit, Nonne decem mundati sunt, et novem ubi sunt? Non est inventus qui rediret et daret gloriam Deo nisi hic alienigena. So as, by his judgment, this Samaritan was alienigena, a stranger born; because he had the place, but wanted obedience. Et si desit obedientia, non adjuvet locus. And this agreeth with the divine, who saith, Si locus salvare poluisset, Satan de cælo pro sua inobedientia non cecidisset. Adam in paradiso non cecidisset, Lot in monte, non cecidisset, sed potius in Sodom.

6. Now resteth the sixth part of this division, that is to say, six demonstrative matrons or conclusions, drawn plainly and expressly from the premises.

1. Every one that is an alien by birth, may be, or might have been, an enemy by accident: but Calvin could never at any time be an enemy by any accident; IlrA he cannot be an alien by birth. Vide 33 H. 6. f. 1. a. b. the difference between an alien enemy, and a subject traitor. Hostes sunt qui nobis, vel quibus nos helium decernimus, cæteri proditores, prædones, &c. The major is apparent, and is proved by that which hath been said. Et Vide Magna Charta, cap. 30. 19 E. 4. 6. 9 E. 3. c. 1. 27 E. 3. c. 2. 4 H. 5. c. 7. 14 E. 3. stat. 2. c. 2. &c.

7 Coke Report 25 a, 77 ER p407

2. Whosoever are born under one natural ligeance and obedience due by the law of nature to one sovereign are natural-born subjects: but Calvin was born under one natural ligeance and obedience, due by the law of nature to one sovereign; ergo, he is a natural-born subject.

[7-Coke-25 a] 3. Whosoever is born within the King's power or protection, is no alien: but Calvin was born under the King's power and protection; ergo he is no alien.

4. Every stranger born must at his birth be either amicus or inimicus: but Calvin at his birth could neither be amicus nor inimicus; ei-go he is no stranger born. Inimicus he cannot be, because he is subditus: for that cause also he cannot be amicus; neither now can Scotia be said to be solum amici, as hath been said.

5. Whatsoever is due by the law or constitution of man, may be altered: but natural ligeance or obedience of the subject to the sovereign cannot be altered; ergo

natural ligeance or obedience to the sovereign is not due by the law or constitution of man. Again, whatsoever is due by the law of nature, cannot be altered: but ligeance and obedience of the subject to the sovereign is due by the law of nature; ergo it cannot be altered. It hath been proved before that ligeance or obedience of the inferior to the superior, of the subject to the sovereign, was due by the law of nature many thousand years before any law of man was made; which ligeance or obedience (being the only mark to distinguish a subject from an alien) could not be altered; therefore it remaineth still due by the law of nature. For *leges naturæ perfectissimæ sunt et immutabiles, humani vero juris conditio semper in infinitum decurrit, et nihil est in eo quod per moriuntur perpetuo stare possit. Leges humane nascuntur, vivunt, moriuntur.*

Lastly, whosoever at his birth cannot be an alien to the King of England, cannot be an alien to any of his subjects of England: but the plaintiff at his birth could be no alien to the King of England; ergo the plaintiff cannot be an alien to any of the subjects of England. The major and minor both be two positiones perspicue veræ. For as to the major it is to be observed, that whosoever is an alien born, is so accounted in law, in respect of the King: and that appeareth first, by the pleading so often before remembered, that he must be extra ligeantiam, Regis, without any mention making of the subject. 2. When an alien born purchaseth any lands, the King only shall have them, though they be holden of a subject, in which case the subject loseth his seigniory. And as it is said in our books an alien may purchase *ad præficuum Regis*; but the act of law giveth the alien nothing: and therefore if a woman alien marrieth a subject, she shall not be endowed (L), neither shall an alien be tenant by the curtesy. Vide 3 H. 6. 55 a. 4 H. 3. 179. 3. The subject shall plead that the defendant is an [7-Coke-25 b] alien born, for the benefit of the King, that he upon office found may seize; and 2. that the tenant may yield to the King the land, and not to the alien, because the King hath best right thereunto. 4. Leagues between our sovereign and others are the only means to make aliens friends, *et fœdera percutere*, to make leagues, only and wholly pertaineth to the King. 5. Wars do make aliens enemies, and *bellum indicere* belongeth only and wholly to the King, and not to the subject, as appeareth in 19 Ed. 4. 4. fol. 6 b 6. The King only without the subject may make not only letters of safe conduct, but letters patent of denization, to whom, and how many he will, and enable them at his pleasure to sue any of his subjects in any action whatsoever real or personal, which the King could not do without the subject, if the subject had any interest given unto him by the law in any thing concerning an alien born. Nay, the law is more precise herein than in a number of other cases to of higher nature: for the King cannot grant to any other to make of strangers born, denizens; it is by the law itself so inseparably and individually annexed to his Royal person (as the book is in 20 H. 7. fol. 8). For the law esteemeth it a point of high prerogative, *jus majestatis, et inter insignia summæ potestatis* to make aliens born subjects of the realm, and capable of the lands and inheritances of England in such sort as any natural born subject 1s. And therefore by the statute of 27 H. 8. c. 24. many of the most ancient prerogatives and Royal flowers of the Crown, as authority to pardon treason, murther, manslaughter, and felony, power to make justices in eyre, Justices of Assise, justices of peace, and gaol delivery, and such like, having been severed and divided

7 Coke Report 26 a, 77 ER p408

from the Crown, were again re-united to the same: but authority to make letters of denization was never mentioned therein to be resumed, for that never any claimed the same by any pretext whatsoever, being a matter of so high a point of prerogative. So as the pleading against an alien, the purchase by any alien, leagues and wars between aliens, denizations, and safe conducts of aliens, have aspect only and wholly unto the King. It followeth therefore, that no man can be alien to the subject that is not alien to the King. *Non potest esse alienigena corpori, quinon est capiti, non gregi qui non est Regi.*

The authorities of law cited in this case for maintenance of the judgment, 4 H. 3. tit. Dower. Bracton, lib. 5. fol. 427. Fleta, lib. 6. cap. 47. In temi. E. 1. Hingham's Report.

17 Ed. 2. cap. 12. 11 Ed. 3. [7-Coke-26 a] cap. 2. 14 Ed. 3 Statut de Francia. 42 Ed. 3. fol. 2. 42 Ed. 3. cap. 10. 22 Lib. Ass. 25. 13 Rich. 2. cap. 2. 15 Rich. 2. cap. 7. 11 Hen. 4. fol. 26. 14 Hen. 4. fol. 19. 13 H. 4. Statutum de Guyan. 29 Hen. 6. tit. Estoppel 48. 28 H. 6. cap. 5. 32 Hen. 6. fol. 23. 32 Hen. 6. fol. 26. Littl. temps Ed. 4. lib. 2. cap. Villenage. 15 Ed. 4. fol. 15. 19 Ed. 4. 6. 22 E. d. 4. cap. 8. 2 Rich. 3. 2. and 12. 6 Hen. 8. fol. 2. Dyer. 14 H. 8. cap. 2. No manner of stranger born out of the King's obeisance, 22 H. 8. c. 8. Every person born out of the realm of England, out of the King's obeisance, 32 H. 8. c. 16. 25, H. 8. 0. 15, &c. 4 Ed. 6. Plowd. Comment fol. 2. Fogassa's case. 2 and 3 Ph. and Mar. Dyer 145. Shirley's case. 5 El. Dyer 224. 13 El. c. 7. de Bankrupts. All commissions ancient and late, for the finding of offices, to entitle the King to the lands of aliens born; also all letters patent of denization of ancient and later times do prove, that he is no alien that is born under the King's obedience.

Now we are come to consider of legal inconveniences: and first of such as have been objected against the plaintiff; an, secondly, of such as should follow, if it had been adjudged against the plaintiff.

Of such inconveniences as were objected against the plaintiff, there remain only four to be answered; for all the rest are clearly and fully satisfied before: 1. That if postnati should be inheritable to our laws and inheritances, it were reason they should be bound by our laws; but postnati are not bound by our statute or common laws; for they having (as it was objected) never so much freehold or inheritance, cannot be returned of juries, nor subject to scot or lot, nor chargeable to subsidies or quinzimes, nor bound by any Act of Parliament made in England. 2. Whether one be born within the kingdom of Scotland or no, is not triable in England, for that it is a thing done out of this realm, and no jury can be returned for the trial of any such issue: and what, inconvenience should thereof follow, if such pleas that wanted trial should be allowed (for then all aliens might imagine the like plea) they that objected it, left it to the consideration of others. 3. It was objected, that this innovation was so dangerous, that the certain event thereof no man could foresee, and therefore some thought it fit, that things should stand and continue as they had been in former time for fear of the worst. 4. If postnati were by law legitimated in England, it was objected what inconvenience and confusion should [7-Coke-26 b] follow if (for the punishment of us all) the King's Royal issue should fail, &c. whereby those kingdoms might again be divided. All the other arguments and objections that have been made have been answered before, and need not to be repeated again.

1. To the first it was resolved, that the cause of this doubt was the mistaking of the law: for if a postnatus do purchase any lands in England, he shall be subject in respect thereof, not only to the laws of this realm, but also to all services and contributions, and to the payment of subsidies, taxes, and public charges, as any denizen or Englishman shall be; nay, if he dwell in England, the King may command him, by a writ of ne exeat regnum, that he depart not out of England. But if a postnatus dwell in Scotland, and have lands in England, he shall be chargeable for the same to all intents and purposes as if an Englishman were owner thereof, and dwelt in Scotland, Ireland, in the Isles of Man, Guernsey, or Jersey, or elsewhere. The same law is of an Irishman that dwells in Ireland, and hath land in England. But if postnati, or Irishmen, men of the Isles of Man, Guernsey, Jersey, &c. have lands within England, and dwell here, they shall be subject to all services and public charges within this realm, as any Englishman shall be. So as to services and charges, the postnati and Englishmen born are all in one predicament.

7 Coke Report 27 a, 77 ER p409

2. Concerning the trial, a threefold answer was thereunto made and resolved:

1. That the like objection might be made against Irishmen, Gascoins, Normans, men of the Isles of Man, Guernsey, and Jersey, of Berwick, &c. all which appear by the rule of our books to be natural born subjects; and yet no jury can come out of any of those countries and places, for trial of their births there. 2. If the demandant or plaintiff in any action concerning lands be born in Ireland, Guernsey, Jersey, &c. out of the realm of

England, if the tenant or defendant plead, that he was born out of the ligeance of the King, &c. the demandant or plaintiff may reply, that he was born under the ligeance of the King at such place within England; and upon the evidence the place shall not be material, but only the issue shall be, whether the demandant or plaintiff were born under the ligeance of the King in any of his kingdoms or dominions whatsoever: and in that case the jury, (if they will) may find the special matter, viz. the place where he was born, and leave it to the judgment of the Court: and that jurors may take knowledge of things done [7-Coke-27 a] out of the realm in this and like cases, Vide 7 H. 7. 8 b. 20 Ed. 3. Averment 34. 5 Ric. 2. tit. Trial 54. 15 Ed. 4. 15. 32 H. 6. 25. Fitz. Nat. Brey. 196. Vide Dowdale's case, in the Sixth Part of my Reports, fol. 47. and there divers other judgments be vouched (M). 3 Brown, in anno 32 H. 6. reporteth a judgment then lately given, that where the defendant pleaded that the plaintiff was a Scot, born at St. John's town in Scotland, out of the ligeance of the King; whereupon they were at issue, and that issue was tried where the writ was brought, and that appeareth also by 27 Ass pl. 24. that the jury did find the prior to be born in Gascoin. (for so much is necessarily proved by the words *trove fuit*.) And 20 Ed. 3. tit. Averment 34. in a *juris utrum*, the death of one of the vouchees was alleged at such a castle in Britain, and this was inquired of by the jury; and it is holden in 5 Rich. 2. tit. Trial 54. that if a man be adhering to the enemies of the King in France, his land is forfeitable, and his adherency shall be tried where the land is, as oftentimes hath been done, as there it is said by Belknap: and Fitz. Nat. Br. 196 in a *mortdanc*. if the ancestor died in *intinere peregrinationis sum vers. Terram sanctam*, the jury shall enquire of it: but in the case at Bar, seeing the defendant hath pleaded the truth of the case, and the plaintiff hath not denied it, but demurred upon the same, and thereby confessed all matters of fact, the Court now ought to judge upon the special matter, even as if a jury upon an issue joined in England, as it is aforesaid, had found the special matter, and left it to the Court.

3. To the third it was answered and resolved, that this judgment was rather a renovation of the judgments and censures of the reverend Judges and sages of the law in so many ages past, than any innovation, as appeareth by the book and bookcases before recited: neither have Judges power to judge according to that which they think to be fit, but that which out of the laws they know to be right and consonant to law. *Judex bonus nihil ex arbitrio suo faciat, nec proposito domestics voluntatis, sed juxta leges et jura pronuntiat*. And as for timores, fears grounded upon no just cause, *qui non cadunt in constantem virum, vani timores æstimandi sunt*.

4. And as to the fourth, it is less than a dream of a shadow, or a shadow of a dream: for it hath been often said, natural legitimation respecteth actual obedience to the sovereign at the time of the birth; for as the *antenati* remain aliens as to the Crown of England, because they were born when there were several Kings of the several kingdoms, and the [7-Coke-27 b] uniting of the kingdoms by descent subsequent cannot make him a subject to that Crown to which he was alien at the time of his birth: so albeit the kingdoms (which Almighty God of his infinite goodness and mercy divert) should by descent be divided, and governed by several Kings; yet it was resolved, that all those that were born under one natural obedience while the realms were united under one sovereign, should remain natural born subjects, and no aliens; for that naturalization due and vested by birthright, cannot by any separation of the Crowns afterward be taken away: nor he that was by judgment of law a natural subject at the time of his birth, become an alien by such a matter *ex post facto*. And in that case, upon such an accident, our *postnatus* may be *ad fidem utriusque Regis*, as Bracton saith in the afore remembered place, fol. 427. *Sicut Anglicus non*

7 Coke Report 28 a, 77 ER p410

*auditur inplacitando aliquem de Terris et tenement' in Franci, ita nec debet Francigena et alienigena, qui fuerit ad fidem Regis Franciæ, audiri placitando in Anglid: sed tamen sunt aliqui Francigenæ in Franci, qui sunt adfidem utriusque; et semper fuerunt ante*

Normaniam deperditam, et post, et qui placitant hic et ibi, ed, ratione qua sunt ad fidem utriusque, sicut fuit Willielmus comes mareschallus et manens Angli., et M. de Gynes manens in Franci., et alii plures. Concerning the reason drawn from the (a) etymologies, it made against them, for that by their own derivation alienæ gentis and alienæ ligeantice is all one: but arguments drawn from etymologies are too weak and too light for Judges to build their judgments upon: for sæpenumero ubi proprietas (b) verborum altenditur, sensus veritatis dimittitur: and yet when they agree with the judgment of law, Judges may use them for ornaments. But on the other side, some inconveniences should follow, if the plea against the plaintiff should be allowed: for first it maketh ligeance local: Videlicet, ligeantia Regis regni sib Scotiæ, and ligeantia Regis regni sui Angliæ: whereupon should follow, first, that faith or ligeance, which is universal, should be confined within local limits and bounds: secondly, that the subjects should not be bound to serve the King in peace or in war out of those limits; thirdly, it should illegitimate many, and some of noble blood, which were born in Gascoin, Guienne, Normandy, Calais, Tournay, France, and divers other of His Majesty's dominions, whilst the same were in actual [7-Coke-28 a] obedience, and in Berwick, Ireland, Guernsey, and Jersey, if this plea should have been admitted for good. And, thirdly, this strange and new devised plea inclineth too much to countenance that dangerous and desperate error of the Spencers, touched before, to receive any allowance within Westminster-hall.

In the proceeding of this case, these things were observed, and so did the Chief Justice of the Common Pleas publicly deliver in the end of his argument in the Exchequer Chamber. First, that no commandment or message by word or writing was sent or delivered from any whatsoever to any of the Judges, to cause them to incline to any opinion in this case; which I remember, for that it is honourable for the State, and consonant to the laws and statutes of this realm. Secondly, there was observed, what a concurrence of judgments, resolutions, and rules, there be in our books in all ages concerning this case, as if they had been prepared for the deciding of the question of this point: and that (which never fell out in any doubtful case) no one opinion in all our books is against this judgment. Thirdly, that the five Judges of the King's Bench, who adjourned this case into the Exchequer Chamber, rather adjourned it for weight than difficulty, for all they in their arguments una v. oce concurred with the judgment. Fourthly, that never any case was adjudged in the Exchequer Chamber with greater concordance and less variety of opinions, the Lord Chancellor and twelve of the Judges concurring in one opinion. Fifthly, that there was not in any remembrance so honourable, great, and intelligent an auditory at the bearing of the arguments of any Exchequer Chamber case, as was at this case now adjudged. Sixthly, it appeareth, that jurisprudentia legis communis Angliæ est scientia socialis et copiosa: sociable, in that it agreeth with the principles and rules of other excellent sciences, divine and human: copious, for that quamvis ad ea quæ frequentius accidunt jura adaptantur, yet in a case so rare, and of such a quality, that loss is the assured end of the practice of it (for no alien can purchase lands, but he loseth them; and ipso facto the King is entitled thereunto, in respect whereof a man would think few men would attempt it) there should be such a multitude and farrago of authorities in all successions of ages, in our books and bookcases, for the deciding of a point of so rare an accident. Et sic determinate et terminala est ista quæstio.

[7-Coke-28 b] The Judgment in the said Case, as entered on Record, &c.

"Whereupon all and singular the premises being seen, and by the Court of the Lord the now Kino, here diligently inspected and examined, and mature deliberation being had thereof; for that it appears to the Court of the Lord the now King here, that the aforesaid plea of the said Richard Smith and Nicholas Smith above pleaded,

7 Coke Report 1 a, 77 ER p411

is not sufficient in law to bar the said Robert Calvin from having an answer to his aforesaid writ: therefore it is considered by the Court of the lord the now King here, that the aforesaid Richard Smith and Nicholas Smith to the writ of the said Robert do further

answer."

[See now the statutes for the union of both kingdoms.]-Note to former edition.  
Bulwer's Case 7 Coke Report 1a, 77 ER 411

Report Date: 1584

[7-Coke-1 a] BULWER'S CASE.

Mich. 26 & 29 Eliz.

[See British South Africa Company v. Companhia de Mo?ambique [1893] AC  
631.]

B. brought an action on the case in the county of N. for maliciously causing him to be outlawed in London upon process sued out of a Court at Westminster, and causing him to be imprisoned in N. upon a *capias utlagatum* directed to the sheriff of that county, but issued at Westminster; and upon demurrer it was adjudged that the action was well brought in the county of N.

In all cases where the action is founded on two things done in several counties, and both are material or traversable, and the one without the other does not maintain the action, the plaintiff may bring his action in which county he will. SC.4 Leon. 52.

Bulwer of Dalling in Norfolk, brought an action on his case against George Smith, and declared that one Henry Heydon, Esq. did recover 20l. &c. in the Common Pleas against the plaintiff, and after judgment, and before execution, the said Henry Heydon died, and afterwards the said defendant knowing thereof, at W. in the county of Norfolk to outlaw the plaintiff upon the said judgment in the name of Henry Heydon *malitios et deceptiv? machinatus est*, in performance of which the defendant, Trin. 23 Eliz at Westminster in Middlesex, purchased a writ of *capias ad satisfaciendum*, in the name of the said Henry, upon the said judgment, directed to the Sheriffs of London, who by the procurement of the defendant returned *non est inventus*; whereupon the defendant purchased a writ of *exigent* in the name of the said Henry, which writ the said sheriff by the procurement of the said defendant returned, that at several Hustings the said now plaintiff had been demanded, *et ad Hustingum ad communibus placitis tent' in Guildhall, civitatis præd' die Lun' prox post Festum Apostol. Simonis et Jud', anno supradict' præd'* the now plaintiff, *quint' exactus fuit, &c. et ideo ipse the plaintiff utlagalus fuit:* and afterwards Pasch. 24 El. the defendant purchased out of the said Common Pleas a writ of *capias utlagatum*, in the name of the said Henry, directed to the Sheriff of Norfolk, to arrest his body, &c. which writ did mention that the said now plaintiff was outlawed *die Lun' prox' ante Festum Apostolorum Simonis et Jud', &c.* And the said writ the defendant at W. aforesaid in the said county of Norfolk, did deliver to one Robert Godfrey then deputy to the sheriff of the said county, to the intent that he should execute the said writ, the which Robert by force of the said writ took, and arrested the said now plaintiff, and did imprison him by the space of two months, until the now plaintiff purchased his charter of pardon, by reason of which outlawry he forfeited all his goods and chattels: and upon this declaration the defendant did demur in law; and the principal cause of the demurrer was because this action, by the pretence of the defendant, [7-Coke-1 b] ought to have been brought in Middlesex where the wrong began, for there (as it was said) the defendant took out as well the cap *ad satisfac* as the *exigent* and the cap' *utlagalum* also. And although the cap *utlagal'* was executed in Norfolk, yet the action ought to be brought where the wrong began; as in the case of conspiracy in 42 E. 3. 14 a. and divers other cases also were put; also by the outlawry which was in London all his goods and chattels were forfeited where it is more reason to bring the action than in Norfolk. But it was answered and resolved, that the (a) action was well brought in Norfolk; for it

7 Coke Report 2 a, 77 ER p412

is a maxim in law, *quod ibi semper debet fieri triatio, ubi jurator meliorem possunt habere notitiam*. And in Norfolk was the visible wrong, for there the plaintiff was imprisoned for the space of two months, and therefore it is great reason that the plaintiff may have his action there; and it doth not appear by the record what goods or chattels the

plaintiff had at the time of the outlawry, but for the aggravating of the damages, the plaintiff may give in evidence what goods and chattels he hath forfeited by the outlawry. And this action doth consist upon two principal parts, the one, matter of record, and the other matter in fact; and none of the matters of record, but is mixed with matter of fact; and no matter of fact, but is mixed with matter of record: for the writs and the outlawry are matters of record, but mixed with matters in fact, sc. purchasing, and prosecution of them by the defendant in the name of Henry Heydon, which are matters in fact; also the imprisonment is a matter in fact, but it is mixed with the writ of cap' utlagat', which is of record, sc. if the plaintiff was arrested by virtue thereof. And matters in fact are triable only by the country and not matters of record; and when one matter in One county is depending upon the matter in the other county, there the plaintiff may (b) choose in which county he will bring his action (unless the defendant upon the general issue pleaded, should be prejudiced in his trial, as he would not be in this case) as if two (c) conspire to indict a man in one county, and they by their malicious prosecution make the execution of their conspiracy in another county, and there cause the party to be indicted, the plaintiff may have his action of conspiracy in which county he will, for they put their conspiracy in one county in execution in the other, and the matter of record of the indictment is mixed with the matter of fact. But if they conspire in one county, by force of which conspiracy without any other act by them, he is indicted in another county, there the writ ought to be brought in the county where the conspiracy was, for the defendants have done nothing in the county where the indictment was, nor were parties nor privies to the finding of the indictment, but only by the conspiracy in the other county. And that appears in 14 E. 4. 3 b. and so 6e books in (d) 42 E. 3. 14 a. 20 (e) H. 6. 10 a. b. F. N. B. (f) 116 b. and other books are well reconciled. If a (g) menace be made in Essex by which my tenants depart in London, I shall have my action in Essex, and not [7-Coke-2 a] in London, for in such case I have done nothing in London, 9 H. 6. 42 b. In all cases where the action is founded upon two (a) things done in several counties, and both are material or traversable, and the one without the other doth not maintain the action, there the plaintiff may choose to bring his action in which of the counties he will (A), as it is if a servant be (b) retained in one county and departs in another, and therewith agree 41 E. 3. 1 b. 34 H. 6. 18 a. 38 H. 6. 15 b. 15 E. 4. 6. 20 H. 6. 11. 29 H. Dyer 38. 20 E. 3. 25. &c. So if a man be arrested in execution

7 Coke Report 2 b, 77 ER p413

in one county, and be (c) escapes into another county, the plaintiff may choose to bring his action in which of the counties he will, and therewith agree 15 E. 4. 3 a. b. 30 H. 6. 6 a. b. 11 El. Dy. 27 8. So in a writ of (d) annuity founded on a prescription against a man of religion, or body corporate, where the church or house is in one county, and the seisin is alleged in another county, the plaintiff may choose in which county he will bring his action. 48 E. 3. 26. a. b. 4 H. 4. 1. 4 H. 6. 5 b. 10 H. 6. 19 a. b. 39 H. 6. 15 b. 2 E. 4. 28 b. 4 E. 4. 26 a. &c. F. N. B. 152 e. Otherwise if the annuity be granted in one county to be paid in another, the action lies where the grant was, and so is 8 H. 6. 23 b. So if a man cites one in one county to appear before (e) the Admiral in another county, for a thing done in the body of the county, by force of which the party appears, he may have his action in the one County or the other at his pleasure, 5 Ma. Dyer 159 b. 42 E. 3. 14 a. 44 E. 3. 31 b. 32 a. 46 E. 3. 8 b. 3 H. 4. 3 a. 38 H. 6. 14 b. 14 E. 4. 3 a. b. The same law of the Spiritual Court. So if the defendant casts a protection in one county, and remains in another county, he may bring his action in which of the counties he pleases. 20 H. 6. 10 a. b. So if a man strikes a person in one county, (f) and he dies in another county, the appeal of murder may be brought in the one or the other county, and yet the defendant did nothing in the county where the party died, but the (g) death which ensued on the stroke makes the felony. 18 E. 3. 32. 9 H. 6. 63. 45 Ass pl. 9. 43 Ed. 3. 3 (h) H. 7. 12 a. 4 H. 7. 18. 6 H. 7. 10. 11 H. 4. 93. If a man commits (i) a robbery in one county, and carries the goods into divers counties, the party robbed may have an appeal of felony in which of the

counties he will, but not an (k) appeal (B) of robbery but only in the county where the robbery was done; for it is felony in all the counties where the goods are carried (for felony doth not divest property) but it is not robbery (which ought to be done to the person of a man) but only in the county where the robbery was done. 4 H. 7. 5 b. 9 H. 8. 39, 40. Dyer, 11 H. 4. 93. 3 E. 3. tit. Ass. 446. In debt if a man declares on a lease (l) for years in one county of land in another county, he ought to bring his action where the lease was made, and not where the land lies; for the action is grounded upon the contract made by the lease (c). 38 H. 6. 15. acc. per Cur. 8 H. 6. 23. Acc. Vide 4 H. 6. 18. 14 E. 4. 3. 29 H. 8. 40 Dyer. So the law well explained in a case in which are [7-Coke-2 b] varieties of opinions in our books. But if a lease be made in one county, and the land lies in another, the action of (a) waste shall be brought where the land lies, and not where the lease was made, although the term be passed; for the land and damages, or damages only for the waste which is local, shall be recovered. 14 E. 4. acc. If a

7 Coke Report 3 a, 77 ER p414

man promises to (b) cure one- in one county, and misdoeth in another county, the plaintiff has his election to bring his action in which of the counties he will, and therewith agrees 11 R. 2. Action sur le Case 37. If a man doth not repair a wall in Essex, which he ought to repair, whereby my land in Middlesex is drowned, I may bring my action in Essex, for there is the & fault, as it is adjudged in 7 H. 4. 8; or f may Turing in Middlesex, for there I have the damage, as it is proved by 11 R. 2. Action sur le Case 36. So if one forge a (c) deed in one county and proclaims it in another, the plaintiff may choose in which county he will bring his action. 29 H. 8. 38. 22 H. 6. 5a, b. But when the defendant upon pleading not guilty shall be prejudiced in his trial, there the plaintiff hath not election to bring his action in which county he will, (d) 29 H. 8. Dyer 38. where Gawyn sued an appeal of robbery in the county of Wilts where the robbery was done, against Hussey and Gibbs, as accessories, and declared that the principals named in the writ, and who were attainted, did the robbery in the county of Wilts, and that the defendant feloniously at London, before the robbery done, did abet them to do it; and it was adjudged, that although the plaintiff can have but (e) One appeal against the principals and accessories, and against the principal of necessity it ought to be brought in the county of Wilts, yet because those of the county of Wilts upon not guilty pleaded, and London cannot join), and those in Wilts cannot inquire of a thing in London, although it be transitory (for in case of felony which concerns the life of a man, every act shall be tried in the proper county where the act was in truth done) the appeal against the said accessories did abate, 43 E. 3. 17, 18, 19. And it is to be observed, that in all real actions, if any issue rises on the land, or in any action in which the possession of the land or (f) local thiD01, or which rises on the land b reason thereof, is to be recovered, all these shall be brought in the county where the land lies; as in a writ of right of ward of land, or writ of intrusion of ward, these shall be brought in the county where the land lies; although the refusal were, or the seigniorie be in another county, 29 E. 3. 3. 38 H. 6. 1, b. 22 R. 2. Bre. 937. Acc. So in a writ of right of ward for the body only, it shall be brought in the county where the land is, for that is in the right and savours of the land, 21 E. 3. 42. 30 E. - 3. 25. 9 E. 3. 12, 13. 10 E. 3. 7. ace and the reason of 40 E. 3A. agrees with it, although the judgment there is mentioned to be given contrary. But a writ of ravishment of ward shall be brought where the ravishment was, and not where the land is, or where the body is carried: for it [7-Coke-3 a] is founded on the ravishment. 38 H. 6. 14 b. 22 R. 2. Brey. 937. and 12 E. Dy. 289. And a writ of forfeiture of marriage shall be brought where the land is, for the writ doth suppose an intrusion into the land; and therewith agrees the said book in 22 R. 2. and 38 H. 6. 15 a. And a writ de valore (a) maritagii shall be brought where the land is; for the lord need not make any (b) tender: but if he makes a tender, and the other refuses, and he alleges it in the county, then the writ de valore maritagii lies in the county where the refusal was, 22 R. 2. Brey. 937. 38 H. 6. 15 a. Writs of qui imp and qu incumbravit (c) shall be always brought where the church is; for by the one the

plaintiff shall recover his presentment, and by the other the bishop's clerk shall be removed, and the plaintiff's clerk admitted, 38 H. 6. 14 and 15 accord. Vide 4 Ed. 3. 9. Otherwise it is in the King's case. But a qu. (d) non admisit shall be brought in the county where the refusal was, and not in the county where the church is, because damages are only to be recovered, and the refusal is the beginning of the wrong, and the ground of the action; and so is the book adjudged in 38 H. 6. 14 and 15. F. N. B. 47. f. And a qu. imp of a prebend shall be brought in the county where the cathedral church is,

7 Coke Report 3 b, 77 ER p415

and not in the county where the body of the prebend is; for the plaintiffs clerk is to be inducted and installed in the cathedral church, a-rid therewith agrees 21 E. 3. 5. and 2 El. Dy. 194. (e) but 43 E. 3. 34. and 15 Ed. 3. Br. 325. seem contrary. 24 E. 3. 37. And so the law is well explained in a case in which there were different opinions in our books. And if a man at the common law had a rent issuing out of two counties, he could not have had an (f) assise in one county, because every part of the land in the two counties is charged with the rent, and all should be put in view, as it is agreed in 18 E. 2. Ass. 380. 18 E. 3. 32. 10 E. 3. 21. 10 Ass p. 4. and 18 Ass. P. 1. But if a man makes a lease pur auter vie of land in two counties, rendering rent, and the rent is behind, and cest' que vie dies, the lessor shall have ail action of debt in which of the counties he will, for now it is changed into debt; and in that case no land shall be put in view, but the person of the debtor shall be only charged by the common law. So if a rent he issuing Out of the land of B. in two counties, and the rent is behind, and he who has the rent dies, his executors may have ail action of debt against B. in which of the counties they will, on the statute of 32 H. 8. cap. 37; for although he ought to bring his action in one of the counties, yet at the common law the person of the defendant is chargeable in the action of debt, and not the land. And before the statute of (g) 6 R. 2. c. 2. a writ of debt and account against a receiver, and such actions might be brought in such county where the party might he best brought in to answer, and the plaintiff might have declared on a contract or receipt, &c. in any other county, quod debitum et contractus, &c. sunt (h) nullius loci. See for that 2 Ed. 3. 44. 6 Ed. 3. 266. and 275. 8 E. 3. 380. [7-Coke-3 b] 10 E. 3. 7. 19 E. 3. Jurisd. 29. 29 E. 3. 26. 33 E. 2. tit. Jurisd. 57. 40 E. 3. 7. 3 H. 6. 30. 15 E. 4. 1, 9. 21 E. 4. 88. As in 22 H. 6. 9 and 10 a. b. where the King granted the office of surveyor of packing of all manner of cloths within London and the liberties thereof, which are in two counties, and the assise was brought in Middlesex, and there Newton and Paston said, that there is a great difference between an assise of rent and that assise; for where a rent-charge is issuing out of lands in divers counties, every parcel is chargeable with the whole, and all the ter-tenants ought to be named; but here the person is charged and not the land, and yet the office-for which the assise was brought did extend in two counties. And if a fine or feoffment be made of lands in two counties, with warranty, the warrants charke may be brought in any of the counties, 29 E. 3. 3 a. b. It is purviewed by the statute of 7 R. 2. c. 10. that an assise of nov' disseis. shall for the future be granted and made of a rent behind, due for tenement in divers counties to be held in confin' comitat': and thereupon the assise shall be taken and tried by the people of the same county, in the same manner and form as it is done of a common of pasture in one county appendant to tenements in another county: for at the common law, if a man had bad common in land in one county appendant or appurtenant to land in another county, he should have two several writs to the sheriffs of the several counties. Or if the land to which, &c. lay in one county, and the land in which, lay in several counties, there he should have a writ of assise to the sheriff of the county where the land in which, &c. lay, and several writs to the sheriff of the county where the land in which, &c. lay; and all that appears in the regist and F. N. B. 180 a. And the same law is, when a nuisance is done in one county, and the land to which, &c. is in another county, as it appears also in the register, and F. N. B. 183 k. (D). So that if a man hath a rent in three or four

7 Coke Report 4 a, 77 ER p416

counties, it seemeth that he who is disseised may have several assises to be brought in confin' comitatum; for the letter of the statute of 7 R. 2. is general of rent due for tenements in several counties. And although it hath a reference to the case of common of pasture, &c. yet forasmuch as in the case of common of pasture, if the land in which, &c. lay in several counties, and the land to which, &c. lay in another county, there should be as many writs as there are several counties; thence it follows, that such remedy he shall have who hath a rent issuing out of lands in many counties. Also the case of common is put *exempli grati, et simililudinari, et null' simile quatuor pedib' currit*; and it is not necessary that a simile should agree in all points. And the statute of 7 T.R. 2. was made to satisfy a doubt which was conceived before: for thereby it is enacted, that writs in such case shall be made in the Chancery without any manner of contradiction, as well of disseisins before made, as after to be made. And the doubt was on the statute of Magna Charta, cap. 2. *Recognitiones de novo, disseisin 6 [7-Coke-4 a] et de morte antecessor' non cavantur nisi in suis comitatu*. And some held, that the same was not observed when the Justices of Assise did sit in *confinio comitatum*; and, namely, when there are twenty counties mesne between the two counties, as it is in the book in 5 E. 4. 2 b. But that doubt also might be conceived on the said assise of *noy disseisin of common* when the land in which, &c. is in one county, and the land to which, &c. in another county (which case without question is not restrained by the said statute. For assise of *noy disseisin of common of pasture* lay at the common law, as by the statute of Westminster 2. c. 29. appears), 10 E. 3. 21. and 10 Ass p. 4. And if need were, the statute of Westminster 2. c. 28. doth extend to the said case of rent, by which it is provided, *quod quotiescunque de cætero, evenierit in cancellaria quod in uno casu resent' breve, et in consimili casu, cadente sub eod jure, et simili inidgente remedio non resent' concordant clerici in canceller' in brevi faciendo, &c. vel ad proxim' Parliament' de consensu arisperitor' fiat breve*. And the statute concludes with the effect of a maxim of the common law, *quod Cur' dom' Regis non debet deficere conquerentibus in justitia, perquirenda*. 38 E. 3. 33 a. where the case was, that the King brought a writ of right of the fourth part of the tithes and offerings of the church of St. Dunstan in the West, in Fleet-street, in the suburbs of London, against the Prior of St. John's of Jerusalem in England, there Candish took exception to the writ, because although this writ was given by the statute of Westminster 2. c. 5. toward the end, and artic. Clerc. 2. which statute gave, that he shall have a writ *ad petendum advocation' decimar petitar'*, &c. And this writ is brought of the fourth part of tithes and offerings, which is not warranted by the statute judgment of the writ, forasmuch as the statutes do not give any writ of the fourth part of tithes. Thorpe, the Chief Justice, who gave the rule, said, although the statute do not limit by express words, but of tithes, yet those in the Chancery may make: a writ in *consim' casu*, and the writ is good enough; wherefore answer. And In 18 E. 2. Br. 287. a writ of entry was brought in the county of Suffolk, the tenant pleaded a release of the ancestor of the plaintiff with warranty, which was denied, and found for the plaintiff in London, by a jury of Friday-street, &c. for which the demandant did recover; and the tenant brought an attain, and there exception was taken, because in the writ is not comprised to attach the party, judgment, &c. And for the plaintiff it was said, that the writ was granted to the Sheriff of London to summon the 24, and attach the 12, and another writ to the Sheriff of Suffolk to attach the party where the land was, and both the writs were read in Court. To which it was said, that there was no special law, that did maintain that writ which is out of the common course. Berisford the

7 Coke Report 4 b, 77 ER p417

Chief Justice, who gave the rule, said, in a now case, a new remedy, &c. wherefore answer. And therefore, if there be lord and tenant, and the tenancy doth extend into two counties, in this case if the rents and services he behind, the lord may have several writs of customs and services, for every county one writ, and shall have [7-Coke-4 b] them

returnable at one day in the Common Pleas, and then to count upon them as his case is, quia aliter Curia (a) Regis deficeret conquerentibus in justitia perquirenda, and therewith agree Fitz. Nai. Brey. 151. b. and 30 Ed. 1. Droit pl. ultim 6. And that is a good example, pro quolibet consimili casu, &c. simili indigente remedio. Vide 12 Ed. 1. tit. Attaint 71. a very good case; and the reason and rule of the book in 21 Ed. 3. 18. is to be observed, where the case was, that a fine was levied of a manor in one county, and the tenancy lay in another county; now where the per quæ servitia should be brought was the question; and it was adjudged that it was well brought in the county where the manor was. And there Stone gave the rule of the Court in these words: he can have no other writ, for his writ must be according to the fine, and brought in the county where the note is levied. Vide 11 Rich. 2. tit. Action sur le Case 36. 7 H. 4. 8. Vide 26 Hen. 6. tit. Covenant 9. 41 Ass pl. 12. 9 Hen. 5, 6. 22 Hen. 6. 5. And in the principal case where it was objected, that the said capias utlagatum was erroneous; for it was proximum ante festum, &c. where it should be, a post festum, &c. the Court took no regard to it; for the error in the writ which the defendant himself hath wrongfully brought, shall not (b) advantage himself; but in regard he was imprisoned and troubled thereby, that gave the plaintiff cause of action. Also the Court did not regard the clause, that the defendant at W. in the county of Norfolk, &c. malitios? et deceptiv? machinats fuit, &c. for that is so secret and so uncertain, that it cannot be tried.

Corbet's Case 7 Coke Report 5a, 77 ER 417

Report Date: 1585

[7-Coke-5 a] SIR MILES CORBET'S CASE.

Hil. 27 Eliz.

In the Exchequer.

Resolved 1. Where one has purchased divers parcels of land in D. together, in which the inhabitants have used to have shack and long since has inclosed it; and notwithstanding always after harvest the inhabitants have had shack there, by passing into it by bars or gates with their cattle, then it shall be taken as common appendant or appurtenant, and the owner cannot exclude them of common: but if in the town of S. the custom and usage hath been, that every owner in the same town hath inclosed their own lands from time to time, and so hath held it in severalty, any owner may inclose, and hold in severalty, and exclude himself to have shack with the others.

2. If the commons of the town of A. and of the town of B. are adjoining, and one ought to have common with the other, by reason of vicinage and in A. there are fifty acres, and in B. one hundred acres of common, the inhabitants of A. cannot put more cattle into their common of fifty acres than it will feed; nec e converso.

Between Sir Edw. Clere and Miles Corbet, then esquire, now a knight, it was resolved in a case concerning the parsonage of Marham, in the county of Norfolk, that where in the county of Norfolk there is a special manor 'of common called shack, which is to be taken in arable land, after harvest until the land be sowed again, &c. and it began in ancient time in this manner: the fields of arable land in this country consist of the lands of many and divers several persons lying intermixed in many and several small parcels, so that it is not possible that any of them, without trespass to the others, can feed their cattle in their own land; and therefore every one doth put in their cattle to feed promiscu in the open field. These words, " To go shack," is as

7 Coke Report 5 b, 77 ER p418

much as to say to go at liberty, or to go at large: in which the policy of old times is to be observed, that the severance of fields in such small parcels to so many several persons was to avoid inclosure, and to maintain tillage. But it is to be observed, that the said common, called shack, which in the beginning was but in the nature of a feeding because of vicinage for avoiding of suit, within some places of that country, is by custom altered into the nature of a common appendant or appurtenant, and in some places it retains its original nature; and the rule to know it is the custom and usage of every several town or

place, for *consuetudo loci est observanda*. And therefore if in the town of D. (exempli gratia) one who hath purchased divers parcels together, in which the inhabitants have used to have shack, and long time since has inclosed it; and notwithstanding always after harvest the inhabitants have had shack there, by passing into it by bars or gates with their cattle, there it shall be taken as common appendant or appurtenant, and the owner cannot exclude them of common there, notwithstanding he will not common with them, but hold his own lands so inclosed in severalty; and that is proved by the usage; for notwithstanding the ancient inclosure, the inhabitants have always had common there. But if in the town of -S. the custom and usage hath been, that every Owner in the same town hath inclosed [7-Coke-5 b] their own lands from time to time, and so hath held it in severalty, there this usage proves, that it was but in the nature of shack originally for the cause of vicinage, and so it continues; and therefore there he may inclose (A) and hold in severalty, and exclude himself to have shack with the others. And although in the said case of the town of D. the usage hath been, that notwithstanding the inclosure by divers inhabitants of late times the other inhabitants have had shack there; yet if a man hath an ancient close of ancient time taken out of the field, and be and all those whose estate he hath have held it always in severalty, he may well keep it inclosed: for as to such parcel so anciently inclosed, the shack there doth retain its ancient and original nature. And he who claims shack there cannot prescribe to have common in it. Nota, a good resolution which stands with reason; and no inconvenience, innovation, or cause of suits or trouble can thereupon arise, but quiet and repose will be thereby in many cases established, which I thought fit to be reported, because it is a general case in the said country; and at first the Court was altogether ignorant of the nature of this common called shack. It was also resolved at the same time, that if the commons of the town of A. and of the town of B. are adjoining, and that one ought to have common with the other by reason of vicinage, and in the town of A. there are fifty acres of common, and in the town of B. there are an hundred acres of common; in that case the inhabitants of the town of A. cannot put more cattle into their common of fifty acres than it will feed, without any respect to the common within the town of B. *nec e converso*; for the original cause of this common for cause of vicinage was not for profit, but for preventing of suits in a Champaign country; for the reciprocal escapes of the one town into the other: and therefore if the common of the town of A. will feed fifty beasts, and of the town of, B. an hundred beasts, it is no prejudice to the one or the other, if the cattle of one town escape and feed in the common of the other town reciprocally; for if all the cattle feed promiscu together through the whole, it will be no prejudice to one or the other.

7 Coke Report 6 a, 77 ER p419

[Note. The like intercommoning is in Lincolnshire, Yorkshire and other counties; and in Mich term, 18 Car. 2. B. R. Twisden, Justice, said, that this common called sh,ck was but Common per cause de vicinage.]-Note to former edition.

[7-Coke-6 a] CASES UPON THE STAT. OF 13 ED. 1. OF WINCHESTER.

Westm. 1 c. 9. 2 Inst. 172. 3 Inst. 117, 118. 2 Saund. 423. 5 Co. 67 b.

The purview of the said Act is, "That from henceforth every county be so well kept, that immediately after robberies and felonies committed, fresh suit be made from town to town, and from county to county, &c." And after the felony or robbery is committed, the county shall have no longer space than 40 days, within which 40 (a) days it shall behove them to agree for the robbery or trespass, or else that they answer for the bodies of the offenders, &c. Upon which words divers resolutions have been made.

[end]

by the Governor Councill & Representatives in Generall Assembly mett, and by the authority of the same, Thatt there shall bee yearly & every yeare an High Sheriff constituted & Commissionated for each County, and thatt each Sheriff may have his Under Sheriff, Deputy or Deputys.

[CHAPTER 5.]

[The original of this act is not in the office of the Secretary of State. This copy was made from the manuscript compilation of the "Dongan laws," formerly in the office of the Secretary of State, but now in the New York State Library. The date of its passage as November 1st, is given by E. B. O'Callaghan, in Hist. Int. to the Journals of the Legislative Council of New York, p. 12. That the act was received by the Board of Trade, on February 17, 1684, appears from the transcript of the Journal thereof, in Doc. Rel. to Col. Hist. of N. Y., III, p. 354.]

AN ACT for naturalizing all those of forreigne Nations at present inhabiting within this province and professing Christianity, and for Encouragement of others to come and Settle within the Same.

[Passed, November 1, 1683.]

FOR AS MUCH as Severall persons of diverse forreigne Nations professing Christianity, now are and for diverse yeares past have beene actuall and settled dwellers and inhabitants within this province under the allegiance of his Majestye of Great Brittain our dread Sovereigne, and the obedience of his Royall Highnesse, and soe desire to continue and remaine and be naturalized and become as his Majesties naturall borne Subjects BEE It Enacted by the Governour Councill and representatives now assembled and by the authority thereof That All and every such person or persons of what forreigne Nation soever they bee professing Christianity, and that now are actuall inhabitants within this province and have taken or Subscribed or that shall take or subscribe to the oath of allegiance are and Shall be hereby naturalized, and in all respects be accounted and Esteemed as his Majesties naturall borne subjects and shall have and Enjoy all Such privileges freedomes and imunities, within this province as other his Majesties subjects doe have or Enjoy provided nothing Contained in this act, is to be Construed to discharge or Sett at Liberty any servant bond man or slave but only to have relacon to such persons as are ffree at the Makeing hereof.

AND BEE It further declared and Enacted by the Authority aforesaid that all and Every person and persons forreigners of what nation soever professing Christianity that at any time hereafter shall come and arrive within the said province with an

## [CHAPTER 293.]

[Chapter 293, of Livingston & Smith and Van Schaack, where the act is printed in full. Printed in full in Bradford, 1715 ed., p. 216; Baskett, p. 211.]

An Act declaring that all Persons of Forreign Birth heretofore Inhabiting within this Colony and dying Seized of any Lands Tenements or Hereditaments shall be forever hereafter Deemed Taken and Esteemed to have been Naturalized, and for Naturalizing all Protestants of Forreign Birth now Inhabiting within this Colony.

[Passed, July 5, 1715.]

WHEREAS by Letters Patents under the Great Seale of England Dated the Twelfth day of March in the Sixteenth year of Charles the Second the Soyle and Government of this Colony was by the Said King given and granted to his then Dearest Brother James Duke of York his heirs and Assigns and amongst other the Powers therein and thereby given to the Said Duke it was granted that it Should and might be Lawfull for the Said Duke his heirs and assigns or any of them at all and every time and times thereafter to take lead carry and transport for and towards the Plantation of this Colony not only any of the Subjects of his then Majesties Realms and Dominions but any other Strangers who would become Subjects to the said King and live under his allegiance AND whereas by the Articles made on the Surrender of this Province to the Crown of England it was among other things Stipulated that all People Should continue free Denizens and enjoy their Lands and houses wheresoever they were within this Colony and dispose of them as they Pleas'd That any People might come from the Netherlands and Plant in this Country And that any of the then Military Officers and Soldiers belonging to the Dutch Garrison that would Plant Should have Fivety Acres of Land Set out for them. AND whereas in Pursuance of the Said Articles made on the Surrender aforesaid and in order to Invite and encourage people to come and Settle in this Colony and Improve the same Severall Letters of Denization were given by Severall Governors Setting forth that the Persons receiving the Same Had by virtue of the Articles made on the Said Surrender and the Said Letters of Denization Privilege and Power to Purchase receive take have hold buy and Possess any Lands Tenements or hereditaments within this Government and them might Occupy and enjoy give Sell alien and bequeath as they Should See cause AND whereas for the Invitation and farther Encouragement of People to come and Settle in this Colony and in order to quiet the minds of his Majesties Subjects then Inhabiting the Same Sir Edmond Androsse then Governor of this Province under his Royall Highness then Duke of York in a Proclamation by him Emittted the Ninth day of November One Thousand Six hundred Seveanty four by command of the Said Duke did Proclaime and declare that all former Grants Privileges or Concessions before that time granted And all Estates Legally Possessed by any under his Royall Highness before the late Dutch Government were thereby confirmed and the Possessors by virtue thereof to remain in Quiet Possession of their Rights. AND whereas for the farther quieting the minds of his Majesties Subjects of Forreign Birth Inhabiting this Colony and for the farther Invitation and encouragement of Such as would come Inhabit and Improve the Same An Act of the Generall Assembly of this Province was assented to in the year One thousand Six hundred Eighty three by the then Governor Colonel Thomas Dongan Entituled An Act for Naturalizing all those of Forreign Nations, at present Inhabiting within this Province, and Professing Christianity, and for Encouragement of others to come and Settle within the Same, And Exprest in the following words, FORASMUCH as Several persons of divers Forreign Nations, Professing Christianity, now are, and for divers Years past have been actual and Settled Dwellers and Inhabitants within this Province, under the Allegiance of his Majesty of Great Britain, our Dread Sovereign, and the obedience of his Royal Highness, and So desire to continue and remain, and Be Naturalized, and become as his Majesties Natural born Subjects, Be it Enacted by the Governor, Councill and Representatives now assembled, and by the Authority thereof, That all and every Such person or persons of what Forreign Nation Soever they be, Professing Christianity, and that now are actual Inhabitants within this Province, and have taken or Subscribed or that shall take or Subscribe to the Oath of Allegiance, are and Shall be hereby Naturalized, and in all Respects be accounted and esteemed as his Majesties Naturall Born Subjects, and shall have and enjoy all Such Privileges, freedoms and Immunities within this Province, as other his Majesties Subjects do, have or enjoy, Pro-

ments or hereditaments within this Government and them might Occupy and enjoy give Sell alien and bequeath as they Should See cause AND whereas for the Invitation and farther Encouragement of People to come and Settle in this Colony and in order to quiet the minds of his Majesties Subjects then Inhabiting the Same Sir Edmond Androsse then Governor of this Province under his Royall Highness then Duke of York in a Proclamation by him Emittted the Ninth day of November One Thousand Six hundred Seveanty four by command of the Said Duke did Proclaime and declare that all former Grants Privileges or Concessions before that time granted And all Estates Legally Possessed by any under his Royall Highness before the late Dutch Government were thereby confirmed and the Possessors by virtue thereof to remain in Quiet Possession of their Rights. AND whereas for the farther quieting the minds of his Majesties Subjects of Forreign Birth Inhabiting this Colony and for the farther Invitation and encouragement of Such as would come Inhabit and Improve the Same An Act of the Generall Assembly of this Province was assented to in the year One thousand Six hundred Eighty three by the then Governor Colonel Thomas Dongan Entituled An Act for Naturalizing all those of Forreign Nations, at present Inhabiting within this Province, and Professing Christianity, and for Encouragement of others to come and Settle within the Same, And Exprest in the following words, FORASMUCH as Several persons of divers Forreign Nations, Professing Christianity, now are, and for divers Years past have been actual and Settled Dwellers and Inhabitants within this Province, under the Allegiance of his Majesty of Great Britain, our Dread Sovereign, and the obedience of his Royal Highness, and So desire to continue and remain, and Be Naturalized, and become as his Majesties Natural born Subjects, Be it Enacted by the Governor, Councill and Representatives now assembled, and by the Authority thereof, That all and every Such person or persons of what Forreign Nation Soever they be, Professing Christianity, and that now are actual Inhabitants within this Province, and have taken or Subscribed or that shall take or Subscribe to the Oath of Allegiance, are and Shall be hereby Naturalized, and in all Respects be accounted and esteemed as his Majesties Naturall Born Subjects, and shall have and enjoy all Such Privileges, freedoms and Immunities within this Province, as other his Majesties Subjects do, have or enjoy, Pro-

vided nothing contained in this Act is to be construed to discharge or Set at Liberty any Servant, Bondman or Slave, but only to have Relation to such persons as are free at the making hereof AND be it further declared and Enacted by the authority aforesaid, That all and every person and persons, Forreigners, of what Nation Soever, Professing Christianity, that at any time hereafter shall come and arrive within the Said Province, with an intent to become his Majesties Subiects, and to dwell, Settle and Inhabit accordingly, and take the Oath of Allegiance to his said Majestie, and Fidelity to his Royal Highness, the Lord Proprietor of this Province, every Such person or persons may be Naturalized by Act of Assembly, and from thenceforth shall in all respects be Accounted, Deemed and Esteemed as his Majesties Natural Born Subiects, and shall have and enjoy all Such Privileges, freedoms and Immunities within this Province, as other his Majesties Subiects have and enjoy. AND whereas Pursuant to the Powers granted to the then Duke of York Several Strangers, willing to become his Majesties Subiects, and live under his allegiance, were Imported into this Province, and did Settle in and Improve the Same, acquiring to themselves, with the consent and approbation Of the Government, Several Lands, Tenements and hereditaments. AND whereas on a firme Dependance on the Publick ffaith, for the Inviolable adherence to and ffaithful performance of the Articles made on the Surrender aforesaid, many of the Subiects of the High and Mighty States of the United Provinces, remain'd in this Colony, as his Majesties Subiects, and quietly held and enjoyed the Lands they were possest of, and acquired other Lands, Tenements, and hereditaments within the Same. AND whereas by the Invitations, and great Encouragements given by the Governors of this Province, under his then Royal Highness, and Particularly the great Encouragement given by the before recited Act of Assembly assented to as aforesaid, great numbers of Protestants of foreign Birth, did come and Settle in this Colony, to the great increase of Trade and Navigation, and considerable Improvement of this Province. AND whereas by many Intermarriages, Wills, Deeds of Sale, and other mean Conveyances in the Law, Several Estates, Lands, Tenements and Hereditaments formerly Possest by persons of Forreign Birth or Extraction (who Settled in this Province on the motives before Exprest) have been and are become the Possessions, Lands, Tenements and hereditaments of his Majesties Natural born Subiects of his Kingdoms of Great Britain or

Ireland, or Some of the Dominions thereunto belonging, THEREFORE to render his Majesties Subiects Secure in the quiet and peaceable enjoyment of their Several Estates, Rights and Properties, prevent any doubts, controversies or disputes that may hereafter arise upon or concerning the true meaning, Intent and Validity of the before mentioned Powers granted to the Duke of York, the Articles made and agreed to on the Surrender, The Letters of Denization, Proclamations, Invitations, and Act of Assembly, or any of them, and to Settle and Quiet the minds of his Majesties Subiects Inhabiting in this Colony, WE Pray that it may be Enacted by the Governor, Councill and Assembly, and is hereby enacted by the Authority of the Same, That all persons of foreigne Birth, now deceased, Inhabiting and being within this Colony at any time before the first day of November, One thousand Six hundred and Eighty three, and being Seiz'd of Lands, Tenements or hereditaments, shall for ever hereafter be deemed, taken and Esteemed to have been Naturalized, and entitled to all the Rights, Privileges and advantages of any of the Natural born Subiects of this Colony; and all bequests, Wills, Grants, AND mean Conveyances in the Law, made or done by any of them, shall be deemed to be as effectual to all intents and purposes whatsoever, as if they had been done and Executed by any of his Majesties Natural born Subiects of this Colony. And any p'son or persons holding any Lands, Tenements or hereditaments, by, from or under any Such person or persons of foreign Birth, shall be deem'd to be, and is hereby as fully and Rightfully Entitled to the Same, to every intent and purpose whatsoever, as if Such person or persons had held by, from or under any of his Majesties Natural born Subiects of this Colony. And be it Enacted by the authority aforesaid, That every person of foreign Birth now alive, and who did Inhabit within this Colony before the Said first day of November, in the year of our Lord One Thousand Six hundred Eighty Three, shall for every hereafter be deem'd to have been Naturalized, and Shall enjoy all the Rights, Privileges, and advantages that any of his Majesties Naturall Born Subiects of this Colony, do, or of right ought to enjoy. And any Devise, Bequest, Deed, grant or mean Conveyance in the Law, heretofore made by any Such person of foreign Birth, shall be as effectually, to all purposes and Intents whatsoever, as if the Same had been done and Executed by any of his Majesties Naturall Born Subiects of this Colony And be it Enacted by the Authority aforesaid, That all persons of foreign Birth,

who have come and Inhabited in this Colony, at any time Since the Said year of our Lord One thousand Six hundred and Eighty Three, and Purchas'd any Lands, Tenements or hereditaments, and Convey'd the Same by mean Conveyances in the Law, or dyed Seiz'd of the Same, Every Such person shall forever hereafter be Deem'd, taken and Esteemed to have been Naturalized, and any Bequest, Deed, grant or other mean Conveyance in the Law, made, done or executed by any Such person or persons of foreign birth, as aforesaid, and now dead, shall be Deem'd, taken and Esteem'd to be as good, valid and Effectual in the Law, to all Intents, constructions and Purposes whatsoever, as if the Same had been made, done or Executed by any of his Majesties Natural born Subjects of this Colony, and the heires, Grantees, Legatees, feoffees of any Such person or persons of foreign Birth, as aforesaid, holding any Lands, Tenements or hereditaments, by, from or under any Such person or persons of foreign Birth, shall have, hold, enjoy, Possess, Occupy and be entituled to the Same, as fully and Rightfully, as if the Said Lands or Tenements had descended from, or been granted and convey'd by any of his Majesties Natural Born Subjects of this Colony, Any Law, Custom or Usage to the Contrary hereof in any wise notwithstanding. And be it further Enacted by the authority aforesaid, That all persons of foreign Birth, being Protestants, now alive and Inhabiting in this Colony, shall be, and hereby are declared to be his Majesties Natural Subjects, and Shall enjoy all the Rights, Privileges and advantages that any of his Majesties Natural Born Subjects do or of right ought to have and enjoy. Provided always, and it is hereby Enacted, That every Such persons now alive shall within nine Months after the Publication hereof, take the Oaths by Law appointed to be taken, in Stead of the Oaths of Allegiance and Supremacy, Subscribe the Test, and make, repeat and Swear to and Subscribe the abjuration Oath, in any of his Majesties Courts of Record within this Colony, which Said Courts respectively are hereby authorized and required, upon application to them made to administer the Same, and take the Subscriptions as aforesaid, and cause the Names of the Person and Persons So Swearing and Subscribing, to be entred upon Record in the Said Court, for which every person and persons is hereby required and directed to pay the Sum of Six shillings Current Money of New York to the Judge of the said Courts respectively, and three Shillings to the Clerk. And be it further Enacted by the authority aforesaid,

That if any person or persons having So Sworn and Subscribed as aforesaid Shall demand a Certificate or Certificates of his being entred upon Record in manner aforesaid the Said Court or Courts are hereby directed and required to grant the Same under the hand and Seale of the Judge of the Said Court or Courts Respectively Counter Signed by the Clerk of the Said Court, for which Certificate every Such person or persons requiring the Same, shall pay, over and above the Nine shillings beforementioned, the Sum of Three shillings, One half to the Judge of the Said Court or Courts Respectively, and the other half to the Clerk thereof; which Said Certificate or Certificates shall at all times be a Sufficient proof of the person or persons being Naturalized by this Act, as if the Record aforesaid were Actually produced by them, or any of them. PROVIDED always, and it is hereby further Enacted, That in case it So happen, any of the persons now alive, of Foreign Birth, abovementioned, shall depart this life before the Term of Nine Months be expired, or before Publication of this Act, every Such Person So departing this life, as aforesaid, shall notwithstanding be Deem'd and esteemed to have been his Majesties Natural Subject, as fully as if he or she had been Born within this Colony, or had taken the Oaths aforesaid, any Law, Custom or Usage to the Contrary hereof in any wise notwithstanding.

## [CHAPTER 294.]

[Chapter 294, of Livingston & Smith and Van Schaack, where the title only is printed. Printed in full in Bradford, 1715 ed., p. 223. Title only is printed in Baskett, p. 215. Provided for by chapter 326.]

An Act for Laying a Duty on Goods Sold by Auction, Vendue or Out-Cry.

[Passed, July 5, 1715.]

Be it Enacted by the Govern'r Council & General Assembly of this Colony of New York, & by the Authority of the same, That there be given & Granted to his Majesty his Heirs & Successors, for every Hundred Pounds Current Mony of New-York of Goods Merchandizes Slaves & other things whatsoever that shall be sold within this Colony at Publick Auction Vendue or Out-Cry (Goods belonging to the Crown, the Excise Houses Lands Ships & Vessells Goods & Effects of deceased person Exposed to Sale by Executors or Administrator's, or Goods taken in Execution, only excepted) the Sum or Quantity of Ten Ounces of Plate, from the publication of this Act During the Space of three Years.

The English Common Law in the United States

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## THE ENGLISH COMMON LAW IN THE UNITED STATES.

THERE has been some debate recently regarding the law that is taught in our American law schools,<sup>1</sup> and the suggestion has been made that the time has now arrived when the emphasis should be placed upon the local law — the law of a particular jurisdiction, like Illinois — rather than upon a so-called general law, which, it has been assumed, is or ought to be the same in all the states where the common law is supposed to prevail. Without contributing directly to this discussion, it has seemed to the writer that a better understanding of the problem of the law in this country, and of the meaning of the terms “local” and “general” law, would be obtained if some attempt were first made to ascertain what is meant by the common law which has been adopted in some form by most of the states in this country. Did the adoption of the common law of England mean the adoption of a complete system or general body of law, which should have the effect, if properly administered, of making the decisions of the courts of the different states uniform; or did its adoption mean primarily that, by reason of the force and effect given by the common law of England to decided cases, there should develop in each separate state, as in England, a more or less scientific system of law which, of necessity, must, in each state, become in time a separate and distinct body of law? Which of these views, as to the effect of the adoption of the common law, is the accepted one, or is it true that, disregarding the fact that the two views necessarily involve more or less inconsistent ideas of what is meant by the law, the courts in this country have been, and still are, attempting to make both views prevail and work in harmony? These questions are worth consideration in any attempt to determine the meaning and nature of the common law in this country.

For some reason the writings of Bentham and Austin upon the nature of the common law have never had any great influence in

<sup>1</sup> Vol. xxxi, Reports of American Bar Association, 1012-1027, 1091-1119, and vol. xxxiii, 780 and 919.

this country, certainly not with the courts. And yet no better opportunity, perhaps, could have been offered for testing conflicting theories of the nature of the common law of England than the adoption of that law as a rule for the government of courts in jurisdictions different from that of England. The earlier generations of lawyers in the United States were taught law by Blackstone, and his view that the courts only discover or declare a preëxisting law was generally accepted in this country, not only by writers on the law, such as Kent, but by the courts and the lawyers. It was, perhaps, of no great practical consequence, so far as English law was concerned, if Blackstone and the English judges preferred to say that the courts did not make the law, but only declared it, so long as it was always understood that the common law of England on any subject was never different from the law as settled by decided cases. But when the question concerned the effect of the adoption of the common law of England as a controlling source of law *in another jurisdiction*, it obviously made some difference whether English decisions were thereby made as controlling and binding upon the courts of that other jurisdiction as the decisions of its own courts, or whether English decisions were only made some evidence of the common law, and the courts of the other jurisdiction were in fact given perfect freedom to determine for themselves what the English common law was or ought to be, at the same time that their own decisions, according to the rule of the English common law, became binding upon them in the decision of subsequent cases. In the one case the common law of England is identified with the decisions of the English courts; in the other it is treated as something existing apart from the decisions of the English courts, which all courts subject to the rule of the common law are engaged independently in discovering and declaring, though in regard to which their discoveries and declarations should be the same. Which of these views is the prevailing one in this country?

## I.

It is generally assumed, even outside of our law schools, that in those states in which the English common law has been adopted, the decisions of the courts should, upon most questions, in the

absence of modifying statutes, be the same. This general assumption is illustrated by the presumption which is indulged in by the courts of one common-law state in regard to the law of another such state.<sup>2</sup> If, for instance, in a case pending in a court in Illinois, it becomes material to know the law of New York, the Illinois court, in the absence of direct evidence, will presume that the common law as found and declared by the courts of Illinois is the law of New York also, on the theory that, as both courts declare or interpret the same common law, they should arrive at the same result. This means, of course, that the decisions of the courts of Illinois are regarded not only as determining the law of Illinois, but as correctly declaring the common law adopted in the different states. The law of Illinois and the common law are regarded by the courts of Illinois as identical, and the courts of all the other states which derive their law from the common law of England regard their own decisions in the same light. But, while each state regards its own decisions as correct declarations of the common law, which ought to be followed in all common-law states unless modified by statute, it admits that the decisions of other state courts, even when different from its own, do in fact determine the law of those states, whether such law be the true common law or not. The settled decisions of the highest courts in each of the states are accepted in other state courts as conclusive evidence of the law in each of those states.

Similarly, the United States courts, upon certain questions of so-called general law, not yet completely defined, assume the existence of a uniform law which should be declared in the same way by the courts of all of the states. But even this general law, which is regarded as so obviously the same everywhere, is not in fact always discovered and declared in the same way by all the courts. This is recognized by the federal courts, but instead, on that account, of following the different decisions of the state courts in which they sit, the federal courts assume the right to exercise an independent judgment in declaring this general law, so that there may be uniformity of decision on such questions in all the federal courts at least.<sup>3</sup> The federal courts sometimes speak of

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<sup>2</sup> See "Presumption of the Foreign Law," by Albert Martin Kales, 19 HARV. L. REV. 401.

<sup>3</sup> *Myrick v. Michigan Central R. R.*, 107 U. S. 102, 109-110.

this law which they declare independently as a general law, and sometimes as the common law, or as based upon common-law principles, but if there is a general law which is still more general than the common law, at any rate it is not regarded by the federal courts as different in its principles from the common law.<sup>4</sup> It is a law which is assumed to prevail at least in all of the states which have adopted the common law of England.

The federal courts, in cases in which they have jurisdiction, like the different state courts, exercise this power of declaring the common law for the purpose of determining the law of the states. The federal courts, like the state courts, assume that the general law and the law of the states is identical, and they assume also that their decisions not only correctly declare the common law, but the law of all the states as well. Unlike the attitude of the different state courts toward one another, however, the federal courts do not always accept the decisions of the state courts on these questions of general law, when different from their own decisions, as conclusive determinations of the law of the states. And as each court, federal and state, applies the common-law doctrine of *stare decisis* to its own decisions, the result is that contracts and other acts subject to the "general" law may be in fact governed at one and the same time by two conflicting laws, — the law as declared by the state court and a different law declared by the federal court.<sup>5</sup>

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<sup>4</sup> In the famous *Baugh* case, 149 U. S. 368, the court refused to follow the decisions of the court of Ohio on the fellow-servant question, — a question of "general law," — but decided it for itself as a question which "rests upon those considerations of right and justice which have been gathered into the great body of the rules and principles known as the 'common law.'"

<sup>5</sup> It has not yet been determined, so far as the writer knows, whether parties may provide that their contract shall be governed by the law of the federal courts, but the law of the place of a contract is usually regarded as determined by the decisions of the state courts.

Suppose a "general-law" contract is made after a decision of the state court, on common-law principles, declaring the rights and obligations of parties to such contracts. Suppose the federal court, exercising an independent judgment in a similar case, disagrees with the state court, and then suppose the contract in question comes before the state court and that court overrules its former decision and follows the decision of the federal court. Would such a change of decision by the state court be held to deprive the parties of their constitutional rights under the doctrine laid down in *Muhlker v. N. Y. & H. R. R. Co.*, 197 U. S. 544? Or is the rule of that case inapplicable to cases which fall within the "general" law, and have parties no right to rely upon the principle of *stare decisis* in such cases?

The result of this doctrine of the federal courts is a striking illustration of the difficulties which follow from an attempt to apply at one and the same time, in the same territory, the common-law doctrine of the authority of precedent — the identification of the law of a particular jurisdiction with the decisions of its courts — and the view that the decisions of the courts are only evidence of the law, which other courts, if given the opportunity, may declare differently. In cases of "general" law, the federal courts consider it of more importance that the true general or common law should be declared as the law of the states by the federal courts at least, even at the sacrifice of the common-law principle of singleness of the law within a given territory; while in those cases where the decisions of the state courts have settled a rule of property, the federal courts deem it better to forego their assumed constitutional duty to declare independently the true common law, for the sake of preserving within each state the common-law principle of the authority of precedent and singleness in the law.<sup>6</sup>

The question which it is now necessary to consider is whether this common or general law, which is assumed to be the same in all states, is identical with the common law of England adopted

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<sup>6</sup> See the latest case in the Supreme Court of the United States on this subject, *Kuhn v. Fairmont Coal Co.*, 215 U. S. 349, where the right of the federal court to decide for itself a question relating to real property was sustained, the cause of action having accrued prior to any decision by the state court on the subject, though such a decision was rendered by the state court before the federal case was decided.

Suppose that after the decision of the case by the West Virginia court, but before the case was decided differently by the federal court, parties in West Virginia had entered into a contract similar to that passed upon. If that contract later came before the West Virginia court and that court changed its mind, and, instead of following its prior decision, followed the decision of the federal court, would the doctrine of the *Muhlker* case, 197 U. S. 544, be applied on writ of error from the United States Supreme Court to the state court? Probably it would. But this only shows that the federal court does not declare the law of the state in the common-law sense; its power in such respects is not in fact coördinate with the jurisdiction of the state court. Even on questions of general law it is the decisions of the state courts which in fact determine the law of the state; the federal courts, while purporting to declare the law of the state, are in fact making the law of the federal courts.

Take another example. Suppose a case similar to *Gelpcke v. Dubuque* had come up in the federal court before any decision on the question in the state court. Suppose, after the decision by the federal court, a similar case came up in the state court on a contract made after the decision by the federal court, and the state court disagreed with the federal court. Would the Supreme Court of the United States, on writ of error to the state court, hold that the decision of the state court deprived the parties of their constitutional rights?

by the different states, in many cases by statute, or whether the adopted common law of England is something different from this general common law.

The Supreme Court of the United States has in several instances<sup>7</sup> put the precise question, "What is the common law?" and has uniformly answered it in these words quoted from Kent's Commentaries:<sup>8</sup>

"The common law includes those principles, usages, and rules of action applicable to the government and security of persons and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature."

Such a definition<sup>9</sup> does not materially advance our present inquiry, and merely suggests in another form the question: Did the adoption of the common law of England have the effect merely to confer upon the courts of each state the power to decide for themselves, in the absence of statute, what are the "principles, usages, and rules of action applicable to the government and security of persons and property," regardless of previous decisions by the courts of England or of any other jurisdiction? If so, and if the statement and application of these principles by the courts of each state become binding as authorities only upon the courts of that state, then obviously the result in time can only be a different body of law in each state. If, on the other hand, it is assumed that there is only one consistent and true set of "principles, usages, and rules of action applicable to the government and security of persons and property," that this one set of principles constitutes the common law as it really is, and the decisions of all the courts are only evidence of what this real common law is, then obviously the search for this true common law ought always to be maintained by the courts of every common-law jurisdiction. No principle of *stare decisis* should be applied by state or federal

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<sup>7</sup> *Western Union Tel. Co. v. Call Publishing Co.*, 181 U. S. 92, 101; *Kansas v. Colorado*, 206 U. S. 46.

<sup>8</sup> Vol. i, page 471.

<sup>9</sup> It may be doubted if this definition is any more helpful than the statement of the chancellor in the case of *Marks v. Morris*, 4 Henning & Munford 463: "It was the *common law* we adopted, and not English decisions; and we should take the standard of that law, namely, that we should live honestly, should hurt nobody, and should render to every one his due, for our judicial guide."

courts until the true common law is discovered and everywhere accepted.

We shall find many state courts repeating the statement that it was the English common law that was adopted and not the decisions of English courts, but, as already pointed out, no court in fact treats its *own* decisions as merely evidence of what the common law is. Each court proceeds upon the assumption that it has discovered the real common law, and regards its own decisions as determining the law for that jurisdiction at least, and as controlling in subsequent cases, regardless of any suggestions as to what the common law really is or ought to be. Even if we assume, therefore, that the adoption of the common law of England means the adoption of a single system — one uniform and consistent set of “principles, usages, and rules of action applicable to the government and security of persons and property” — we are yet forced to recognize that each one of the separate states has adopted the common-law principle of the authority of precedent, and acts on the theory that what its courts decide is the real common law governing each question passed upon. No court treats its own decisions as subject to be disregarded as readily as the decisions of the courts of another jurisdiction, on the ground that they do not represent the true adopted common law. If it did, it would not be following the practice of the English courts, and the method of developing and defining the law would be essentially different from that recognized by the English common law. Such an adopted common law would be the English common law with its most distinctive feature left out, — the feature which identifies the law with the rules enforced by the courts.

In short, the acceptance and application of the common-law principle of the authority of precedent in a given jurisdiction eats up and destroys the theory that the decisions of the court are only evidence of the law. The two principles are entirely inconsistent; if you accept one you cannot have the other. Bentham and Blackstone will not work together. But what becomes, then, of the adopted common law of England in this country? What is *that* common law?

In the recent case of *Kansas v. Colorado*,<sup>10</sup> the United States

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<sup>10</sup> 206 U. S. 46.

Supreme Court, after quoting the passage from Kent already referred to, goes on:

“As it [the common law] does not rest on any statute or other written declaration of the sovereign, there must, as to each principle thereof, be a first statement. Those statements are found in the decisions of the courts, and the first statement presents the principle as certainly as the last. Multiplication of declarations merely adds certainty. *For after all, the common law is but the accumulated expressions of the various judicial tribunals in their efforts to ascertain what is right and just between individuals in respect to private disputes.*”

This is a sufficient identification of the common law with the decisions of the courts, and if the first declaration of a principle by any common-law court were followed by all other common-law courts everywhere, or if there were a final court of appeal for all jurisdictions in which the common law is the rule of decision, no further difficulty, perhaps, would be experienced in determining what the common law is. But state courts in declaring the common law do not always follow a prior decision in England or in another state, and the federal courts do not always follow the prior decisions of the state courts whose common law they purport to declare. The result is that there are a great many independent jurisdictions in this country alone, in which the courts are all supposedly engaged in declaring the common law, and there is no final court of appeal to determine what this common law really is. Most of these jurisdictions have expressly adopted the common law of England, but there is great uncertainty as to what this English common law thus adopted is.

If we adopt the language of the United States Supreme Court last quoted, which identifies the common law with the decisions of the courts, it should follow, if the authority of precedent within a single jurisdiction is recognized, that the *English* common law is “but the accumulated expressions” of the *English* courts “in their efforts to ascertain what is right and just between individuals in respect to private disputes.” No courts other than English courts can determine definitely and finally what the law of England is, and the common law of England on any subject cannot possibly be something different from the final and settled determinations of the highest court in England. The common law of England is what the English courts make it. The courts

of New York and Illinois may express an opinion as to the common law of England, but they cannot by any possibility *make* the law of England as the English courts in fact make it, any more than the courts of New York can settle the law of Illinois, or the federal courts, which are in fact courts of another jurisdiction, can make the law of the states in which they sit.

Any other jurisdiction, therefore, which should now adopt the English common law as it is to-day must at least adopt those principles which are now established as the law of England by the decisions of the English courts. There is no English common law which is different from the final decisions of the English courts. To talk, therefore, about adopting the English common law without adopting the decisions of the English courts is to talk about adopting something which does not exist; it is an attempt to adopt the common law, as already stated, with the essential and significant feature of the English common law left out, — the feature which identifies the English common law with the decisions of the English courts. Yet that is what many of our states have attempted to do, and what the federal courts regard all of them alike as having in fact done. The theory is, as it is often expressed, that the “whole body” of the English common law was adopted, without thereby making any English decisions at any period of time controlling authorities in the states. On the other hand, in other states, while it is admitted that English decisions of some period of time are binding upon the state courts, it is not agreed what the period is in which the decisions rendered by English courts should be regarded as controlling, and, as a matter of fact, in most instances the courts in this country treat all English decisions of all periods as of the same consequence, to be followed or not as may be seen fit in each particular case.

Whether we speak of previous decisions in a given jurisdiction, which, under the rule of *stare decisis*, are absolutely binding in subsequent cases, as constituting the law itself, or only as authoritative sources of the law, is of no great consequence. The two statements, properly understood, mean the same thing. But it is important to distinguish such binding decisions from the decisions of the courts of other jurisdictions, which, though they may be sources of law in the sense of furnishing assistance in the matter of reasoning upon the principles involved in a case, are not binding

or controlling sources of law in the decision of subsequent cases in other jurisdictions. In all serious litigation, where the questions involved are never absolutely settled, it is necessary to draw upon all the sources of legitimate legal argument. Opinions rendered in decided cases bearing upon the matter in hand are better sources of law, usually, than expressions of opinion in any other form. Opinions in such decided cases from other jurisdictions, when based on general principles, or on general sources of law common to all courts, will always be persuasive and especially valuable for purposes of argument;<sup>11</sup> *but not because they constitute any part of the adopted common law of England.* That is the point to remember. Decisions of New York courts, for instance, do not represent, in Illinois, any part of the common law of England adopted by the Illinois statute, which provides that the common law of England, so far as applicable, shall be the rule of decision until changed by statute. The English common law thus adopted by statute in Illinois is not necessarily the law of all the states, or a general law which all the states of the Union are constantly pursuing and discovering, much less developing. No doubt the law grows, but not the adopted common law of England which is to remain unaltered until changed by statute. The failure to distinguish between the adopted and binding common law of England, and those general sources of law and right methods of reasoning which may properly be regarded as of the same force and validity in all the states, has been the cause of much of the confusion regarding the meaning of the common law.

From the historical point of view, also, difficulties have existed. No doubt the common law brought to this country by our English ancestors who settled the first colonies in America did not, as a matter of historical fact, consist of all the decisions of English courts rendered prior to such settlements. Our ancestors knew

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<sup>11</sup> No one, therefore, who is to engage actively in the practice of the law anywhere in this country can safely confine his knowledge of the law to the cases of a particular jurisdiction, and it may well be argued that the law schools should aim to fit the lawyer, not to know merely the settled law of any one jurisdiction, but to know the general sources of law and methods of reasoning which will enable him to deal with the unsettled problems. At the same time, if he is to be properly trained in common-law methods of making law, he must know in particular the force and effect to be given in each jurisdiction to the decisions of the courts of that jurisdiction. As a practicing lawyer it will always be with what the courts of some particular jurisdiction will decide that he will be concerned.

little enough about such decisions, and, as a matter of fact, in some of the colonies the law of God was preferred to the common law. The appeal to the protection of the common law by the colonists was not, for the most part, an appeal to the decisions of English courts in matters of private rights, but in matters affecting the personal liberty and political privileges of the citizens.<sup>12</sup> It was a long time before English decisions were known and referred to by the courts in this country in the decision of litigated matters between private parties. After the Revolution and the creation of the states, when settled courts conducted and presided over by lawyers became established, English decisions were generally accepted as authoritative. Whether the adoption by the states of the common law of England meant that English decisions prior to the first colonial settlements were binding upon the state courts, and those after that time were not, was a matter little discussed. As Mr. Gray has said,<sup>13</sup> the decisions of English courts after the settlement of the colonies and before the Revolution had as great and direct an influence, as a matter of fact, upon the decisions of the courts of this country as if they had been considered binding authorities. For a long time the English cases were the only cases to which any reference could be made. It was the practice of the courts then, as it is still, to declare that such and such a rule was the rule of the common law, and refer as authority to English cases, without reference to the date of the decisions relied on. The prejudice which existed for a time in this country against English decisions rendered after the Revolution was not, in particular, a prejudice on the part of the courts. But when, for any reason, the courts did not wish to accept the rules laid down in such decisions of the English courts, the usual method of avoiding their conclusions was by saying that the English decisions were not the law, but only evidence of the law. This, in fact, became the common method of treating all English cases not found acceptable; it was easier than showing in each one of such cases that the principle involved was not applicable to conditions in this country.

Then there was the further practical difficulty, if all English

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<sup>12</sup> See the article by Reinsch, "The English Common Law in the American Colonies," vol. ii, *Bulletin of the University of Wisconsin*, 23.

<sup>13</sup> "The Nature and Sources of the Law," § 525.

decisions prior to a particular period were to be regarded as binding, in the fact that not all of such decisions were accessible to the courts. In such a situation it was easier to adopt the general principles of the common law than its particular applications by the English courts. This practical difficulty is illustrated by two comparatively recent decisions of the Illinois and Kentucky courts.<sup>14</sup> Both courts agree that the question of criminal liability at common law in the case of agreements between competitors to maintain prices is to be determined by the law of conspiracy as settled in England prior to 1606, but they disagree entirely as to what that settled law was, and neither court bases its conclusions entirely upon actual decisions of English courts rendered before 1606. It would be a difficult matter, in the case of many subjects, to state the common law of England as it was prior to 1606 without taking cases since that date into account. Where the common-law method of developing the law by means of the decisions of courts prevails, it is possible to speak of decisions prior to a certain date, but it is very difficult to state the law in general prior to that date without regard to later decisions which have in fact settled the law as, theoretically, it always was in the particular jurisdiction.

It was not until there existed in the different states in this country courts regularly established, prepared to decide cases, write opinions, and apply the common-law principle of the authority of precedent, that it could be said that there was any law administered in this country which was substantially like the common law of England. But when that time arrived, when the highest courts in each state were regularly engaged in deciding cases and applying the rule of *stare decisis* to their own decisions, then there began to develop in each state a law of that state in precisely the same sense that there existed a common law in England developed by the English courts. If English decisions at first, no matter of what period, had as great influence with the state courts as if they were decisions of their own courts, this influence could not continue with the growth of the decisions of the separate state courts. The true state of the case has been concealed by the universal assumption that, at the same time that we adopted or created

<sup>14</sup> Chicago, W. & V. Coal Co. v. People, 114 Ill. App. 75, 104; 214 Ill. 421; and *Etna Insurance Co. v. Commonwealth*, 106 Ky. 864, 880.

common-law courts to determine the common law in each state, we adopted also a whole body of law or system of principles known as the English common law, which, if properly understood and applied, would be a sufficient guide to the courts of each state in the determination of all questions that might come before them.<sup>15</sup> But, as already shown, if the adoption of the common law meant no more than the adoption of this so-called general law, then the application in each state of the common-law principle of the authority of precedent meant, not only the destruction of this general law, but the development in each state of a law different from the common law of England. Only if all English decisions were accepted by the courts in this country, not merely as *evidence* of the English common law, but as identical with it, could it be said that the whole common law of England had been adopted. The refusal to follow English decisions means necessarily the development in each state of a law different from the English law, just as the refusal of the federal courts to follow the decisions of the state courts on certain subjects means the development in the federal courts of a common law different from the law of the states.

The truth of the matter is, therefore, that the greater part of the law of the states which is in fact identical with the common law of England does not consist of the common law of England which was adopted and made binding upon our courts, but it consists of rules established by the English Courts which have in fact been accepted and followed by the courts in this country, without regard to the dates of the English decisions establishing such rules, and without consideration of the question whether such decisions are a part of the adopted common law and binding upon our courts or not. The distinction between English cases which are controlling because part of the adopted common law, and English cases which are not controlling because not a part of the adopted common law, is seldom noticed. The confusion and inconsistency which have resulted from the failure to keep the distinction in mind can be fully appreciated only after a careful examination of the cases in each state. That this confusion has contributed greatly to the uncertainty of the decisions of our

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<sup>15</sup> The statutes which, in many states, expressly adopt the common law of England assume, apparently, that that law will enable the courts to decide all questions that may come before them.

courts there can be no doubt. At one time the decisions of English courts are accepted as conclusive of a question; at another time, or in another jurisdiction where the common law is equally controlling, English decisions are disregarded and a new common law, a law founded upon a supposedly better reason, is established in its place. If we had not adopted the common-law principle of the authority of precedent, the law of the better reason might be accepted as the law which all of our courts, as well as our law schools, should unceasingly strive to discover; but as this principle of the common law has now become established more or less securely in every jurisdiction, we can only hope that in time our courts will be at least as successful as the courts of England in establishing a reasonably definite and certain body of law in each separate state.

## II.

The consideration of a few of the decisions of the courts in this country, if not sufficient to disclose all the uncertainty which has resulted from the failure to determine definitely what is meant by the common law of England, will at least show something of the variety of views entertained by the courts in regard to the adopted common law. Let us examine, in the first place, some of the cases in which the view is expressed that it was the whole of the common law of England that was adopted in this country, and not a portion of it merely, or only certain decisions of the English courts.

In *Williams v. Miles*<sup>16</sup> we have an excellent statement of this theory. In that case the question presented was whether a former will was revived by the destruction of a subsequent will which in terms revoked the former one. Lord Mansfield had held that, in such a case, the former will was revived, while the rule of the English ecclesiastical courts was the other way and was generally followed in this country. It was contended by counsel that the Nebraska statute adopting the common law of England required the court to follow the rule laid down by Lord Mansfield and applied in the English common-law courts, since English decisions prior to the Revolution were made controlling. As to this contention the court says:

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<sup>16</sup> 68 Neb. 463.

"What is the meaning of the term 'common law of England,' as used in chapter 15 a, Compiled Statutes?<sup>17</sup> Does it mean the common law as it stood at the time of the Declaration of Independence, or as it stood when our statute was enacted, or are we to understand the common-law system, in its entirety, including all judicial improvements and modifications in this country and in England, to the present time, so far as applicable to our conditions? We can not think, and we do not believe this court has ever understood, that the legislature intended to petrify the common law, as embodied in judicial decisions at any one time, and set it up in such inflexible form as a rule of decision. The theory of our system is that the law consists, *not in the actual rules enforced by decisions of the courts at any one time*, but the principles from which those rules flow; that old principles are applied to new cases, and the rules resulting from such application are modified from time to time as changed conditions and new states of fact require. . . . The term 'common law of England,' as used in the statute, refers to that general system of law which prevails in England, and in most of the United States by derivation from England, as distinguished from the Roman or Civil Law system, which was in force in this territory prior to the Louisiana purchase. Hence the statute does not require adherence to the decisions of the English common-law courts prior to the Revolution, in case this court considers subsequent decisions, either in England or America, better expositions of the general principles of that system."

In this view, the adoption of the common law gives to the court of Nebraska the fullest power to determine for itself what it regards as the soundest or preferable common-law doctrine upon any subject.

In *Chilcott v. Hart*<sup>18</sup> it was contended by counsel that the Colorado statute,<sup>19</sup> adopting the common law, made English decisions prior to 1607 controlling where not changed by statute, while

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<sup>17</sup> The statute reads: "So much of the common law of England as is applicable and not inconsistent with the Constitution of the United States . . . is adopted and declared to be law within said territory."

<sup>18</sup> 23 Col. 40.

<sup>19</sup> The Colorado statute is similar to that of Illinois and several other states, all of which follow the Virginia act of 1776, and provide that "the common law of England, so far as applicable and of a general nature, and all statutes or acts of the British Parliament made in aid of, and to supply the defects of the common law, prior to the fourth year of James the First, and which are of a general nature and not local to that kingdom, shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority."

English decisions since that time were not; that prior to 1607 the English rule was that executory devises which did not vest within lives in being were void, and that the period of twenty-one years and a fraction was not added until later, and therefore was not in force in Colorado. The contention as to what the law of England was prior to 1607 was probably unsound, but the court deals with the question of the common law of England that was adopted by the Colorado statute, and says:

“The rule against perpetuities was of slow growth, and in its development it was for no considerable period, if at all, that the time was thus limited to one life only. The common law thus being a constant growth, gradually expanding and adapting itself to the changing conditions of life and business from time to time, what the law is at any particular time must be determined from the latest decisions of the courts; and the recognized theory is that, aside from the influence of statutory enactments, the latest judicial announcement of the courts is *merely declaratory of what the law is and always has been*. We are at liberty, therefore, if not absolutely bound thereby, to avail ourselves of the latest expression of the English courts upon any particular branch of the law, in so far as the same is applicable to our institutions, of a general nature, and suitable to the genius of our people, *as well as to consult the English decisions made prior to 1607.*”

The Colorado court evidently agrees with the Nebraska court in regard to the adopted common law, although the statutes of the two states are not the same. In fact, statutes similar to that of Colorado have been construed in Illinois and Kentucky at least as adopting the English common law as it existed prior to the fourth year of James the First. The Nebraska statute, which contains no reference to the fourth year of James the First or any other period, is construed merely as excluding the civil law (which might otherwise be claimed to be in force in a state originally a part of Louisiana territory) or any other law which might be considered as different from the common law. What the adopted common law is, is left to the determination of the Nebraska court, and, as the Nebraska case above referred to shows, the court considers itself at liberty to prefer the rule of the English ecclesiastical courts to that of the English common-law courts, or even to adopt as preferable a rule different from that of the English courts.

It might be difficult, perhaps, to suggest any different interpre-

tation which could be given to such a statute as that of Nebraska, and the courts of other states which have adopted a similar statute seem to regard the adopted common law in the same light. For instance, in *Lux v. Haggin*<sup>20</sup> the question was as to the rule to be applied in California regarding the right of a riparian owner to appropriate the waters of a stream. The common law of England, by a statute passed in 1850, had been made "the rule of decision in all the courts of this state," and the court says that "the expression 'common law of England' designates the English common law as interpreted *as well in the English courts* as in the courts of such of the states of the Union as have adopted the English common law." The court then goes on:

"And it was not the common law 'as the same was administered' at a certain date that was adopted, *but the common law*. . . . The statute adopts the common law of England, except where inconsistent with the constitution and statutes, and there can be no good reason why, to ascertain the common law of England, we should not refer to the decisions of English and American courts (in states where the common law prevails) rendered before and subsequent to the date of the statute.

*Looking at the whole array of adjudications*, if we find a question has often been decided in one way . . . the rule of the common law involved or presented in the question ought to be considered as settled. . . . Where the rule has become settled, it is not, as opposed to any former decision, a new rule, but must be held to have been the law from the beginning, because 'right reason' has always been the prime element of the law. . . . Courts do not repeal former decisions: when they reverse them they hold they were never law."

The statute of the state of Washington is substantially like that of California. The case of *Sayward v. Carlson*<sup>21</sup> presented the fellow-servant question, and the court held it was not obliged, by the statute adopting the common law, to follow English decisions, that American courts as well as English courts decide what the common law is. "Therefore," the court says, "we have the common law as declared by the highest courts of this, that, and the other state, and by the courts of the United States, sometimes varying in each."

Many more expressions similar to those above quoted might

<sup>20</sup> 69 Cal. 255.

<sup>21</sup> 1 Wash. 29.

be given from the decisions of other state courts. It is not too much to say that they express the generally accepted view in most of the western states where the common law has been adopted by statute. Where the common law of England has not been adopted by express statute, some cases, as in Ohio, apparently hold that there is a common law of the state of which the law of England forms a part.<sup>22</sup> No English cases evidently are made controlling. In Pennsylvania, in the case of *Lyle v. Richards*,<sup>23</sup> we find the statement that our ancestors "brought with them the common law *in general*, although many of its principles lay dormant, until awakened by occasion."

The law which is followed or declared by the United States courts in connection with the decision of questions of so-called general law, where the rule of *Swift v. Tyson* applies,<sup>24</sup> and in cases where the federal courts have a special or exclusive jurisdiction, is a general common law substantially like that adopted in the states to whose decisions reference has already been made. Whether there is a common law of the United States — a much-discussed question — depends obviously upon what is meant by the common law. In connection with the classes of cases above referred to, the federal courts are developing a separate law in the same sense and by the same methods that the state courts are developing what is called the common law in the states.

This is clearly stated by the Court of Appeals for the Eighth Circuit in the case of *Murray v. C. & N. W. Ry. Co.*,<sup>25</sup> where the court says:

"It has always been assumed that the federal courts were endowed with a power and jurisdiction adequate to the decision of every cause, and every question in a cause, presented for their consideration, and

<sup>22</sup> *Railroad Co. v. Keary*, 3 Oh. St. 201, 205; *Bloom v. Richards*, 2 Oh. St. 387, 390. See also *State v. Cawood*, 2 Stew. (Ala.) 360, 362.

<sup>23</sup> 9 Serg. & Rawle 330.

<sup>24</sup> An inconsistency in the application of the doctrine of *Swift v. Tyson* should be noticed. When a state adopts a statute governing matters of so-called general law, the federal court follows the statute and the decisions of the state courts interpreting it. Yet state statutes adopting the common law, and the decisions of the state courts determining the meaning of the statute, are disregarded by the federal courts, even though the common law of England, as adopted by statute, does not mean the same thing in every state.

<sup>25</sup> 92 Fed. 868.

of applying to their solution and decision any rule of the common law, admiralty law, equity law, or civil law applicable to the case, and that would aid them in reaching a just result, which is the end for which courts were created. If a case is presented not covered by any law, written or unwritten, their powers are adequate, and it is their duty to adopt such rule of decision as right and justice in the particular case seem to demand. It is true that in such a case the decision makes the law, and not the law the decision, but this is the way the common law itself was made and the process is still going on. A case of first impression, rightly<sup>26</sup> decided to-day, centuries hence will be common law, though not a part of that body of law now called by that name."<sup>27</sup>

And in the recent case of *Kansas v. Colorado*<sup>28</sup> the United States Supreme Court speaks of its decision of cases connected with boundary disputes between the several states as being in effect the creation of an "interstate common law." It is difficult to see, therefore, any real difference between the general or common law which the federal courts rely on in the decision of such matters, and the common law which states like Nebraska, Colorado, and California have adopted as the rule of decision for their courts in such cases as come before them. The only controlling body of law in any case is the law which the courts, state and federal alike, make, unless it can be said that the state courts are excluded from preferring a rule of the civil law as preferable to a settled rule of the common-law courts of England, while the federal courts are not. And, as a matter of fact, there are many principles established as law in the various states which have been introduced at different periods from the civil law, and which are not a part of the original common law of England.<sup>29</sup> The body of common law which is said to exist in the states is in no essential respect a different source of law from that which the federal courts rely upon.

Let us consider now some of the decisions in which the view is expressed that the adoption of the common law of England meant,

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<sup>26</sup> Is the use of this word intended to suggest that the common law consists of all cases rightly decided in all jurisdictions?

<sup>27</sup> See also *Western Union Telegraph Co. v. Call Publishing Co.*, 181 U. S. 92.

<sup>28</sup> 206 U. S. 46.

<sup>29</sup> See Professor Beale's article in 23 HARV. L. REV. as to the adoption of the civil-law rule with respect to the law which governs a contract, an especially important question in this country.

not the adoption of the whole common law, but the adoption of the common law as it existed in England prior to some particular period, so that English cases prior to that time became binding upon the courts in this country.

The most interesting, and perhaps the most logical, view in this connection is that expressed by Chief Justice Marshall to the effect "that as the common law of England was and is the common law of this country, and as an appeal from the courts of Virginia lay to a tribunal in England, which would be governed by the decisions of the courts, the decisions of those courts, made before the Revolution, have all that claim to authority which is allowed to appellate courts."<sup>30</sup> Marshall states this theory again in two other cases,<sup>31</sup> but, in spite of the weight which is usually attached to an opinion of Marshall's, the view never gained general acceptance, although it is referred to with apparent agreement in some other cases,<sup>32</sup> and was accepted by Cooley as the correct exposition of the matter.<sup>33</sup> It is much easier, however, to find cases which state that English cases after the Revolution are not binding than it is to find cases where an English decision prior to that time, but after the settlement of the colonies, is followed for the reason merely that it is a binding authority.<sup>34</sup>

In some states the common law as it existed down to the time of the Revolution<sup>35</sup> is declared, either by a constitutional or statutory provision, to be in force. For instance, the Florida statute provides that "the common law and statute laws of England which are of a general and not of a local nature . . . down to the fourth day of July, 1776," shall be in force in that state. Without making a more careful search of the authorities in these states than the writer has found time for, it is impossible to say, however, that English decisions after the settlement of the colonies and before the Revolution are held in any of these states to be absolutely binding.

The prevailing view in the eastern states of the country seems

<sup>30</sup> *Murdock & Co. v. Hunter's Rep.*, 1 Brock. 135, 140-141.

<sup>31</sup> *Cathcart v. Robinson*, 5 Pet. (U. S.) 264, 280, and *Livingston v. Jefferson*, 1 Brock. 203, 210.

<sup>32</sup> *Johnson v. U. P. Coal Co.*, 28 Utah 46; *Mayor v. Williams*, 6 Md. 235, 265.

<sup>33</sup> Cooley, *Constitutional Limitations*, chapters iii and iv.

<sup>34</sup> Gray, *Nature and Sources of the Law*, p. 232.

<sup>35</sup> For example, New York, Georgia, and Florida.

to be that decisions of English courts prior to the settlement of the colonies, particularly if regarded in England as establishing or settling the law of England, are to be regarded by the state courts as binding upon them. This, apparently, is the view which is taken also in those states which follow the Virginia statute of 1776, for instance Kentucky and Illinois. In *Ray v. Sweeney*<sup>36</sup> the Kentucky court holds that it is the common law as it existed prior to March 24, 1606, that is adopted, and says:

"To declare that the common law and statutes enacted prior to that time should be in force, was equivalent to declaring that no rule of the common law not then recognized and in force in England should be recognized and in force here, . . . and when it is sought to enforce in this state any rule of English common law as such, *independently of its soundness in principle*, it ought to appear that it was established and recognized as the law of England prior to . . . [March 24, 1606]."

In Illinois the statute seems to be given the same construction, although there has been considerable uncertainty in the decisions from the beginning. For instance, in *Penney v. Little*,<sup>37</sup> one of the earliest cases, the court said it did not consider itself restricted to the limits of the common law of England as it was prior to 1606, without subsequent improvements and modifications, "for the simple reason that it is more than two hundred years behind the age." Then, in a case a little later, *Gerber v. Grabel*,<sup>38</sup> the court accepted the English doctrine in regard to ancient lights on the ground that the English common law as it existed prior to the fourth year of James the First was adopted by the statute, while Judge Caton, in a separate opinion, expressed the view that it was the common law as administered in England at the time the Illinois statute was enacted that was adopted, although only English statutes prior to 1606 were included. In *Guest v. Reynolds*<sup>39</sup> the doctrine of ancient lights was repudiated on the ground that it was inapplicable to conditions existing in Illinois, and the court stated that it was not authoritatively settled prior to what period of time the common law was regarded as adopted. In *People v. Williams*<sup>40</sup> the court refers to the statute and says, "Thereby the great body of the English common law became, so far as appli-

<sup>36</sup> 14 Bush (Ky.) 1.

<sup>39</sup> 68 Ill. 478.

<sup>37</sup> 3 Scam. (Ill.) 301.

<sup>40</sup> 145 Ill. 573.

<sup>38</sup> 16 Ill. 217.

cable, in force in this state." Finally, in the Revell case,<sup>41</sup> which involved the right of shore owners to build structures out into the lake, the court says that the statute adopts "the common law as it existed prior to March 24, 1606," and that, "in the absence of any statute of the state changing the common law in regard to rights of riparian or littoral owners, the common law *as it then existed* must control."

The interesting point to notice in connection with this last Illinois case referred to is, that the particular rule accepted and applied, because a part of the common law of England as it existed prior to 1606, was in fact settled by a decision of the House of Lords<sup>42</sup> in 1876, as the Supreme Court of the United States says,<sup>43</sup> "after conflicting decisions in the courts below." Apparently, therefore, the Illinois court considers the recent decision of the House of Lords a conclusive determination of the common law as it in fact existed prior to the fourth year of James the First. It should be noticed also that, in a recent New York case,<sup>44</sup> the question decided in the Revell case is decided differently, although the New York court admits that the constitution of New York adopted the common law of England as it existed prior to the Revolution. The New York court, however, does not base its decision upon the ground that recent English decisions are no part of the common law, but on the ground that the principle of the English cases is inapplicable to conditions existing in New York. Yet in a recent English case<sup>45</sup> the House of Lords, referring to the case decided by it in 1876, says that "that decision was arrived at not upon English authorities only, but on grounds of reason and principle, which must be applicable to every country in which the same general law of riparian rights prevails, unless excluded by some positive rule or binding authority of the *lex loci*," and therefore applies the rule to Canada. These cases sufficiently illustrate the difficulties of determining what the adopted common law is and how it is discovered, as well as what principles of the common law the courts may consider applicable to conditions existing in this

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<sup>41</sup> 177 Ill. 468.

<sup>42</sup> *Lyon v. Fishmongers' Co.*, 1 App. Cas. 662.

<sup>43</sup> *Shively v. Bowlby*, 152 U. S. 14.

<sup>44</sup> *Town of Brookhaven v. Smith*, 188 N. Y. 74.

<sup>45</sup> *North Shore Ry. Co. v. Pion*, 14 App. Cas. 620.

country. A common law which is to be the rule of decision until altered by the legislature ought not readily to be held inapplicable by the courts.

It is worth noticing also that the law merchant, which did not become a part of the common law of England, so that it need not be proved as a foreign law, until the eighteenth century, is nevertheless considered a part of the adopted common law in this country.<sup>46</sup>

It has already been noticed that the Kentucky and Illinois courts, although they apparently agree as to the construction of the statutes adopting the common law, disagree as to what the common law of conspiracy was prior to 1606. In the Kentucky case<sup>47</sup> the court says:

"In the volumes of Wright and Stephen all the English cases cited on behalf of the Commonwealth are considered and discussed, and it is very conclusively shown that prior to 1607 there was no such thing at the common law as criminal conspiracy, except the confederacy for the false and malicious promotion of indictments and pleas, or for embracery or maintenance of various kinds, and that whatever may have been the *dicta* of the judges who decided subsequent cases, or the deductions drawn therefrom by some of the text-writers, the cases themselves, for more than two hundred years thereafter, do not support the contention made on behalf of the Commonwealth."

On the other hand, the Illinois court holds<sup>48</sup> that by the adopted common law every conspiracy which has a tendency to prejudice the public in general is a crime. The court says:

"We must look to the acts of Parliament enacted and to the judicial decisions handed down prior to the fourth year of James I for evidence of what the common law is. An examination of them shows that the points made and the conclusion reached by the learned judge in *State v. Buchanan*<sup>49</sup> are clear and correct statements of the common law concerning conspiracy as it existed at the time from which we adopted the same."

In concluding our examination of the cases it will be well to notice the Maryland case which is referred to by the Illinois court

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<sup>46</sup> *Cook v. Renick*, 19 Ill. 598; *Piatt v. Eads*, 1 Blackf. (Ind.) 81.

<sup>47</sup> *Ætna Insurance Co. v. Com.*, 106 Ky. 864, 880.

<sup>48</sup> *Chicago, W. & V. Coal Co.*, 114 Ill. App. 75, 104.

<sup>49</sup> 5 H. & J. (Md.) 317.

in the case last referred to, because it states the theory of the adoption of the whole common law in a form which we might have expected to come across more frequently, — a theory, however, which the Illinois court was hardly justified in relying on for ascertaining the common law prior to 1606. The court in that case first says that “it is to judicial decisions that we are to look, not for the common law itself, *which is nowhere to be found*, but for the evidences of it,” and then, after referring to English cases decided prior to the settlement of Maryland, goes on to say that it is a mistake to suppose that later English cases

“are expansions of the common law, *which is a system of principles not capable of expansion, but always existing*, and attaching to whatever particular matter or circumstances may arise and come within the one or the other of them. . . . *Precedents therefore do not constitute the common law, but serve only to illustrate principles.* And if there were no other adjudications on the subject to be found, the judicial decisions since the colonization furnish *conclusive evidence*, not only of *what is now understood to be the law of conspiracy* in England, so far as these decisions go, *but of what were always the principles on which that law rests.*”

The court then says that the section of the Maryland Bill of Rights adopting the common law of England “has no reference to adjudications in England anterior to the colonization, or to judicial adoptions here of any part of the common law during the continuance of the colonial government, but to the common law *in mass*, as it existed here, *either potentially or practically*, and as it prevailed in England at the time.”

If what we have adopted is indeed the whole common law, or the common law “in mass,” then it may well be that, rather than to speak of a developing common law, which is in constant process of improvement by means of the decisions of the courts in all common-law jurisdictions, as is maintained by the courts of some of the states, it is better and more logical to adopt, with the Maryland court, the timeless, unchangeable, complete, and perfect common law which exists nowhere. Then, in truth, only those cases, “rightly decided,” as stated in the opinion of the federal court before referred to, would constitute conclusive evidence of the true common law; and no court could content itself, in the decision of any case, with the application of the easy rule of *stare decisis*, but

must determine each time that the decision to be followed is indeed rightly decided and in harmony with the true common law.

As has been previously explained, however, the constant search by the courts for the true common law (particularly if it is nowhere to be found) means the elimination of the principle of the authority of precedent, the distinguishing characteristic of the English common law. That principle of the common law of England at least has been accepted and applied to such an extent by our courts that, in most states to-day, any supposed duty on the part of the courts continually to review and modify their decisions to keep them in harmony with a true common law is lost sight of in the ever-present problem of the systematic and consistent development of the law in each state in accordance with common-law methods, and the principle of *stare decisis* in particular. The adoption of the common law of England has resulted in the creation in each state of courts possessed of the power of making and developing the law in each state as the English courts make it in England, and not with the power only of the courts of the countries where the civil law or some other system of law prevails. The exclusion of the civil law by the adoption of the common law has meant that at least. The first question always in every common-law jurisdiction is the determination, with respect to any question, of the already settled law of that jurisdiction. If English cases of some period, as well as cases already decided by the courts of each state, are to be regarded as controlling authorities, it is important that it should be known what those cases are. The previously settled law being ascertained, then, if the case in hand is not concluded thereby, other sources of law may be resorted to. But the fundamental problem in each jurisdiction is the systematic, consistent, and, so far as possible, certain development of the law by means of the cases decided by the courts which make the law for that jurisdiction. So only will the law in each state develop in accordance with the essential principles of the English common law.

*Herbert Pope.*

CHICAGO, ILL.

A  
S U P P L E M E N T  
TO THE  
I N V E S T I G A T I O N  
O F T H E  
N A T I V E R I G H T S  
O F  
**British Subjects.**

B Y  
FRANCIS PLOWDEN, Esqr.

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— Veritas nil veretur nisi abscondi.

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L O N D O N,

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M D C C L <sup>126</sup> X X V.

(1785)

or reference to the statute *de natis ultra mare*, their adopting the disjunctive sense, is a Legislative construction of that statute in the *disjunctive*: if not, they must at least establish a rule from parity of reasoning so to interpret it.

I will conclude my observations upon the statute *de natis ultra mare*, with a repetition of Lord BACON's words: " By  
 " the Law of England it should suffice  
 " either place or parents. If he be born  
 " in England, it is no matter, though  
 " his parents be Spaniards or what you  
 " will. On the other side if he be born  
 " of English parents, it skilleth not  
 " though he be born in Spain, or in any  
 " other place of the world." Such then  
 is the common Law of England, and  
 with this agree HUSSEY, RASTAL, BROOK,  
 FITZHERBET, &c. Now " It is a good  
 " exposition of a statute, when the reason  
 " of the common Law is pursued (a)." And " In all doubtful matters, and where  
 the

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(a) 2 Inst. 48. 308. Co. Lit. 172.

“ the expression is in general terms,  
 “ they are to receive such a construction,  
 “ which may be agreeable to the rules  
 “ of the common Law, in cases of that  
 “ nature : for statutes are not presumed  
 “ to make any alteration in the common  
 “ Law, further or otherwise than the  
 “ Act does expressly declare; therefore  
 “ in all general matters, the Law pre-  
 “ sumes the Act did not intend to make  
 “ any alteration : for if Parliament had  
 “ had that design, they would have ex-  
 “ pressed it in the Act (a).” Parliament  
 did probably in this instance make one  
 alteration in the common Law, which  
 was the requisition of the husband’s con-  
 sent for the wife to quit the kingdom :  
 and therefore they expressed it in the Act.  
 But it cannot be supposed, much less  
 proved, that if the guilt of high treason  
 in either of the parents were to exclude  
 their children from the benefit of the Act,  
 in the same manner as the wife’s quitting  
 the

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(a) 11 Mod. 150.

the kingdom against the consent of her husband, that such exception should have been overlooked or omitted to be mentioned by that Parliament, which was actually at that time so busily employed in ascertaining the Law of treason. And, as I said before, since the foreign birth of the child depends solely upon the mother's quitting the kingdom, therefore the statute has very properly annexed the only condition of the Law to her; for there is not a shadow of pretence to say, that the husband's being within or without the kingdom at the time of his child's birth, causes any difference in the operation of the Law: nor can it be even surmized, that the attainder of the husband, obstructs the operation of the common Law upon the wife, by which every subject is authorized to quit the kingdom without licence. And in fact, the Law, by which every subject has licence to quit the realm, is a demonstration, that their children born out of the realm are by common Law natural born subjects; or otherwise it would be at

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A  
GENERAL ABRIDGMENT  
OF  
**Law and Equity,**

ALPHABETICALLY DIGESTED UNDER  
PROPER TITLES;

WITH NOTES AND REFERENCES  
TO THE WHOLE.

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BY CHARLES VINER, Esq.  
FOUNDER OF THE VINERIAN LECTURE IN THE UNIVERSITY  
OF OXFORD.

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*FAVENTE DEO.*

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M. DCC. XCI.

L. E. 13077 d. 22.1

† And therefore all persons born in Normandy, Gascony, Guyen, Anjou, and Bretagne, while they were under the actual obedience of the king of England, were inheritable within this realm as well as Englishmen, because they were under one ligeance due to one sovereign; and therefore persons born in the isles of Guernsey and Jersey, parcel of the dukedom of Normandy, though no parcel of the realm of England, but several dominions enjoyed by several titles, and governed by several laws, are inheritable to lands within the kingdom of England. 7 Rep. 20. b. 21. a.—But persons born in other parts of Normandy, &c. now out of the actual possession of the kings of England, are not, for that reason, subjects of the kings of England. 7 Rep. 18. a.

‡ And therefore the *Antenati* in Scotland were aliens born. 7 Rep. 18. b. in Calvin's case.—And the uniting the kingdoms by descent subsequent cannot make him a subject to that crown, to which he was an alien at the time of his birth; but if the kingdoms should by descent be divided and governed by several kings, yet all those born under one natural obedience, while the realms were united, will not be aliens; for naturalization vested by birth-right, cannot by a separation of the crowns afterwards be taken away; nor can he that was by judgment of law a natural subject at the time of his birth, become an alien by such a matter, *Ex post facto*. 7 Rep. 27. a. b.—S. P. & S. C. cited by Vaughan Ch. J. Vaugh. 285. 287. in case of *Craw v. Ramsey*.

19. An alien is a subject that is born out of the allegiance of the king, and under the ligeance of another. 7 Rep. 16. in Calvin's case.

Secus if the wife be a  
[ 263 ]  
foreigner.  
Jenk. 3. pl. 2.

20. If ambassador in a foreign country has issue there by his wife, an Englishwoman, by the common law they are natural-born subjects, and yet they are born out of the king's dominions. 7 Rep. 18. a. in Calvin's case.

Mar. 91. pl. 250. S. C. resolved accordingly.  
—Jenk. 3. pl. 2. cites S. C. accordingly; for the vocation of a merchant requires a long commerce abroad, if he will not trust his fortune wholly to factors.—Sid 198. cites S. C.—S. C. cited by Hale Ch. Baron in his argument, as adjudged by all the justices of England.

21. A merchant trading in Poland married an alien, and died, leaving her big with child. It was held that the father, being an English merchant, and living abroad for merchandize, the after-born child is born a denizen, and shall be heir to him; for as Berkley J. said, she is sub potestate viri & quasi under the allegiance of our king. And per Brampton, though the civil law is that partus sequitur ventrem, yet our law is otherwise, and the child shall be of the father's condition, and he being an English merchant, and residing there for merchandize, his children shall by the common law, or rather, as Berkley said, by the statute 25 E. 3. be accounted the king's lieges, as their father was. And another case being cited to have been adjudged 2 Car. accordingly, judgment was given for the plaintiff, the after-born child. Cro. C. 601. pl. 5. Hill. 16 Car. B. R. Bacon v. Bacon.

So where such merchant had several children born in Poland of a Polish woman, and devised his lands in England to such children; and it being demanded of all the justices of England at Serjeant's-inn, as Yelverton J. said, they made no scruple any of them but that the issue should inherit, and were not aliens, because the father went with licence, being a merchant, and in our law partus sequitur patrem; and also there is blood between him and his issue, and he communicates nature to them; and the judges said that this issue have *Fidem utriusque regis*, both of England and Poland. And several of the judges took it, that the words of 25 E. 3. *De natis ultra mare, ubi sunt patres et matres &c.* or shall be of the allegiance of the king, shall be taken distributive & non copulative, fathers or mothers. But the reporter adds a note, that no such opinion was delivered by some of the justices as mentioned by Yelverton J. Litt. Rep. 28. 29.

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concerns. Naturalized strangers, like immigrants' children, were dangerous in so far as they might be treated as English, evading aliens' customs duties and trading on an equal footing with the true subjects of the realm. Equal taxation meant a loss of revenue. The right to trade as English meant that trade fell into the hands of strangers, for it was a given that aliens, once naturalized, would remain tied in affection to their brethren at home and abroad. Such objections to naturalization implied that true subjecthood could *never* be granted. Seen hand in hand with the rejection of equality for the children of strangers, it also confirmed the primacy of English descent as the sole means of granting true belonging.

As in the later years of the Commonwealth, the City continued to protest any possible favors for strangers or their children, as well as further moves on the part of the new government in the direction of naturalization. In July 1660 the lord mayor and aldermen, assembled in the Court of Common Council, petitioned Parliament asking the House of Commons to ignore further requests on the part of strangers for their naturalization. The petitioners asked that the House might continue to protect the "birth rights and privileges" of the king's subjects, granted them "by the providence and tender care of so many successors of generations" and to ensure that "the strangers who are now petitioners for it may not share in them, by an act of naturalization." The consequences of inaction, they argued, would be many and dire, not least of which would include a catastrophic loss of trade for the natural-born English. Once naturalized, strangers "may export our manufactures on equal terms with us the natives." As a result, "their relations beyond the seas in all parts, who formerly bought them of our English factors will now have them wholly from these new English men." The *true* English, and the kingdom as a whole, "shall lose all the benefit of the foreign trade."<sup>131</sup>

The 1660s were, in fact, a mixed bag, bringing new measures for the naturalization of strangers together with the ongoing exclusion of their English-born children. A 1662 statute for "preventing frauds and regulating abuses in his Majesty's customs" contained a provision that "no children of aliens under the age of twenty-one years be permitted to be traders or any goods or merchandizes to be entered in their names."<sup>132</sup> The full rights of all English-born were, apparently, open to question in Westminster too, and in a manner that received royal assent.

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<sup>131</sup> CLRO, CC Jour., vol. 41, fols. 238v–39v. The Commons received a delegation from the City delivering this petition (or one like it) on 3 August 1660. They referred it to committee; see *Journal of the House of Commons*, vol. 8, p. 111. Statt cites similar arguments against naturalization made in print during the same year, such as *Reasons Humbly Offered to the Parliament by the Free-Born Merchants of England; To the Right Honourable the Commons in Parliament Assembled: the Humble Petition of the Native Merchants of England; The Great Evil of Naturalizing Aliens Discovered by the City's Reply to the Aliens' Petition*, cited in Statt, *Foreigners and Englishmen*, pp. 58–60, 233 n. 66, 67, 68. These denounced the 1657 naturalizations and raised points almost identical to both the City's objections of that year and the petition of 1660.

<sup>132</sup> 14 Car. II c. 11. See *Statutes of the Realm*, vol. 5, pp. 393–400.

# Subjects, Citizens, Aliens and Others

Nationality and Immigration Law

Ann Dummett  
and Andrew Nicol

between the theoretical powers of the colonial governors and the powers they were actually able to enforce. All these factors made for variety and often for vagueness because of the difficulty of delineating where authority lay when theory said one thing and practice another.

One of the powers which colonial leaders assumed, with or without a clear grant to that effect, was the power to naturalise. Here lay the seed of a huge growth of confusion, which flourished into the twentieth century. Local naturalisation made a person into a subject of what was neither an autonomous sovereign state by itself nor an integral part of a larger sovereign state. A person naturalised by the legislature in, say, Virginia was made a British subject and owed allegiance to the king, but outside Virginia the same person was still an alien.

The law on this matter was stated in 1669, in a case that was concerned with the position in Ireland. In 1634, the Irish Parliament had passed a statute which naturalised all the Scots, *antenati* and *postnati* alike. In *Craw v. Ramsey* in 1669,<sup>9</sup> an English court had to consider the position in England of an *antenatus* Scot who had been naturalised in Ireland. It held that naturalisation in Ireland did not make a person a subject in England, because legislation was effective only within the territory over which the legislator had authority. But a person naturalised in England *was* a subject in Ireland, because Ireland was subordinate to England; it had been 'conquered and subjected'.

It followed that anyone naturalised under a statute passed at Westminster would be a subject anywhere in the king's dominions. A number of such statutes were passed during the eighteenth century: for example, the Plantation Act of 1740,<sup>10</sup> by which a person resident in an American colony for seven years, and not absent from it for more than two months at a time in that period, would be deemed to be a natural-born subject of Great Britain on payment of two shillings. Although an imperial statute of this kind offered rights superior to those obtainable by local naturalisation, many immigrants to the colonies did not want closer ties with Britain and preferred the local process.

The point of becoming naturalised in a colony was to own land there or to enjoy commercial privileges denied to aliens. An alien could travel to, and settle in, a colony without restriction, and could even enlist in its army. (Everywhere in the eighteenth century, national origin was irrelevant to service in a state's armed forces: the

lower ranks were generally poor conscripts, and many rulers employed mercenary troops.) By an Act of 1761, the Westminster Parliament provided that foreign Protestants who had served two years in the Royal American regiment or as engineers in north America were naturalised by imperial statute.<sup>11</sup> This Act, and that of 1740, barred the persons naturalised under them from the Privy Council, Parliament and office under the Crown in Great Britain and Ireland, but not 'in the dominions thereunto belonging', and thus persons naturalised in colonies could enjoy full political rights there.<sup>12</sup> Already, in fact, without express approval from Westminster, some colonies had been extending full rights to their naturalised inhabitants.

Thus, in effect, there was a system of separate nationalities within the British empire though there was only one name for them all: the British subject. By the early twentieth century, if a locally naturalised person from a colony, who was a British subject in that colony but not outside it, wanted to claim the protection of the British Crown for any reason in another country (if, say, his goods had been seized by another country's government) the device used by the British authorities was to regard the claimant as a British protected person, an alien under the Crown's protection.<sup>13</sup> From other countries' points of view, such a British protected person was indistinguishable from a British subject: both were British nationals on the international plane. The distinction was important only within the British empire.

### III

The Plantation Act 1740 exempted Jews and Quakers from having to take the sacrament in some Protestant congregations, and modified the wording of the oaths for their benefit. Some Jews in England, who played an important part in the commercial life of the empire, complained that it was unfair for them to be treated less favourably in the mother country than they would be in the colonies. In 1656, Cromwell had permitted Jews to return to England. The Levellers had argued for toleration of the Jews; Puritanism's emphasis on the Old Testament had stimulated interest in them, and in a revealing remark the preacher Hugh Peters had asked that 'strangers, even Jews, be permitted to trade and live with us'. Charles II, after his return, allowed the Jews to remain, and their English-born children became subjects under the *ius soli* rule. Although, like other non-Anglicans, these Jewish subjects were excluded from public life and the universities, they came to play an active part in English social and intellectual life.

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**1809.**

Lord Chancellor ELLESMERE's Speech in the Exchequer Chamber, in the Case of the POSTNATI (c).

My lords: Mine age, mine infirmities, and indisposition of health, my decaying and weakness of memorie, and *desuetudo*, and long discontinuance from this manner of legall exercise (aboue foureteene yeeres) haue bereaued mee of the meanes and helps that should inhabilitate mee to speake in so great a case.

I feare therefore, that it will be deemed presumption (if not worse) that I aduenture to speake heerein at all; specially after so many

learned and iudicious arguments of so many graue, learned, and reuerend iudges.

To say the same that hath bene said, must needes be vnpleasaunt, wearisome, and loathsome to the hearers; and not to say the same is to speake little to the purpose: for, what more can bee said than hath bene?

Yet, for that the case is depending in Chancerie, and adourned hither for difficultie in law, and there I must giue iudgement accord-

(c) This Argument was printed in 1609, with the following title:—The Speech of the Lord Chancellor of England, in the Exchequer-Chamber, touching the Post-nati. Before the Speech there was the following Address to the reader:

“To the louing readers; Before I presumed to speake in the Eschequer-Chamber in R. C. case (which is now commonly called the Case of Post-nati.) I considered mine age and infirmities, and how long I had discontinued from such legall exercises. I might hereupon haue iustly challenged the priuiledge of silence. But greater and weightier reasons ouer-ruled mee, and enforced mee to waite the benefit of that priuiledge: for, looking into the nature of the question then in hand, and examining the circumstances, I found the case to bee rare, and the matter of great import and consequence, as being a special and principall part of the blessed and happy Vnion of Great Britaine. —I heard many learned and iudicious arguments, made by the reuerend Judges: and finding that they did not all concur in opinion (though the number was indeede so few, of them that differed, that in Greeke it woulde not make a plurall number) and that some things were by them omitted, which seemed to mee to bee both pertinent to the matter, and necessary to bee knowne, and more proper and fit to bee spoken by me respecting the place I should, than by them, that did wholly binde themselves to the forme and rule of legall argument and discourse: I thought that I coulde not, in dutie, sit as a dumme and idle hearer onelie; the cause being iudicially depending in the high court of Chancerie, where I was to iudge of it according to lawe, following the rule of mine owne conscience, and the measure of mine owne vnderstanding, and not to bee swayed with the weight of other mens opinions.—I considered also, that although *silentij tutum primum* is often true in humane policie, yet sometime there is *crimen reticentie*; and therefore the prophet said, ‘*vā mibi quia tacui.*’ And Chrysostome obserueth, that, ‘*tribus modis in veritatem peccatur: 1. veritatem præ timore tacendo: 2. veritatem in mendatium commutando: 3. veritatem non defendendo.*’ Remembering this, my conscience tould me, that howsoever silence might in this case haue excused mee of the

second, yet I coulde not haue escaped by silence, from offending in the first and last. And if Festus thought it not reason, to send a prisoner, without shewing the causes which were layed against him, I might haue bene worthily and iustly censured, if vpon other mens arguments, and as it were *fide implicita*, I should haue pronounced my iudgement and sentence in so great a cause, without declaring the grounds and reasons whereupon I stood. Thus, dutie and necessitie (for, *ratio sapienti necessitas*) were the causes that induced mee to speake in this rare and weightie cause, and the force of truth moued mee to speake that which I did speake, without respect of pleasing or displeasing any. And so, hauing the warrant of a sincere conscience, which is truly said to be, ‘*verū luti comes, et testis, et iudex actionum.*’ I haue in the Chancerie iudged and decreed the case for R. C. And the like iudgement is also giuen by the iudges of the King's Bench, in the assise depending in that court. The decree and iudgement being thus passed, diuerse vnperfect reports, and seuerall patches and pieces of my speech haue bin put in writing, and dispersed into many hands, and some offred to the presse. The king's maiestie, hauing knowledge thereof, misliked it; and thereupon commanded me to deliuer to him in writing, the whole discourse of that which I said in that cause.—Thus I was put to an vnexpected new labour, to reuiew my scribled and broken papers. Out of which (according to the charge imposed vpon me) I gathered all which I had before spoken, and so set it downe faithfully and plainly, and (as neare as I coulde) in the same words I vttered it. It pleased his sacred maiestie to take some view of it; and taking occasion thereby, to remember the diligence of the Lord Chief Iustice of the Common-Place, for the summary Report he had published of the Iudges arguments, he gaue mee in charge to cause this to be likewise put in print, to prevent the printing of such mistaken and vnperfect reports of it, as were already scattered abroad.—Whatsoeuer it is, it was first conceiued and spoken out of conscience and duty; and is now published in humble obedience to my most gracious soueraigne. And so I offer and commend it to your good acceptance and fauourable interpretation.

T. ELLESMERE, Cancr.

ing to the law, whether the complainant bee inhabled, by lawe, to maintaine his suit in that court or not; I holde it more fitting to deliuer the reasons of my iudgement heere, where others haue beene heard, than there, before a few, which haue not heard that, which hath beene so learnedly argued and largely debated heere.

And therefore the case standing thus, I will speake what I thinke. And I must say as one of the graue iudges saied, I can tell no newes; but some old things which I haue read and obserued, I will remember; but I cannot diuine, or prophesie *de futuris*, I leaue that as iustice Yelverton did.

I am free and at libertie, 'nullius addictus' in verba magistri, and therefore I will speake ingenuously and freely.—In the arguing of this case, some things, which are of great weight with mee, haue, (in mine opinion) beene passed ouer too lightly: and some other things, which seeme to me but light, haue beene overweighed, as I thinke.—Halfe an howers time longer or shorter I meane not to strue for; and therefore I will presume on your patience, and assume to myselfe such conuenient time as others haue done; and yet I will husband time as well as I can.—I will not be abashed to strengthen my weake memory with helpe of some scribbled papers, as others haue done: for I accompt it a point of wisdom to followe wise mens examples. Other exordium, insinuation, protestation, or preface for the matter itselfe either to prepare attentue and beneuolent auditors, or to stirre offence or mislike against either partie, I meane not to vse. It is fit for orators; I neuer professed the art; I had neuer skill in it: and it is not decorum for iudges that ought to respect the matter, and not the humours of the hearers.—The exordium the ciuilians vse in their sentences I like well; 'in Dei nomine amen, et Deo primitus inuocato.' Other exordium I care not for.

The case now depending in Chauncerie, which is adourned hither, is thus.

Robert Caluine, sonne and heire apparent of James lord Caluine of Colcrosse in the realme of Scotland, an infant of three yeares of age, borne in the saied realme of Scotland, maketh title by his bill to a messuage and garden with th' appartenaunces in the parish of St. Buttolph without Bishops-gate in the cite of London; and complaineth against Iohn Bingley, and Richard Griffin, for detaining the euidences concerning the same messuage and lands, and taking the profits thereof.—The defendants pleade, that the plaintife is an Alien; and that in the third yeere of his maiesties raigne of England, and in the 39th yeere of his maiesties raigne of Scotland, hee was borne in the realme of Scotland, within the ligeance of his said maiestie, of his realme of Scotland, and out of the ligeance of our soueraigne lord the king of his realme of England.—And the defendants say further, that at the time of the birth of the complainant, and long before, and euer since, the saied kingdome of Scotland was, and still is, ruled and gouerned by the proper lawes and

statutes of the said kingdome of Scotland, and not by the lawes and statutes of this realme of England; and therefore the defendants demand iudgement, whether the complainant ought to bee answered to his said bill, or shall he receiued to prosecute the said suite against the defendants, being for, and concerning the title of inheritance, and euidence touching the same.—Heereupon the complainant hath demurred in law.

This is the speciall case now depending in the Chancerie; in which, and touching all like cases in general, mine opinion is, and since the question was first moued hath beene, that these Post-nati are not Aliens to the king, nor to his kingdome of England, but by their birth-right are liege subjects to the king, and capable of estates of inheritance and freehold of landes in England; and may haue and maintaine as well reall as personall actions for the same: and that therefore the now complainant Robert Caluine ought to bee answered.

This opinion I did first conceiue vpon those rules and reasons in lawe (as well the common law of England, as the Ciuile law) which heereafter in the course of my speech I will remember. And in this opinion I haue beene since confirmed by many great and weighty reasons.

First, in the statute made in the first yeare of his maiesties raigne of England, [16. Mart. 1603.] authorizing the Treatie betwene the commissioners for both the kingdomes, it is said (as iustice Warburton noted well) that both the famous and ancient realmes of England and Scotland are now vnited in allegiance and loyall subiection in his royall person, to his maiestie, and his posteritie for euer.

Heere wee haue the iudgement of the parliament, that there is a vnite in allegiance to one royall person; and therefore I see not how wee may out of imaginarie conceits, and by subtle distinctions straine our wittes to frame seuerall allegiances to one and the same royall person, contrary to so plaine a declaration made by parliament.

Next followeth his maiesties Proclamation 20 Octobris 1604, by which hee assumed to himselfe the name and stile of king of Great Britaine: in which Proclamation, among many other weighty reasons, this is added for one, 'we haue receiued from those that be skilful in the lawes of the land, that immediately vpon our succession, diuerse of our auncient lawes of this realme are *ipso facto* expired; as namely, that of escuage, and of the naturalization of the subjects.' This was not done sodainely, nor lightly; but vpon graue and serious deliberation, and aduise: and therefore seemeth to mee to be a matter of great importance, and not to be lightly regarded.

The same 20th of October, these commissioners beganne their Treatie. Of the graue and iudicious course which they held, in debating of the matter then propounded, I will forbear to speake: but for this point of Naturalization now in question, their Resolution at the end was thus:—That it shall be pre-

pounded to both the parliaments at the next sessions, that an Act be made containing a Declaration, as followeth: that all the subjects of both the realmes, borne since the decease of Elizabeth the late queen of England of happy memory, and all, that shal be born hereafter vnder the obedience of his maiestie and his royall progeny, are by the common lawes of both the realmes, and shall be for ever, inhabited to obtaine, succcede, inherite, and possesse all lands, goods, and chattels, &c. as fully and amply as the subjects of either realme respectively might haue done, or may doe in any sort within the kingdome where they were borne.—This, after long debating, and graue and deliberate consideration, was, in the end, the Resolution of the greater part of the commissioners, not one openly gainesaying it. And diuerse of the principall iudges of the realme were present at all times when the point was debated. And herein I note the wise and iudicious forme of that resolution, which was not to propound to the parliament the making of a new lawe, but a declaration of the common lawes of both the realmes in this question.—Now, if wee consider who these commissioners were, what lords of the higher house, and what persons of the common house, selected of all degrees, most eminent for their learning and iudgement, as well in ciuile and common law, as in knowledge, and experience other waies, beeing assisted by the graue iudges of the realme: if this, I say, be well considered, then this resolution must be accompted and esteemed as a matter of grent and wrighty importance, and much to be regarded in the deciding of this question.

According to this act of the commissioners, the case was propounded in the next session of parliament. In the higher house, the iudges were required to deliuer their opinions. There were then eleven iudges present; whereof tenne did with one vni forme consent affirme the law to be, that the Postnati were not aliens, but natural subjects (one onely dissenting.) After this, the question was debated in a solemne conference between both the houses of parliament at severall times, and at great length, and with much heetie; nothing was omitted that wit or art could inuent to object against this opinion; and that was done by men of great learning, and singular iudgment in the common lawe, and ciuile lawe, and by some other gentlemen of the common house, of rare gifts for their learning, knowledge, elocution and experience.—At this conference the iudges were present; who, after they had heard all that was, or could be said, did confirme their former opinions, which they had before deliuered in the higher house: three of the chiefe of them declaring their reasons, and all the rest (saying one alone) concurring in the same. So, here was now a generall Resolution by all the iudges of the realme (one excepted) and that deliuered, not priuately, but in parliament; which without more adoe had bene sufficient to haue decided and determined this question.

Touching the proclamation, it was discreetly and modestly saied by a learned gentleman of the lower house, that it was of great respect, and much to bee regarded; but yet it was not binding, nor concluding; for, proclamations can neither make, nor declare lawes; and besides, that this proclamation was not grounded vpon any resolution of the reuerend iudges; but vpon the opinion of some skilfull in the lawes of this land.—Of the strength of proclamations, being made by the king, by the aduise of his counsell and iudges, I will not discourse; yet I will admonish those that bee learned and studious in the lawes, and by their profession are to giue counsell, and to direct themselves, and others, to take heede that they doe not conuicne, or lightly regard such proclamations.—And to induce them therunto, I desire them to looke vpon, and consider aduisedly these few proclamations, prouisions, or ordinaunces, which I will point out vnto them; and of what validitie and force they haue bene houlden to bee in construction of lawe, albeit they be neither statutes, nor acts of parliament.

M. 4 H. 3. in Dower, the defendant pleaded, 'quod petens est de potestate regis Francie, et residens in Franciis; et prouisum est a consilio regis, quod nullus de potestate regis Francie respondeatur in Anglia; antequam Angli respondeantur de iure suo in Francia.' [Fitzh. dower. 179.] This the plaintifes attorney could not denie; and thereupon the iudgment was, *idem sine die*.—Anno 20 Hen 3, Certaine prouisions and ordinaunces were made which were called Prouisions Merton, where the king assembled his archbishops, bishops, earles, and barons for the coronation of the king, and his wife queene. Elenor; and the words be, 'prouisum est in curia dom. regis apud Merton coram Willihelmo Cantuariensi archiepiscopo, et coepiscopis, suffraganeis suis; et coram maiori parte comitum et baronum Anglie ibidem existentium pro coronatione ipsius domini regis et Elionore regine, pro qua omnes vocati fuerunt, cum tractatum esset de comuni utilitate regni super articulis subscriptis, ita prouisum fuit et concessum, tam a predictis archiepiscopis, episcopis, comitibus, et baronibus, et alijs. De viduis primis, &c.'

Fitzherbert [Nat. Br. 32.] citeth a prouision made anno 19 H. 3. in these words, 'et prouisum fuit coram domino rege, archiepiscopis, episcopis, comitibus, et baronibus, quod nulla assisa vltima, presentationis de cetero capiatur de ecclesiis, prebendis nec de prebendis.' This prouision was allowed and continued for lawe, vntill W. 2. anno 13 Edw. 1, cap. 5. which provides the contrary by expresse words.

Anno 6 Ed. 1, the king and his iudges made certaine explanations of the statute of Gloucester, which are called Explanationes Statuti Glocestrie: and these be the words, 'Postmodum per dominum regem et iusticiarios suos factæ sunt quedam explanationes quorundam articulorum superius positorum.' Which explanations haue euer since bene received as a law.

There is a proclamation by king Ed. 3, bearing *teste* at Westminster anno 15 Ed. 3. And iudge Thorpes opinion pa. 39 Ed. 3, 7. both which I will now forbear to report, and wish the students to reade the same in the printed bookes, where they shall see both the effect, and the reason, and the cause thereof; they are worth their reading, and may informe and direct them what iudgement to make of proclamations.

Touching the opinion of the iudges, some haue objected (yet modestly, and I suppose, according to their conscience and vnderstanding) that there is not like regarde to be had of iudges opinions giuen in parliament, as ought to bee of their iudgements in their proper courts and seates of iustice: for, in those places their oath bindeth them; but not so in the other.—1. To this I answer: the reuerence, and woorthinesse of the men is such, as is not to bee quarrelled and doubted of, if there were no oathe at all: for, if men of so great and eminent places feare not God and his iudgments, euen out of a religious conscience, which is, 'frangam ante peccatum, et flagrum post peccatum,' it may be doubted that the externall ceremonie of adding a booke will little auaille.—2. Their oath doth bid them as much in the court of parliament, as in their proper courts: for, that is the supreme court of all: and they are called thither by the kings writ, not to sit as tell-clocks, or idle hearers; but, 'quod personaliter intersitis nobiscum, ac cum cæteris de consilio nostro super dictis negotiis tractaturi, vestrumque consilium impensuri:' and those 'negotia' be 'ardua et vrgentia negotia regni, &c.' And their oath, amongst other things, is, that they shall counsell the king truly in his businesse.—3. This exception may serue against the iudges, as well in cases when they sit and giue iudgement, as iustices of Assizes, Nisi Prius, Oyer and Terminer, and Gaole Deliuerie, as in this case of parliament: for, there they haue none other oath but their generall oath.—4. It becomes vs to esteeme of iudges now, as our forefathers esteemed them in times past; for, as they succede them in time and place (I thanke God, and the king, I haue neither cause to feare any for displeasure, nor to flatter any for fauour: wherefore I will neither be afraid, nor abashed to speake what I thinke:) I say then fore, that as our iudges now succede the former iudges, in time and place; so they succede them, and are not inferior to them in wisdome, learning, integritie, and all other iudicious and religious vertues.

Then let vs see what the wisdome of parliaments in times past attributed to the iudges opinions declared in parliament; of which there bee many examples; but I will trouble you but with two or three.

I will not remember Richard the 2d's time (of which some of our chroniclers doe talke idly, and vnderstand little) where power and might of some potent persons oppressed justice, and faithful iudges, for expounding the law soundly, and truly.—1. The first, that I

will remember. As this, in the parliament 28 H. 6, 16 Ianuarij, the commons made suite, that W. de la Poole duke of Suffolke should bee committed to prison for many treasons and other heinous crimes committed by him. The lordes in parliament were in doubt what answer to giue; they demanded the opinion of the iudges. Their opinion was, that hee ought not to bee committed; and their reason was, for that the commons did not charge him with anie particular offence, but with generall slaunders and reports: and therefore because the specialties were not shewed, hee was not to bee committed. This opinion was allowed; and thereupon 28 Ianuarij, the commons exhibited certaine speciall articles against him, viz. that he conspired with the French king to inuade the realme, &c. And thereupon hee was committed to the Tower.—2. In the parliament anno 31 H. 6, in the vacation (the parliament being continued by prorogation) Thomas Thorpe the Speaker was condemned in a thousand pounds dammages in an action of trespassse, brought against him by the duke of Yorke, and was committed to prison in execution for the same. After, when the parliament was re-assembled, the commons made suite to the king and the lords, to haue Thorpe the Speaker deliuered, for the good exploite of the parliament; whereupon the duke of Yorke's counsell declared the whole case at large. The lords demanded the opinion of the iudges, whether, in that case, Thorpe ought to bee deliuered out of prison by priuledge of parliament. The iudges made this aunswere, that they ought not to determine the priuledge of that high court of parliament; but for the declaration of proceeding in lower courts, in cases where writtes of *superseatas* for the priuledge of the parliament be brought vnto them, they answered, that if any person that is a member of the parliament bee arrested in such cases as bee not for treason or felonie, or for suretie of peace, or condemnation had before the parliament, it is vsed that such persons be released, and may make attorney, so as they may haue their freedome and libertie, freely to intend the parliament. Hereupon it was concluded, that Thorpe should still remaine in prison according to the lawe, notwithstanding the priuledge of parliament, and that hee was the Speaker. Which resolution was declared to the commons by Walter Moyle, one of the king's serieants at lawe. And then the commons were commanded in the kings name, by the bishop of Lincolne (in the absence of the abp. of Canterbury, then chauncellor) to chuse another Speaker.—3. In the parliament an. 7 H. 8, a question was moued, whether spirituall persons might bee conuented before temporall iudges for criminall causes. There sir Iohn Fineux and the other iudges deliuered their opinion, that they might and ought to bee so. And their opinion was allowed, and maintained by the king and the lords: and D. Standish, who before had houlden the same opinion, was deliuered from the bishops. And it is worth

the noting, what wordes passed in that case betwene the archbishop of Canterbury and that worthy iudge Fineux.—4. If a writ of error bee brought in parliament vpon a iudgement giuen in the King's Bench, the lords of the higher house alone (without the commons) are to examine the errors; but that is by the aduise and counsell of the iudges, who are to informe them what the lawe is, and so to direct them in their iudgement. And if the iudgement bee reuersed, then commandement is to bee giuen to the lord chancellour to doe execution accordingly. And so it was in anno 17 R. 2, in a writte of error brought in parliament by the deane and chapter of Lichfield, against the prior and conuent of Newport-Paenell, as appeareth by the record. But if the iudgement bee affirmed, then the court of the King's-bench are to proceed to execution of the iudgement, as it appeareth in Flowerdewes case, P. 1. H. 7. fol. 19. But it is to bee noted, that in all such writtes of error, the lords are to proceede according to the lawe; and for their iudgment therein they are informed and guided by the iudges, and doe not follow their owne opinions or discretions otherwise.

This extravaugant discourse touching proclamations, and iudges opinions deliuered in parliament, and how they ought to bee regarded, I haue thought materiaall and necessarie, both in respect of the time wherein wee liue, and the matter which we haue in hand. And these bee thinges which I thinke haue bene too lightly passed ouer. But if you condemne it as impertinent, I must then confesse I haue presumed too much vpon your patience; I pray you beare with mee, it is but my labour lost, and a little time mis-spent, if it seeme so vnto you; you are wont to pardon greater faultes; call it either a passe-time, or waste-time as pleaseth you. Now, to returne to the case we haue in hand.

The generall question hauing had this passage (by proclamation, by commission, and by debating in parliament) remaineth yet without conclusion or iudgement: and as euerie man abounds in his owne sence, so euery one is left to his owne opinion; specially those that were not satisfied with the graue resolution of the iudges in parliament, which (although some may tearme and accompt as bare opinions) I must alwayes valew, and esteeme as a reall and absolute iudgement. Now, I say, this generall question is reduced to two particular cases, and is iudicially depending in two the highest courts of iustice in this realme; and that is by one complainant against seuerall defendants for the freehoulde and inheritance of seuerall parcells of land: and (as Mr. Solicitor said well) is a case, not fained, nor surmised, but a true case betwene true parties: and being *questio iuris, non facti*, is by both these courts adiourned hither to bee decided, and determined by all the iudges of England, as the rarenesse of the case, and the weight and importance of it, both for the present and the future, doth require.—And the case being of this nature and qualitie, it is

not amisse to obserue the proceeding in it: for, it is woorth the obseruing, and not to bee forgotten. The defendants counsell, men of great learning, and in their profession inferiour to none of their qualitie and degree, men conuersant and well exercised in the question, and such as in the great conference in parliament, most of them were specially selected and chosen, for so they wel deserved, as most sufficient, able, and fit, as well for learning and knowledge, as for all other giftes of witte and nature, to handle so great and rare a question. And although it hath pleased them of their good discretion to vse the paines but of a few in the debating and arguing of the case at the barre: yet no doubt that was done vpon mature deliberation and conference with all the residue: and whatsoever the spirites, the learning, the wisdom, and knowledge of all the others, vpon long study, could afford, was put into the mouth of those few to serue as organs and instruments to deliuer it vnto vs; which they haue so well and sufficiently performed, that they deserue great praise and commendation: for, in my poore opinion, the witte of man could not deuise to say more touching this question in lawe than they haue said. And whatsoever hath bene since spoken for that part, it is for the matter but the same in substance, which the counsell at the barre did deliuer; though it hath bene varied in forme, and amplified with other wordes and phrases, and furnished with shew of some other strained cases and authorities.

The handling of it by the learned and reuerend iudges hath bene such, as it may appeare to the world, that euerie one hath spoken his owne heart and conscience; and hath laboured by long studie to search out the lawe and the true reason of the lawe in this rare case; and so they haue spoken, as *coram Deo et angelis*: none, with desire to seeme popular; for nothing ought to bee *tam popolare quam veritas*: none to seeme to be time-servers, or men-pleasers; for the king (whome vader God they serue) being *pater patrie*, and soueraigne head of both these great vnitid kingdomes, is to them both, like as the head of a naturall body is to all the members of the same, and is not, nor cannot bee partiall more to one than to another. Hee deliteth in truth, and desireth it; and without truth hee cannot bee pleased. He ruleth by his lawe, and commaundeth his iudges to minister to all his subjects lawe and iustice sincerely, and truly; and equally and indifferently, without any partiall respect.

It was neuer seene, but that in all rare and difficult cases, there haue bene diuersitie of opinions; but yet without breach of charitie, which is the bond of vnitie. So it hath happened in this case. The case hath bene argued at large by foureteene learned iudges; twelue of them haue concurred in iudgement, but vpon seuerall reasons; for, as many wayes may leade to one end of the iourney; so diuerse and seuerall reasons may conduce to one true and certaine conclusion.—And here I may

not omit the woorthie memorie of the late graue and reuerend iudge, sir John Popham, chiefe iustice of the King's bench deceased, a man of great wisdom, and of singular learning and iudgement in the lawe, who was absolutely of the same opinion, as he often declared, as well in open parliament, as otherwise.

The apostle Thomas doubted of the resurrection of our Saviour Iesus Christ, when all the rest of the apostles did firmly beleve it: But that his doubting confirmed, in the whole church, the faith of the resurrection.—The two woorthy and learned iudges that haue doubted in this case, as they beare his name, so I doubt not but their doubting hath giuen occasion to cleare the doubt in others; and so to confirme in both the kingdomes, both for the present and the future, the truth of the iudgement in this case.

Thus my lords, haue you hitherto nothing from mee but Amen, to that which all the iudges (saying two) haue said; and much more you cannot expect from mee: yet, since I must giue iudgement in this case; and I said in the beginning, that I would render the reasons of my iudgement (for that is the course of argument I must houlde); I will now deliuer vnto you, what are the speciall and principall reasons that first haue induced mee, and still moue mee to houlde the opinion that I doe: and as I goe, I will indenuour to cleere some doubts and questions, that partly in the conference in parliament, and partly otherwise, I haue heard made; not onely touching this case it selfe, but also touching the forme and manner how it is to be decided and iudged.—The case is rare, and new (as it hath beene often said); it was neuer decided *terminis terminantibus*; it was neuer iudged by any statute lawe, which is a positive lawe; nor by iudgement of the iudges of the common lawe.

Now, the first question is, as some would haue it, how it is to be iudged, and by what lawe; and haue wished that it might haue stayed vntill the parliament, and so bee decided by parliament. They that make this doubt, I will let them demurre, and die in their doubts: for, the case being adiourned hither before all the iudges of England, is now to be iudged by them according to the common lawe of England; and not tarrie for a parliament: for, it is no transcendent question, but that the common lawe can and ought to rule it, and ouer-rule it, as iustice Williams said well.—But then this question produceth another; that is, what is the common lawe of England? whether it be *ius scriptum*, or *non scriptum*? and such other like niceties: for, wee haue in this age so many questionists; and *quo modo* and *quare*, are so common in most mens mouthes, that they leaue neither religion, nor lawe, nor king, nor counsell, nor policie, nor government out of question.

And the end they haue in this question, what is the common lawe, is to shake and weaken the ground and principles of all government: and in this particular question of the law of England, to overthrow that law whereby this

realme hath many hundred yeares beene gouerned in all honour and happinesse: or at least to cast an aspersion vpon it, as though it were weake and vncertaine. I will therefore declare mine opinion in this point plainly and confidently, as I thinke in my conscience, and as I finde to be sufficiently warranted by ancient writers, and good authorities voide of all exception.

The common law of England is grounded vpon the law of God, and extendes itselfe to the originall lawe of nature, and the vniuersall lawe of nations.—When it respectes the church, it is called *Lex Ecclesiæ Anglicanæ*, as *Magna Charta*, ca. 1. '*Ecclesiæ Anglicanæ habent omnia sua iura integra et illæsa.*'—When it respectes the crowne, and the king, it is sometimes called *Lex Coronæ*, as in stat. 25 Edw. 3, cap. 1. '*Lex Coronæ Angliæ est et semper fuit, &c.*' And it is sometimes called *Lex Regiæ*, as in *Registo* fo. 61. '*Ad iura regiæ spectat:*' and '*ad conseruationem iurium coronæ nostræ, et ad iura regiæ ne depossent, &c.*'—When it respectes the common subiects, it is called, *Lex Terræ*; as in *Magna Charta* ca. 29. '*Nisi per legale iudicium parium, vel per legem terræ.*'—Yet, in all these cases, whether it respectes the church, the crown, or the subiects, it is comprehended vnder this generall tearme, the common lawes of England: which although they bee for a great parte thereof reduced into writing; yet they are not originall *leges scriptæ*.

This I first learned of the late lord treasurer Burleigh (whose honourable memorie England can neuer forget) and hearing it from him, I indenuored by my priuate studie to satisfie myselfe thorowlie in it. And whosoever shall well consider the lawes of England, which were before the Conquest (whereof wee haue some remanants and patches) or since the Conquest vntill *Magna Charta*, anno 9 H. 3. will make little doubt of it.—In H. 3's time Glanville writeth thus; '*leges Anglicanas licet non scriptas, leges appellari non videtur absurdum.*'—And in Hen. 3's time Bracton writeth thus: '*cùm autem fere in omnibus regionibus vtantur legibus et iure scripto, sola Angliæ vsa est in suis finibus, iure non scripto et consuetudine; in ea quidem, ex non scripto ius venit quod vsus comprobauit.*'

But I may not agree with Bracton, that '*sola Angliæ vsa est iure non scripto*.' for I find that the grauest, and the greatest learned writers of the Ciuile Lawe, both auncient and of this our time, doe hould the same opinion, touching the Ciuile Lawe itselfe, for thus they write: '*ex non scripto ius venit quod vsus approbauit.*' And thus; '*ius ciuile dictum ex non scripto natum est.*' And, '*ius non scriptum dicitur consuetudo, non quod scripto perpetuò careat, hoc enim falsum est: nam et consuetudines in memoriam constantiorem reducuntur in scripturam, vt cætera quoque quæ sine scriptura perficiuntur: sed non scriptum ius est: id est, quoddam à scriptura vis eius non cœpit nec pendet.*' So, hereby it may appeare how in this wee concurre with the Ciuile Lawe.

But hereupon these questionists moue an other question, viz. If the common lawe be not written; how then shall it be knowne?—To this I answer; it is the common custome of the realme, as Bracton saith, '*ius venit quod vsus comprobauit*.' and it standeth vpon two maine pillars and principall parts, by which it is to bee learned and knowen.—1. The first is, certaine knowen principles and maxims, and ancient customes, against which there neuer hath beene, nor ought to bee any dispute. As in cases of subiects; an estate in fee-simple, for life, for yeeres, dower, curtesie, &c. In cases of the crowne, the female to inherite: the eldest sole to bee preferred: no respect of halfe blood: no tenant in dower, or by the courtesie of the crowne; no disability of the king's person by infancie, &c.—2. The second is, where there be no such principles, then, former iudgements giuen in like cases: and these be but '*arbitria iudicium, et responsa prudentum*,' receiued, allowed, and put in practise and execution by the king's authoritie.

Of these Bracton speaketh; '*ego H. de Bracton animus erexi ad vetera iudicia iustorum perscrutanda; facta ipsorum, consilia, et responsa in vnam summam redigendo compilauit*.'

And before the Conquest, king Ethelbert caused a booke to bee made, which was called *Decreta Iudiciorum*: and king Alured did the like, as master Lambard, a iudicious and learned obseruer of antiquities, doth remember. [Lambard in explicatione verbi Hyde.]—Of these also the iudges speake H. 35, ff. 6, Moyle, fol. 8, 'we rule the law according to the auncient course.' Ashton, fol. 9, 'all our lawe is guided by vse, and by statute.' And Pryot saith, fol. 9, 'there cannot be a positive law, but such as was iudged or made by statute.' Wherein I note also that hee equalleth a iudgement with a statute.—In 36 H. 6, fol. 25, Fortescue reasoneth thus; 'the lawe is as I haue saide, and so hath beene alwaies since the lawe beganne.'—In 37 H. 6, f. 22, Ascue reasons thus; 'such a charter hath bin allowable in the time of our predecessors, which were as sage and learned as wee bee.'—In H. 4, Edw. 4, fol. 41, Markham reasoneth thus; 'it is good for vs to doe as it hath bin vsed before this time, and not to keepe one way one day for one party, and another day the contrary for the other party: and so the former precedents be sufficient for vs to follow:' and iudgement was giuen accordingly.—And in the former case 36 H. 6, Fortescue saith further; 'wee haue many courses and formes which be houlden for lawe.'

Also euerie one of these foure principall courts, the Chauncery, King's Bench, Common-Plees, and Eschequer, haue in many things seuerall courses and formes which are obserued for law, and that not onely in that proper court, but also in all courtes through the realme; whereof many examples be remembered in the case of the Mines in Plowden's Commentaries.

3. The third: but if there be no such former iudgements, nor direct examples or precedents, then this rule hath a further extention, which is this.

There is a rule in the common lawe, that *in nouo casu nouum remedium est apponendum. Et concordent clerici de breue faciundo, ita quod nullus recedat a Cancellaria sine remedio*: for the Chancery is properly *officina iustitie et equitatis*; where all original writs (which in ancient times were the grounds of all suites) are deuised and framed. And these clerici were graue and auncient men; skilfull, and long experienced in the course of the Chancery; and called '*clerici de prima forma*;' and of late time '*magistri Cancellarie*;' who in new and strange cases, besides their owne knowledge and experience, had oftentimes conference with the graue iudges for the deuising and framing of new writtes when neede required. And this I take to bee the same which is in the statute W. 2, cap. 24, [St. W. 2, cap. 24, anno 13 Ed. 1.] '*Et quotiescunque de cetero euenerit in Cancellaria, quod in vno casu reperitur breue, et in consimili casu, carente sub eodem iure et simili indigente remedio, non reperitur, concordent clerici de Cancellaria in breui faciundo, vel atterminent querentes in proximum parlamentum: et scribantur casus in quibus concordare non possunt, et referant eos ad proximum parlamentum: et de consensu iurisperitorum fiat breue, ne contingat de cetero, quod curia regis deficiat conquerentibus in iusticia perquirenda*.'

Wherein I note these three things. First, the clerkes are to agree; and if they agree, that is an end, and standes for lawe, and then no referrement to the parliament. Second, if the clerkes agree not, and so the case be referred to the parliament; then '*de consensu iurisperitorum fiat breue*,' so '*consensus iurisperitorum*' is the rule, and not the multitude of vulgar opinions. The third is, that iustice faile not them which complaine; which will often faile, if you stay vntill a parliament; for parliaments are not to be called for the wrong of a few priuate subiects, but for the great and vrgent affaires of the king and the realme.

I finde also a like rule in the ciuile lawe; '*vbi non est directa lex standum est arbitrio iudicis, vel producendum ad similia*.' And another saith, '*de similibus ad similia iudicium et argumentatio recipiuntur*.'

4. Besides these, there is another generall and certaine rule in the ciuile lawe, which I reserue to the last parte of that which I meane to speake in this matter.—So, leauing that vnto a more proper place, I will hereupon conclude, that if there bee no former iudgements, nor examples, nor precedents to bee found, then '*concordia clericorum, et arbitrium iudicium*' is to seeke out the true and solide reason; and thereupon to ground their iudgements in all new cases: for it was truly saide by a learned gentleman of the lower house, '*deficiente lege recurrendum est ad consuetudinem: deficiente*

'consuetudine recurrendum ad rationem.' And so from the iudges we shall haue *responsa prudentum* to decide all such new cases and questions. And according to this rule, all such new doubts and questions haue beene resolved and decided by the graue iudges in former times.

But here, before I proceede further, I am to make a suite, which is this :—That whatsoever I haue spoken, or shall happen to speake of the ciuile lawe; or whatsoever I shall cite out of any writer of that law, I pray fauor of my masters that professe it. I acknowledge that lawe to be auncient and generall in many parts of the world; and I reuerence the professors of it, as men of great learning, wisdom, and iudgement. I professe it not; I haue learned little of it; but in that little I haue found that in the reall and essentiall partes of iustice, the ciuile and common lawe doe in many things concur, though they differ much in the forme and manner of proceeding. And that which I shall haue occasion to produce of that lawe, will bee to shew how the common law and ciuile doe agree in one reason and iudgement in those things which I shall speake of.

Yet I must take libertie to say, that neither in Spaine, nor in France (those two great monarchies) it is not generally receiued nor allowed as a concluding and binding law.—They take there the reason of it onlie as a direction to their proceeding and iudgement: but to produce or alleadge it as a concluding or binding law, was no lesse than *capitis pena*.

This I make not of my selfe; for, besides common practice and experience, I haue an honest and substantiall witness, master Adam Blacwood a Scottishman, a man of singular learning in the ciuile lawe, who defendeth in like manner the lawes of Scotland, [Blacwood cap. 10.] as appeareth in his learned booke intituled, *Pro Regibus Apologia*, written by him against a seditious Dialogue or Libell made by George Buchanan, *De Iure Regni apud Scotos*, where he tells him, *aliud sceptrum, aliud plectrum*. But it is not amisse to recite his owne words, which are thus; 'Philippus cognomen-  
'to Pulcher, cum Lutetia supremæ iurisdictionis curiam institueret, eam Romano iure  
'solutam esse declarauit: in eamque sententiam  
'vetus extat eius curiæ decretum, ne causarum  
'patroni Romanarum legum auctoritatem patri-  
'æ legibus opponant. Sed cum illæ bono et  
'æquo niti videntur et probabiliter utilitatis  
'publicæ causam continere, nos earum vtimur  
'haud imperio, sed ratione, cui omnes homines  
'naturæ præscripto subiunguntur. Quin etsi  
'quid aduersus rationem legum Romanarum  
'perperam ac temerè iudicatum est, id earum  
'multis poenis haud æstinatur, sed vel princi-  
'pis, vel superioris magistratus arbitratu. Nam  
'cùm in publici muneris partem admittimur,  
'et et conceptis verbis inauguramur, solemnī sa-  
'cramento regiarum et municipalium legum  
'atq. morum obseruationem, nulla Romani  
'iuris mentione, spondemus. Apud Hispanos  
'capitis penam ijs indictam legimus, qui Ro-  
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'manarum legum auctoritatem vel in foro lau-  
'darent, vel in puluere scholastico profiteren-  
'tur. Sed si quid occurreret patrijs legibus ac  
'moribus indefinitum quod iudicanti religionem  
'adiherret, vnicum erat eximendo scrupulo  
'regis consulendi remedium. Alaricus Tolosa  
'regnans, idem Gothi imperauit, vt si quis ad-  
'uersus ipsius leges ciuile Romanorum ius ci-  
'taret, temerè factum morte lueretur.'

Now to returne to that which I haue touched before, I say, that when there is no direct lawe, nor precise example, we must '*recurrere ad rationem*, et ad *responsa prudentum*:' for, although '*quod non lego, non credo*,' may bee a true and certaine rule in diuinitie; yet for interpretation of lawes, it is not alwaies so: for wee must distinguish betwene '*fidem moralem*,' and '*fidem diuinam*,' or else wee shall confound many things in the ciuile and politike gouernement of kingdomes and states. For, the first precedent, which wee haue now, had no precedent when it began; but as Tacitus saith, '*quæ nunc vetustissima creduntur noua fuerunt; et quod hodie exemplis tuerimur, inter exempla futurum est.*' And to those that should, that nothing is to bee done but by former examples, Horace speaketh thus; '*O imitatores seruum pecus*:' and Cicero saith, '*non exempla maiorum quærenda, sed consilium est eorum à quibus exempla nata sunt explicandum.*'

Thus hath iustice beene duely administred in England, and thereby the kings haue ruled, the people haue beene gouerned, and the kingdome hath flourished for many hundred yeeres; and then no such busie questionis is moued any quarrell against it.—Thus haue all doubts growing vpon Magna Charta, and Charta de Foresta, made in king Henry the thirds time, and vpon the statutes of Westmin. 1. Westm. 2. Westm. 3. and many other statutes made in Edw. 1. time: and vpon Prærogatiua Regis, and many other statutes made in Ed. 2. time, beene from time to time expounded; and so of later times, the statutes of lines, of vses, of willes, and many more.—Thus also haue all doubts and cases, whereof there was no statute or positiue lawe, beene alwaies expounded: for such are most of the cases which wee haue in our yeere-bookes, and bookes of reports, which are in effect nothing but *responsa prudentum*, as iustice Crooke did truly say.—Vpon this reason it is, that some lawes, as well statute lawe as common law, are obsolete and worne out of vse: for, all humane lawes are but *leges temporis*: and the wisdom of the iudges found them to bee vnneete for the time they liued in, although very good and necessarie for the time wherein they were made. And therefore it is saide '*leges humane nascuntur, vigent, et moriuntur, et habent ortum, statum, et occasum.*'

By this rule also, and vpon this reason it is, that oftentimes auncient lawes are changed by interpretation of the iudges, as well in cases criminall as ciuile.—In criminall cases the law was *voluntas reputabitur pro facto*; but it is

not so now, saving in treason onely.—In an appeale of maine Britton, fol. 43, saith 'soit le iudgement, que il perde antiel member, 'come il auer tolle a le plantife;' but it is not so now.—In auncient time, one present, aiding, comforting, and assisting to a murder, was taken to bee no principall, but an accessorie, as it appeareth M. 40 Edw. 3, fol. 42. et 40. Li. Ass. p. 8. and p. 25. But now in that case he is judged a principall. And so it was ruled by all the iustices M. 4 Hen. 7, 18. and so Plowden affirmeth the lawe to be, in his Commentaries fol. 99. and 100.—In ciuile causes in auncient time, the lawe was houlden, that hee in remainder in taile could not haue an action of waste, nor be receiued vpon default of tenant for life: but afterwards, the lawe was often judged otherwise; and so is the common experience and practise at this day.—In anno 40 Edw. 3, 28. Fynchden, chiefe iustice of the Common Place, saith, that in ancient time the vicar could not haue an action against the parson; but hee saith the contrarie is vsed at this day, which is the better.—In ancient time a disseisee could not enter vpon the feelee of the disseisor, for sauing of the warrant; but for many yeres the lawe hath bene houlden otherwise, and so the common practise yet remaineth.

By this rule it is also, that words are taken and construed, sometimes by extension; sometimes by restriction; sometimes by implication; sometimes a disjunctive for a copulative; a copulative for a disjunctive; the present tense for the future; the future for the present; sometimes by equity out of the reach of the wordes; sometime words taken in a contrary sence; sometime figuratiuely, as *contineus pro contento*, and many other like: and of all these, examples be infinite, as well in the ciuile lawe as common lawe.

And oftentimes the reuerend iudges haue had a grane regarde in their proceeding, that before they would resolute, or giue iudgement in such new cases, they desired to consult with the kings priuie counsell; as appeareth in diuerse cases in king Edward the third his time.—R. W. assaulted Adam Brabson in presence of the iustices of assise at Winchester, [39 E. 3, li. As. p. 1.] for which A. B. complained by bill before the said iustices, alledging this offence to bee in despite of the king and his iustices, to his damage of 100*l.* R. W. pleaded, not guiltie; and was found guiltie, and damages taxed to 10*l.* Thereupon the iudges awarded him to prison in the sherifes keeping. And for the fine, and that which should be further done for the king, for the assault done in the presence of the iudges, they would haue the aduise of the kings counsell: for in a like case, [M. 19 Edw. 3, iudgement 174.] because R. C. did strike a iurour at Westminster, which passed in an enquest against one of his friends; it was adiudged by all the counsell, that his right hand should be cut off, and his lands and goods forfeited to the king. These be the wordes in the booke.

In this case I note three things.—1. The iudges consulted with the counsell.—2. They haue a like case before when the counsell was also consulted with, viz. anno 19 E. 3, and yet they would not proceede in this case before they had againe consulted with the counsell.—3. That before anno 19 Edw. 3, there was no like case nor precedent for such a iudgement; and therefore the iudges would not of themselves pronounce that heauy iudgement before they had conferred with the counsell touching the same. And after they had the opinion and aduise of the kings counsell, they proceeded to that iudgement.

Thomas Vghtried knight brought a *forme-done* against a poore man and his wife; [M. 39 Ed. 3, 35.] they came and yeilded to the demandant, which seemed suspicious to the court: whereupon they examined the matter, and staied iudgement, because it was suspicious. And Thorpe saide, that in the like case of Giles Blucket it was spoken of in parliament: and wee were commaunded, that when any like case should come, we should not go to iudgement without good aduise. Wherefore sue to the counsell, and as they will haue vs to doo, wee will; and otherwise not, in this case.

Greene and Thorpe were sent by the iudges to the kings counsell [M. 40 Ed. 3, 34.] (where there were 24 bishops and earles) to demand them, whether by the statute 14 E. 3, ca. 6. a word may be amended in a writ, as well as a letter or a sillable; for, the statute speakes but of a letter or a sillable; and it was answered, that it may well be amended: for, there cannot be a word without a sillable; and that it was a nice question of so sage men.

Thus *arbitria iudicum* and *responsu prudentum* haue bene receiued, allowed and reuerenced in all times as positive lawe; and so it must be still; for, otherwise much mischief and great inconuenience will ensue. For new cases happen every day: no lawe cuer was, or euer can be made, that can provide remedie for all future cases, or comprehend all circumstances of humane actions which iudges are to determine. Therefore, when such happen, and complaint is made; what shall iudges doe? Shall they giue no remedie to the partie grieved? Shall they stay for a parliament? *Interim patitur iustus*. They must therefore follow *dictumen rationis*; and so giue speedie iustice. And in many matters of materiall circumstances they must guide themselves by discretion.

As in iudging vpon presumptions, to discerne which be *presumptiones temerariae*, which *probabiles*, which *violente*.—So for time; what is a conuenient time, and what not.—So for waste; what is waste punishable, and what not.—So for tenders of money; what is a conuenient place for tender of money, and what not: and what is a lawfull tender, and what not.—So for disparagement; what is a disparagement, and what not: and so of other the like cases, which are infinite.

If it be said (for so some haue said) that if

this be thus, then the common lawe of England is vncerten; and so the rule of iustice, by which the people are gouerned, is too pliable, and too weake, and vncerten.—By the same reason it may be said, that all the lawes of all nations are vncerten: for, in the ciuile lawe, which is taken to be the most vniuersall and generall lawe in the world, they should the same rule and order in all cases which be out of the direct words of the lawe; and such cases be infinite; for as I saide, new cases spring euery day, as malice and fraude increaseth. And since the Roman empire beganne, most of their laws bee either *edicta principum*, or *arbitria iudicum*, or *responsa prudentum*. And in their iudgements they are guided by arrests and former iudgements, as may appear in the books of many that haue collected such arrests. And they attribute so much to such former iudgements, that as Prysot equalleth them to a positive lawe, so they hold, that ‘sententia facit ius, et res iudicata pro veritate accipitur, et legis interpretatio legis vim obtinet.’—Nay (which is more vncerten) sometimes they relie vpon doctours opinions deliuered in their prelections and treatises. And when they finde them varying, and differing one from another (as sometimes they doe) then they preferre that which is *communior opinio*: and so in good reason they may: for, ‘pluralitas idem sententium semper superat; quia facilius inuenitur quod à pluribus queritur.’

But to conclude this point, I would aske of these nouelists, what they would haue done in Sibill Belknappe case, if they had liued in Henry the fourths time?

Sir Robert Belknappe, that reserend and learned iudge, [M. 2 H. 4. 7.] of whom sundrie noble and worthy persons, and some now of great and eminent place in England, are descended, was banished out of the realme, (*relegatus in Vasconiam*) not for any desert or offence of his, but by the might of his potent enemies, and malice of the time. The lady his wife continued in England; she was wronged; she brought a writ in her owne name alone, not naming her husband. Exception was taken against it, because her husband was liuing; and it was adiudged good, and shee recovered; and the iudge Markeham said;

‘Ecce modo mirum quòd femina fert bræ regis,  
Non nominando virum coniunctum robore legis.’

Here was a rare and a new case, yet it was not deferred vntill a parliament: it was iudged, and her wrong was righted by the common law of England, and that ‘ex arbitrio iudicum, et ex responsis prudentum;’ and yet it was counted *mirum* with an *ecce*.

Now to apply this to R. Caluines case. His case is rare and new: so was that. There is no direct law for him in precise and expresse termes; there was neuer iudgement before touching any borne in Scotland, since king James beganne his happie raigne in England; hee is the first that is brought in question: so there was no direct lawe for Sibill Belknap to sue in her owne name without her husband, who was

then liuing; nay rather there was direct lawe against it. Yet by the lawe of England shee had iudgement to recouer with an *ecce modo mirum*: so by the lawe of England iudgement ought to bee giuen for Robert Caluine, but not with an *ecce modo mirum*; but vpon strong arguments deduced à *similibus*, and *ex dictamine rationis*.

But before I come to those arguments, I will vse a few words more touching some rules which I haue read for the interpretation of lawes.—There is a graue and learned writer in the ciuile law that setteth downe foure waies and formes of interpretation of lawes: that is, first, *interpretatio historica*; secondly, *etymologica*; thirdly, *analogica*; fourthly, *practica*.—In the argument of this case all these formes haue bene vsed, and largely handled: and the two first be those that seeme but light to me, and therefore in mine opinion haue bene too much stoode vpon, and ouerweighed.

For the historical interpretation, it is alwaies darke, obscure, and vncerten, of what kingdom, countrey, or place soeuer you speake; I doe alwaies and onely except the diuine histories written in the bible.—Luy saith, ‘in tanta rerum vetustate multi temporis errores implicauerunt.’—Saint Augustine speaking of the supposed bookes of Henoch saith, ‘libri isti ob nimiam antiquitatem reiiciuntur.’—Wherefore, for this parte let this suffice, whether in the beginning there were one or seuerall kingdomes in Great Britaine; or one or seuerall monarches and kings of these two great and famous kingdomes in Great Britaine. The kinour soueraigne is lawfully and lineally descended of the first great monarchs and kings of both the kingdomes; [Fergus, Inas.] and that by so long a continued line of lawfull descent, as therein he exceedeth all the kings that the world now knoweth; and therefore to inquire further of historical knowledge in this case, I should it needlesse.

For the etymological interpretation, there hath bene very much saied, euen as much as wit and art could devise. There haue bene alleadged manie definitions, descriptions, distinctions, differences, diuisions, subdivisions, allusion of wordes, extension of wordes, construction of wordes; and nothing left vnsearched to finde what is *ligeantia*, *allegiantia*, *fides*, *obedientia*, *subiectio*, *subditi*; and who hee *aborigenes*, *indigenæ*, *alienigenæ*, *aduenticii*, *denizati*, &c. And much of this hath bene drawe out of some writers of the ciuile law; amongst whome the etymological interpretation of the words *ligeus*, and *ligeantia*, is as vncerten and doubtfull, as it is with our common lawyers; and so vpon any of these there cannot be any certain rule found for iudges to iudge by, especially in new and rare cases.

As for definition, Vlpian teacheth us, ‘omnis definitio in iure ciuili est periculosa;’ and it is said, that ‘definitio est duplex: propria, quæ constat ex genere, et differentia: impropria, quæ et descriptio vocatur, et est quælibet rei designatio;’ so definition and description are

often confounded, and both vncerten. Then, since both be vncerten and dangerous, I will leaue both, and seeke a more certen rule to iudge by.

As for etymologie of words, I agree with him which saith, it is 'leuis et fallax, et plerumque 'ridicula.' It is a pedant grammarians fault. Marcus Varro and others haue beene noted for it. And if you examine the examples which some doe bring, you will perceiue how ridiculous and vaine it is. So this rule will not serue to finde out that which wee seeke for. These bee but 'tendiculæ verborum, et nucupationes 'syllabarum,' as one calleth them: it may haue some vse, and serue a turne in schooles, but it is too light for iudgements in lawe, and for the seates of iustice.—Aquinas setteth downe a more certen rule, 'in vocibus videndum, non 'tam à quo, quam ad quid suniantur.' And words should be taken *sensu currenti*: for vse and custome is the best expositor both of lawes and wordes, 'quem penes arbitrium et ius et 'norma loquendi.'—Wherefore, of the many and diuerse distinctions, diuisions, and subdiuisions, that haue beene made in this case, I will say no more but, 'confusum est quicquid in puluerum sectum est:' and will conclude with bishop Juel; 'a man may wander and misse 'his way in mists of distinctions.'

Then leauing these historicall and etymologicall interpretations, and these curious and subtile distinctions and diuisions, I say, *ligentia*, or *allegiantia*, vnderstood *sensu currenti*, is *vinculum fidei et obedientie*, as iustice Daniel said well. And hee that is borne in any of the kings dominions, and vnder the kings obedience, is the kings liege subiect, and borne 'ad fidem 'regis' (for that is the proper and ancient word which the lawe of England hath vsed; 'ad fidem regis Angliæ, ad fidem regis Franciæ) and therefore hee cannot bee a stranger or alien to the king, or in any of his kingdomes; and by consequence, is inhablied to haue lands in England, and to sue, and be sued in any reall action for the same.—And *ligentia* hath sometimes a more large extension: for, hee that is an alien borne out of the kings dominions, vnder the obedience of another king, if hee dwell in England, and be protected by the king and his lawes, hee oweth to the king the dutie of allegiance; and so hee is *ligatus regi*, and *ligens regis*: and if hee commit treason, the indictment shall bee 'contra ligenitiæ suæ debitum,' as it was in Shirley the Frenchmans case: yet is hee not the kings subiect: for, hee was not borne 'ad fidem regis.' But, this is not that ligenitiæ which wee must finde: for, in a true and lawfull subiect, there must bee *subiectio, fides, et obedientia*; and those cannot be seuered, no more than true faith and charitie in a true Christian. And hee that hath these three à *natiuitate*, is *ligens regis*, and cannot bee a stranger or alien to the king, or in his kingdomes. And that it is so, may be proued by the rule of the other two interpretations of lawe; that is, *analogica, et practica*.

King James hath now the kingdomes of Eng-

land, Scotland, and Ireland, and the isles of Gernsey and Iersey by descent; all these bee his dominions, and vnder his subiection and obedience.—King Henry 2, had England and Normandy by descent from his mother Maud the emperesse; and Aniw and Maine by descent from his father, G. Plantagenet; and Ireland by conquest.—Henry 3, had England and Ireland by descent from his grandfather Henry 2; and Aquitany by descent from his grandfather queene Elenor, wife to king Hen. 2, and daughter to the duke of Aquitany.—Edw. 1 had all the same by descent; and parte of Scotland by conquest.—Edw. 2 and Edw. 3 had all the same by descent also: and besides, Edw. 3. claimed all France by descent from his mother queene Isabell, and had the most part of it in possession; and so had Henry 5 and Henry 6 also.

Now if in these kings times, subiectes borne in those countries, being then vnder their obedience, were no aliens but capable of landes in England: and if at this time subiects borne in Ireland, or Gernsey and Iersey, be no aliens, but capable of lands in England; then, by an analogicall interpretation, why should not subiectes borne in Scotland be at this time in like degree? For, in proportion, and in likeness, and conueniencie, there can bee no difference at all.

But whether the subiects borne in those countries in the time of those kings were then capable of lands in England as naturall subiects; or were deemed aliens, is the question: and therein *inter et alio practica* is to bee considered; and so the case is brought to be examined *per similia*. And in diuinitie 'praxis 'sanctorum est interpres præceptorum.'—Now then the question is, whether the kings subiects of England and Scotland, that be Post-nati, may be resembled to the kings subiects of Ireland, and the isles of Gernsey, &c. as now they bee; and to the subiectes of Normandie, Aniw, and Gascoyne, and parte of Scotland in former times, when the same were the dominions, and vnder the obedience of the king of England; for I speake alwaies, and would be vnderstoode of kingdomes and dominions in possession, and vnder obedience, and not of those whereunto the king hath right, but hath no possession or obedience, I houlde, that in all points materiall concerning this question they are alike, though not in all things: (for, then it were *idem*, and not *simile*: and this can not bee better vnderstoode, than by examining the objections to the contrary: which in substance may be reduced to foure in number.

First for Ireland, it was gotten by conquest, and the conquerour may impose what lawes hee will vpon them: but it is otherwise of kingdomes comming by descent.—This is a conceived difference, and lacks the foundation of reason, and hath not the true parts of a difference: for those that are borne in Ireland, and those that are borne in Scotland, are all alike for their birth within the kings dominions, and are borne vnder the like subiection and obedi-

ence to the king and have the like bond; nay, even the same bond of allegiance; that is, they are borne *ad fidem regis*.—Besides where it is said, the conquerour may impose what laws hee will: then consider how it was in the interim before king Iohn gave lawes to Ireland. —Nay, which is more, I aske whether the conquerour of Ireland can give new lawes to England, and make Irishmen to bee as naturall borne subiectes in England (if their birth-right doe not give it them) which before the conquest they were not? For, that is properly the question. But if any difference bee, the case of descent is the stronger: for, (as iustice Yelverton saide) that is by an undoubted title made by lawe; the other by a doubtfull title wonne by the sword.

But leaue Ireland gotten by conquest; what say you to the great kingdome of France; which Edward 3 had first in right by lawfull descent, and after in possession by triumphant conquest; and which Henry 6 held after in possession by descent? Was euer doubt made, whether the subiects borne there, so long as it was in subiection and obedience to the king, were capable of landes in England?

I will now turne the case, and aske another question; if king Iames our soueraigne had first bene king of England by lawfull descent (as now hee is) and after Scotland had descended vnto him, should not the subiects of Scotland (I speak still of Post-nati) have bene iudged as naturall subiects in England, as those of France were in Edward 3's time?—Then, he hauing now both kingdomes by lineall, true, and lawfull descent, it can make no difference touching the capacitie of subiects, which kingdome descended to him first, and which second; but both to him alike. And it is cleere, Post-nati in England are now capable and inheritable in Scotland, though some haue made a causelesse and needelesse doubt of it: and so on the other side those of Scotland are in England.

It is said, Normandie and Aquitania were no monarchies or kingdomes, but dukedomes or seigniories in France, and holden of the crowne of France, and therefore not to bee resembled to Scotland, which is an ancient and absolute kingdome. This objection reacheth not to the reason of our question: for, bee they kingdomes, be they seigniories, yet the subiectes borne there were borne out of the kingdome of England, and so in that respect aliens: but in that they were borne within the kings dominions, and vnder his subiection and obedience, they were no aliens, but liege and naturall borne subiectes to the king; and so capable and inheritable in England.—I say besides, the dukes of Normandie and Aquitany were absolute princes, and had soueraigne power in those countries, although they did not beare the name of kings; as at this time the duke of Savoy; the duke of Florence: the duke and state of Venice; and of late, the great duke of Russia; the duke of Burgundy; the archduke of Austria, &c.—So the difference in stile and

name makes no difference in soueraignty: for, king Henry 8 had as absolute soueraigne in Ireland, when his stile was lord of Ireland, as when hee changed his stile and was called king of Ireland.—And to say, that the tenure of the crowne of France should giue any priuiledge to them of Normandie and Aquitanie in England is a strange conceipt; it might rather bee objected against them. But, as I saied before, they were borne within the kings dominions, and vnder his obeisance, and therefore as subiects borne in England.—And if men may beleeeue some auncient stories, Aquitany and Normandie had sometimes kings and were kingdomes of themselves: and not depending nor subiect to the crowne of France: and the kingdome of France was then a small portion of Gallia, and but a little one, in comparison of that which it is at this day. And some say, that there were 24 kings in Gaule: but as the kings of France increased in power and strength, they subdued their neighbor-princes, and so that kingdome grew to that greatnesse that now it is at; euen as the heptarchie in England was dissolved, and made an intire kingdome, when one of the kings mightier than the rest subdued his neighbors.

It is saied further, that Normandie and Aquitany were subiects to the crowne of England; and to the great seale of England: but so is not Scotland: *ergo*, &c.—This standeth not wel with that which was objected before; that they were but seigniories bounden of the crowne of France. And it is true, that before Edward the thirds time, those kings of England, that held those great seigniories, did acknowledge, that they held the same of the crowne of France.—But these objections be light, and not worth the time that hath bene spent about them. The soueraignetie is in the person of the king; the crowne is but an ensigne of sovereignty; the inuesture and coronation are but ceremonies of honour, and maiestie; the king is an absolute and perfect king before he be crowned, and without those ceremonies.

The seale is to be altered and changed at the will and pleasure of the king: hee may have one, he may haue many, as pleaseth him. The king did vse queene Elizabeth seale, for diuerser moneths after his comming into England; queene Elizabeth vsed king Philip & queene Maries seale for a time; and queene Marie vsed king Edwards seale. And all that was so done, was well and lawfully done. Many things were done by auncient kings of England before the conquest by their signature, and signe manuell without anie seale at all; and some such since the conquest also: as graunts made by Maude the empress to Alberick de Vere, and others.—The king may by his great seale command all his subiects that bee vnder his obedience, wheresoeuer they bee in the world: so he did in Normandie; so he did in Aquitany; so hee did in that part of Scotland that he had in possession. And in 24 Edw. 1, his iudges kept ordinary courts of iustice there: and I haue seene the records of *placita exerci-*

*tus regis apud Edinburgh, apud Roxburgh, apud S. Iohns-towne, &c. in Scotia.* So hee may commaund his subjects, if they be in France, Spaine, Rome, or Turkie, or the Indies. And for seuerall seales the earle of Chester had a speciall seale for that his auncient county palatine. The duke of Lancaster had a speciall seale for his new countie palatine. And after, when these counties came to the kinges possession, the kinges continued seuerall seales in them both for the administration of iustice; but as subordinate to the great seale of England.—And I make little doubt, but if the king shall now commaund any of his subjects of Scotland vnder his great seale of England, they will, as they ought, duetifully obey him. As in king Edward the 1st, Edward the 2nd, and Edward the 3rd times, they commanded many of the lords of that parte of Scotland which then was vnder their obedience.—I finde, that in 13 Edw. 2nd quarto die Iunij, the king ‘constituit Adomari de Valentia comitem Pembrochie custodem regni sui; ac locum suum tenentem quamdiu rex in partibus transmarinis moram fecerit.’ And the next day, viz. die Iouis quinto die Iunij, ‘rex ordinavit, quod magnum sigillum suum remaneret clausum in aliquo loco securo, dum rex esset in partibus transmarinis: et ordinavit quoddam aliud parvum sigillum interim pro regimine regni, ad breuia, &c. consignanda, sub teste Adomari de Valentia comitis Pembroch.’ Nota, heere was a petty seale *pro regimine regni*, wherein are comprised commissions for iustice, *mandatoria, et ad brevia consignanda*; which is for *remedialia*, as they are termed.

It is saide, that Scotland hath lawes that are proper for that kingdome, and that they are not subject to the lawes of England, and so *è contra*.—And lastly it was saide, that in England every person was within the iurisdiction of some leete, and at the age of twelve years every one is to bee sworn in the leete to bee foiall and loiall to the king of England; that is, to the lawes of England (for so hee vnderstood loiall): but Post-nati in Scotland can not be so; and that they haue another forme of oathe in Scotland: *ergo, &c.*

For this laste parte, of the oathe in the leete, the lord chief baron did cleere it so plainly, as more needs not to be said. This is *legalis ligeantia*, it is not *alta ligeantia* by birth, which is that which we haue now in question.

The historicall discourse that hath bin made of leetes, of law-dayes, of *decenna, decennarij*, of the tenne-mens tale, and the oath of all male children of twelve yeeres, &c. taken at the leete, is no newes indeede, it is very olde.—Master Lambard hath it all, and more too, at large in *explicatione verborum* in the word *centuria*; it was before the conquest.—But it maketh nothing to this naturall allegiance and subjection of birth; it is not *alta ligeantia* by birth right; it is but *legalis ligeantia* by policie: and Fitzherbert calleth it ‘swearing to the lawe.’—And if that were the onely bond and mark of allegiance, many are out of it, and so at liber-

tie. As, children vnder twelve yeeres; yet sometimes they may commit treason and felony; where, *malitia supplet ætatem*. So women of all sortes; yet they may be shrewd and dangerous traitours; and if they bee women nobly borne, or widows that were wiues to noble men, they shall be tried *per pares*.—Also noble men of all sortes, who are neither bound to attend the leete, nor to take that oath, as appeereth by Britton cap. 29, treating of the court called ‘the shirifes turne,’ out of which the leete seemeth to be extracted: for, whatsoever is not presented in the leete may be presented and punished in the ‘shirifs turne.’ And M. Kitchin cieth Britton in this point for the leete; and alleadgeth also the statute of Marlebridge cap. 10, to the same purpose.—And at this day the view of francke-pleges, and the putting in of francke-pleges, and the *decennarij*, are but bare names of things past, the vse and substance is obsolete and gone.—And as it was saide, few in this place haue put in such pleges, or taken that oath, and yet I trust we are good subjects, and beare true faith and allegiance.

But this hath beene so fully answered and cleered by the lord chiefe baron, and the lord Coke, chiefe iustice of the Common Pleas, as I doe wrong to spend time in it.

But touching the seuerall lawes; I say, that seuerall lawes can make no difference in matter of soueraintie; and in the bond of allegiance and obedience to one king: and so it concludeth nothing for the point in question.—Normandy and Aquittany had seuerall lawes differing from the lawes of England: so had Fraunce in king Edw. the 3, and Hen. the 6, his time.—Ireland, before king Iohns time, continued their auncient lawes, and so, for the most part, haue done euer since.—Gernesey and Iersey haue yet at this day seuerall lawes, which, for the most part, were the auncient lawes and customes of Normandie.—Wales had, and in many things yet haue seuerall lawes: so for the county palatine of Chester also.

Yet these neuer were, nor must not be cancelled and cut off from their allegiance and obedience to the king; nor the kings subjects borne there be incapable of lands and inheritance in England: for where there is but one souereigne, all his subjects borne in all his dominions bee borne *ad fidem regis*; and are bound to him by one bond of faith and allegiance: and in that, one is not greater nor lesse than another: nor one to bee preferred before another, but all to bee obedient alike; and to be ruled alike; yet under seuerall lawes and customes. And as Saint Gregorie sayeth of the church, ‘in una fide nihil officit ecclesie sancte diuersa consuetudo.’ So I will conclude for this point, that diuersitie of lawes and customes makes no breach of that vnitie of obedience, faith, and allegiance which all liege subjects owe to their liege king and souereigne lord. And as none of them can be aliens to the king, so none of them can bee aliens or

strangers in any of his kingdoms or dominions; nor aliens or strangers one to another, no more than a Kentish-man to a Cheshire-man; or *à contra*.—And therefore all, that have bin borne in any of the kinges dominions since hee was king of England, are capable and inheritable in all his dominions without exception.

And as to the other parte of the obiection, that there will be defect of triall; for, things done in Scotland, cannot bee tried in England; I say, that that maketh little to our present question, whether Post-nati in Scotland be aliens in England, and not capable of landes in England: but it trencheth to cast some aspersion vpon the common lawe of England; that it is not sufficient to giue iustice to the kinges subiectes for lacke of sufficient meanes of triall of questions of fact. But to this baron Altham gaue so full an aunsweare, as more cannot bee said: and so hee did both cleare the doubt, and did vphould the sufficiencie of the law of England in that behalfe. And it seemeth strange, that this should now bee found out to bee objected against Scotland; since it was neuer heeretofore objected for France, Normandie, Aquitany, nor is at this day for Ireland, Geraceye, and Iersey, &c. whereas all stand vpon the same reason for the point of triall. But the wisdom of the lawe of England hath bene such, as there neuer failed certain rules for triall of all questions in fact; and those were fitted and adapted to the matter which was to be tried. And therefore, whosoever doth diligently obserue it, hee shall finde in the course and practise of the lawes of England aboue twenty seuerall formes of trialls; as by battell; by iurie, and that in diueres kindes; by wager of lawe; by proofes; by examination; by inspection; by certificates of diuers kinds; and by manie other wayes: and lest there should bee any defect in that behalfe, the law hath provided seuerall formes of ioyning of issues; and in that, hath speciall regard of things done out of the realme, as curie student may see in the books of reports.

Thus I haue passed these foure obiections, and therefore for this part I conclude, that if *argumentum à simili* were ever good and concludent in lawe, my lords the iudges haue prooued this case by so many plaine and direct examples, and like cases, and by so manie strong arguments and solide reasons drawne out of booke cases, out of statutes, out of the true rules and forme of pleading, and out of ancient records and precedents, some produced by Mr. Attorney, and many more remembered by the iudges, as no one thing can bee more plainly exemplified, nor appeare more like to an other, than this case is to those cases which they haue remembred.

But if examples and arguments *à simili* doe faile, then it remaineth *recurrere ad rationem*; and what reason that ought to bee, and how to bee vnderstoude, is to be considered: for, it is said, that '*lex est ratio summa, iubens ea quæ*

*'facienda sunt, et prohibens contraria.'* So it must be the depth of reason, not the light and shallow distempered reasons of common discourses walking in Powles, or at ordinaries, in their feasting and drinking, drowned with drinke, or blowne away with a whiffe of tobacco. Lucretius noteth, that in many there is '*rationis egestas*:' and Saint Gregory saith, '*qui in factis Dei rationem non videt, infirmitatem suam considerans cur non videat, rationem videt*:' for, although reason and knowledge bee infinite, yet no man can haue more of it than he is capable of; euery man must receive it, and keepe it in his owne vessell; he cannot borrow his neighbours braine-pan to put it in. And therefore it is not without cause, that one of the grauest and best learned lawyers of our age, [Hopperus de vera iuris prudentia p. 118.] and a priuie counsellor to one of the greatest monarches of Europe, describeth those that should bee interpreters of lawes by foure speciall qualities, that is, 1. *Ætate graues*, 2. *Eruditione præstantes*, 3. *Vsu rerum prudentes*, 4. *Publica autoritate constituti*: so, there must be grauitie, there must be learning, there must be experience, and there must be authoritie: and if any one of these want, they are not to be allowed to be interpreters of the lawe.—How all these qualities concur in these reuerend iudges, whom wee haue heard in this present case, I will spare to speake what I thinke; for, Chrysostom teacheth mee, '*qui laudatur in facie, flagellatur in corde*.'—In seeking out this depth of reason, the same author [Hopperus, *ibid.* page 119.] giueth a caution, which is this; '*vitium quod in hoc genere fugi debet est, ne, si rationem non inuenias, mox legem sine ratione esse clames*.' And in 36 H. 6. Fortescue saith the same in effect, which is thus; '*we haue many courses and formes which bee houlden for lawe, and haue bene houlden and vsed because of reason; and notwithstanding the reason be not ready in memory, yet by study and labour a man may finde it*.'

Now when wee come to examine by reason, whether Post-nati in Scotland shall be disabled as aliens, or shall be capable of lands in England, as naturall borne subjects there; wee are first to consider what is the reason while aliens in the dominions, and vnder the obedience of other forraine princes, are not capable of landes in England. And surely, the true reason is, that which was noted by baron Altham; and hath since bene ofte remembred, viz. the danger that might thereby come to the king and the common-weale: specially by drawing hither too great multitudes of them: for so the treasure of the realme might bee transported by them into other forraine kingdomes and countries; whereby it might bee vsed against the king, and to the preiudice of the state: and besides, they might vnder-hand practise sedition and rebellion in the kingdom, and cause many other daungers and inconueniences. But that reason cannot serue against Post-nati in Scotland, now that there is but one king of

both the kingdomes, no more than it can serue against those that are borne in Ireland, or Gernesey, or Iersey: and therefore in reason they are as capable of landes in England, as the kings subiects of Ireland, and Gernesey, and Iersey are.

Against this, there haue also beene many obiections made, and reasons deuised, that seeme witty, and haue some shew of probability to proue, that Post-nati in Scotland are aliens, and ought not in reason to bee capable of landes in England, videlicet.—1. That England and Scotland were two ancient seuerall kingdomes vnder seuerall kings, and seuerall crownes.—2. That they continue yet seuerall kingdomes.—3. That they haue yet seuerall lawes, seuerall seales, seuerall crownes, and seuerall kings: for, it is said, though king James be king of both, and hath but one naturall body, yet in iudgement of law, he is in respect of his two seuerall kingdomes, as two seuerall kings, and the subiects of each seuerall kingdome are bound to him by distinct allegiance, according to the seuerall lawes of the kingdome where they were borne.—And all this is grounded vpon this rule or fiction in lawe: ‘quando duo iura concurrunt in vna persona, æquum est acsi essent in diuersis.’

And vpon this ground is this new form of pleading deuised, which the defendants haue vsed in this case, such as cannot be found in any record, euer to haue beene pleaded before; and may as well serue against the kinges subiects of Ireland, as against the Postnati of Scotland. And sithence in former times the like forme of pleading was neuer seene against any of the kinges of Englandes subiects, which were borne in any of his dominions out of England, as in Normandie or Aquitanie, or in France (I meane such part of it as was in the kinges possession, and in subiection and obedience to him, and not in that parte of France which his enemies helde) it may be probably inferred, that it was then generally houlden, that neither such a forme of pleading, nor the matter itselfe was sufficient in lawe to disable anie such plaintife: for, against French-men that were not vnder the kinges obedience wee finde it often pleaded. And as those that were not subiects to the king, nor borne vnder his obedience, did then presume to bring suites and actions in England; so it can not bee thought, but that the king hauing then so large and ample dominions beyond the seas, as Normandy and Aquitany, and many other parts of France, some of his subiects borne there, had cause to haue, and did bring the like suites in England. And sithence no such plea is found to haue beene then vsed against them, it can not in lawe and reason bee now allowed against the Post-nati in Scotland: for, I may say as Ascue saied in 37 H. 6. ‘Our predecessors were as sage and learned as we be.’

And I see not, but that in this case a good argument may bee reasonably deduced from the negative, as it was in the case reported by the great learned, and most graue and reue-

rend iudge sir James Dyer, chiefe iustice of the Common Pleas, anno 23 Elizab. The question there, was, whether an erroneous iudgement giuen in Rie, which is a member of the cinque-portes, might bee reuersed in the Kings Bench, or Common Place at Westminster; and it was thus resolved; ‘sed pro eo quod nullum tale breue in Registro, nec in aliquibus præcedentibus curiarum prædictarum inueniri potuerat, dominus cancellarius Bromley per opinionem capitalium iusticiariorum vtriusque banci denegauit tale breue concedere.’ And so iustice Fenners argument houldeth well, viz. there is in this case no lawe to exclude the complainant, ergo hee is a liege and a naturall borne subiect.

But the forme of pleading in the time of king. Ed. 1. in Cobledickes case, which was cited out of Hengham, (and the booke shewed beere by the lord chiefe iustice Coke) is so direct and plaine for this our question, as nothing can be more plaine: and therefore I thinke it not amisse to report it againe.—That case was in effect and substance, thus:—A woman brought a writte of *ayel* against Roger Cobledicke, and declared of the seisin of Roger her grand-father, and conueied the discent to Gilbert her futher; and from him to the demaundant, as his daughter and heire. The tenant pleaded, that the demaundant was a French-woman, and not of the ligeance nor of the fidelitie of England; and demaunded iudgement if shee ought to haue the action against him. This plea was houlden to bee insufficient; and thereupon the tenant amended his plea, and pleaded further, that the demaundant was not of the ligeance of England, nor of the fidelitie of the king; and demaunded iudgement, &c. And against that plea none exception was taken, but thereupon the demaundant prayed licence to depart from her writ. By this it appeareth plainly, that the first plea, alledging that shee was a French-woman, and not of the ligeance, nor of the fidelitie of England, was insufficient (and so declared by Berkeford the chiefe iustice); for, there can bee no fidelitie nor allegiance due to England, respecting the land and soile without a soueraigne and king. But the second plea, alledging, that shee was not of the ligeance of England, nor of the fidelitie of the king, was good and sufficient: for, to the king fidelitie and allegiance is due; and therefore, since shee failed in that, she was not to be answered: and thereupon shee praied licence to departe from her writte, and so she left her suite.

Now, for the reasons which haue beene drawne and strained out of the statute an. 14 Edw. 3. If they bee well examined, they serue little for this point which we haue in hand.—It is to be considered, at what time, and vpon what occasion that statute was made. King Edward the third being right heire to the crowne and kingdome of Fraunce by descent from his mother, and hauing spent many yeeres for the recouering of the same, resolved to take vpon him the name and stile of king of Fraunce; he-

ing advised thereunto by them of Flaunders. Hereupon he did take the stile of king of France; and altered his seale and his armes; and after a while, placed the armes of France before the ancient armes of England, as they are borne at this day. This gave occasion for the making of this statute: for some people (*uscum gentes*, with the statute) seeing this change, and considering the large and ample extent, and the magnificence of that great kingdom, beganne to doubt that the king would make his imperiall seate there; and conceived thereby, that the kingdom of England, being the lesser, should bee in subiection of the king and kingdom of France, being the greater, and to bee gouerned and ruled by a vice-roy, or deputy, as they saw Ireland was. And though in the kings stile, England was placed before France, yet they sawe the armes of France marshalled before the armes of England; though at the first bearing thereof some say it was not so.—To cleere this doubt, and to take away this feare from the subjects of England, was this statute made, as doth plainly appeare by the wordes of the statute itselfe.

Now if you will make an apt and proper application of that case then betwene England and France, to this our case now, betwene Scotland and England, it must be thus:—1 Edw. 3, then king of England (being the lesser) had afterwards the kingdom of France (being the greater) by descent, and tooke the stile of king of France. King James king of Scotland (being the lesser) hath afterward the kingdom of England (being the greater) by descent, and taketh the stile of king of England.

2. King Ed. 3, altered his seale, and his armes, and placed the armes of France before the armes of England.—King James hath changed his seale, and his armes in England, and hath placed the armes of England before the armes of Scotland.

3. It was then doubted, that king Edw. 3 would remove his court out of England, the lesser, and keepe his imperiall seate and state in France, the greater.—King James hath indeede remooued his court out of Scotland, the lesser, and doth in his royall person (with the queene and prince, and all his children) keepe his imperiall seate in England, the greater.

4. In all these the cases agree; but yet one difference there is, and that is in the stile: for king Ed. 3, in his stile placed England, the lesser, being his ancient kingdom, before France, the greater, being newly descended vnto him.—But king James in his stile placeth England, the greater, though newly descended vnto him, before Scotland, the lesser, being his ancient kingdom.

5. Now, this being thus; perhappes Scotland might out of this example haue conceived the like doubt against England, as England did then against France: but as there was then no doubt made, whether the kings subjects borne in England should be capable of lands in France; so, out of this statute, and vpon this example

no doubt can bee inferred, whether the kings subjects now borne in Scotland, shall be capable of lands in England.

But, all these obiections, and the ground whereupon they are framed, viz. *quando duo iura*, &c. haue beene so thorowly and profoundly examined, and so learnedly and fully answered and cleered by the iudges, as I make no doubt but all wise and indifferent hearers be well satisfied therein.—And if there be any so possessed with a preiudicate opinion against truth, and reason, that will say in their owne heartes, '*licet persuaseris non persuadebis*;' and so, either serpent-like stop their eares, or else wilfully absent themselves, because they would not heare the weaknesse and absurdities of their owne concepts laied open and confuted: if there bee any such I say (as I trust there bee but few, and yet I feare there bee some) I would they had learned of Tertullian, that '*veritas docendo suadet, non suadendo docet*.' And I wish that they bee not found among the number of those to whome St. Paul saith, '*si quis ignorat, ignoret*;' and St. Iohn in the Apocalips, '*qui sordidus est, sordescat adhuc*.' And I will exhort with St. Paul: '*qui tenet, teneat*,' and not wauer or doubt by such weak arguments and obiections.

But in this new learning, there is one part of it so strange, and of so dangerous consequent, as I may not let it passe, viz. that the king is as a king divided in himselfe: and so as two kings of two severall kingdoms; and that there be severall allegiances, and severall subiections due vnto him respectively in regarde of his severall kingdoms, the one not participating with the other.

This is a dangerous distinction betwene the king and the crowne, and betwene the king and the kingdom: it reacheth too farre; I wish every good, subject to beware of it. It was neuer taught, but either by traitours, as in Spencers bill in Edward the seconds time (which baron Suig, and the lord chiefe baron, and lord Coke remembered) or by treasonable papists, as Harding in his confutation of the apologie maintaineth, that kings haue their authority by the positive lawe of nations, and haue no more power, than the people hath, of whome they take their temporall iurisdiction; and so Eiclerus Simanca, and others of that crew. Or by seditious Sectaries and Puritans, as Buchanan de Iure Regni apud Scotos, Penry, Knox, and such like. For, by these, and those that are their followers, and of their faction, there is in their pamphlets too much such traitorous seede sowne.—But leaving this, I will add a little more, to prouoe, that in reason Robert Caluine, and other like Post-nati in Scotland, ought by lawe to be capable of lands in England: and for that, I will remember one rule more which is certain and faileth not, and ought to bee observed in all interpretation of lawes; and that is, '*ne quid absurdum, ne quid illusorium admittatur*.'

But, vpon this subtil and dangerous distinction of faith and allegiance due to the king,

and of faith and allegiance due to the crowne, and to the kingdome (which is the onely basis and fundamentall maine reason to disable the plaintife, and all Post-nati) there follow too many grosse, and fowle absurdities, whereof I will touch some few, and so conclude, that in lawe and reason this subtle, but absurd and dangerous distinction, ought not to be allowed. — This bond of allegiance, whereof wee dispute, is *vinculum fidei*; it bindeth the soule and conscience of euery subiect severally and respectively, to be faithfull and obedient to the king: and as a soule or conscience cannot bee framed by policie; so faith and allegiance cannot bee framed by policie, nor put into a politike bodie. An oath must be sworne by a naturall bodie; homage and fealtie must be done by a naturall bodie, a politike body cannot doe it.

Now then, since there is but one king, and soveraigne, to whome this faith and allegiance is due by all his subiects of England and Scotland, can any humane policie diuide this one king, and make him two kings? Can 'cor regis Angliae' be 'in manu Domini,' and 'cor regis Scotiae' not so? Can there bee warres betweene the king of England and the king of Scotland, or betweene the kingdome of England and the kingdome of Scotland, so long as there is but one king? Can the king of England now send an army roial into Scotland against the king of Scotland? Can there bee any letters of marke or reprisall now graunted by the king of England, against the subiects of the king of Scotland? Can there bee any protections now, 'quia profecturus in exercitu Iacobi regis Angliae in Scotiam?' Nay shortly, can any man bee a true subiect to king Iames as king of England, and a traitor or rebell to king Iames as king of Scotland? Shall a foote breadth, or an inch breadth of ground, make a difference of birth-right of subiects borne vnder one king; nay, where there are not any certen bounds or limites knowne at all, but an imaginarie partition wall, by a conceived fiction in lawe? It is enough to propound these and such like questions, whereof many more might be remembered: they carry a sufficient and plaine answer in themselves: 'magis docet qui prudenter interrogat.'

As the king nor his heart cannot bee diuided, for he is one entire king ouer all his subiectes, in which soeuer of his kingdomes or dominions they were borne, so hee must not bee serued nor obeyed by halues; he must haue intire and perfect obedience of his subiects: for 'ligentia' (as baron Iloron saied well) must haue 'voure qualitates'; it must bee '1. pura et simplex: 2. integra et solida: 3. vniuersalis non localis: 4. permanens, continua, et illasa.' Diuide a man's heart, and you lose both parts of it, and make no heart at all; so he that is not an intire subiect, but halfe-faced, is no subiect at all: and hee, that is born an intire and perfect subiect, ought by reason and lawe to haue all the freedomes, priuiledges, and benefites pertaining to his birth-right in all the kings dominions: and such are all the Post-

nati in England and Scotland. And the inconvenience of this imaginary locall allegiance hath bene so lately, and so fully declared by the lorde chiefe iustice Coke, as more needes not bee saied in it.—In some speciall cases there sometime may bee a king of subiects without land in possession, as iustice Fenner noted in the gouernement which Moses had ouer the people of Israel in the wilderness; and as in the case which sir Iohn Popham the late lord chiefe iustice did put in the parliament. If a king and his subiects bee driuen out of his kingdome by his enemies, yet notwithstanding hee continueth still king ouer those subiects, and they are still bound vnto him by their bond of allegiance, wheresoeuer he and they bee. But there can not bee a king of land without subiects: for, that were but 'imperium in belluas,' and 'rex et subditi sunt relatiua.'

I saied there was an other generall rule for expounding of lawes, which I reserued to bee last spoken of. I will now but touch it; for, I will not stand to examine by humane reasons whether kings were before lawes, or lawes before kings; nor how kings were first ordained: nor whether the kings or the people did first make lawes; nor the seuerall constitutions and frames of states and common-weales: nor what Plato or Aristotle haue written of this argument. They were men of singular learning and wisdom; but wee must consider the time, and the countrie, in which they liued, and in all their great learning they lacked the true learning of the knowledge of God. They were borne and liued in Greece, and in popular states: they were enemies, or at least inslikers of all monarchies; yet one of them disdained not to bee a seruant or mercenarie hireling to a monarch. They accepted all the world barbarous, but their owne countrey of Greece: their opinions therefore are no canons to give lawes to kings and kingdomes, no more than sir Thomas Moores Vtopia, or such pamphlets as wee haue at euerie mart.

I beleue him that saith, 'per me reges regnant, et principes iusta decernunt'; [Prov. c. 3.] and I make no doubt, but that as God ordained kings, and hath giuen lawes to kings themselves, so hee hath authorized and giuen power to kings to giue lawes to their subiects; and so kings did first make lawes, and then ruled by their lawes, and altered and changed their lawes from time to time, as they saue occasion, for the good of themselves, and their subiects.—And this power they haue from God Almighty; for, as saint Augustine saith 'in hoc reges Deo seruiunt sicut eis diuinitus precipitur, in quantum sunt reges, si in suo regno bona iubeant, mala prohibeant, non solum quae pertinent ad humanam societatem, verum etiam quae ad diuinam religionem.'

And I should Thomas Aquinas his opinion to be good, 'rex solutus a legibus quoad vim coactivam, subditus est legibus quoad vim directivam propria voluntate.' And for this opinion there is a stronger authoritie, even from

God himself in Ecclesiastes, c. 8. ver. 2. 'ego  
'os regis observo; et præcepta iuramenti Dei:  
and ver. 4. 'sermo illius potestate plenus est:  
'nec dicere ei quisquam potest, quare in fa-  
'cias?'

Now being led a little from the common  
law to the civile lawe, I finde in the civile lawe  
[Cod. 1. li. tit. 14. le. 1.] a direct text, war-  
ranting that generall rule which I reserved to  
this place, which is this; 'inter æquitatem ius-  
'que interpositam interpretationem nobis solis  
'et licet et oportet inspicere.'

And another like text [ibidem le. 12.] in  
these words, 'sententia principis ius dubium  
'declaramus, ius facit quoad omnes.' And some  
grate and notable writers in the civile lawe  
say, 'rex est lex animata;' some say, 'rex est  
'lex loquens;' some others say, 'interpretan-  
'tur legem consuetudo et princeps;' another  
saith, 'rex solus iudicat de causâ iure non de-  
'finita.'

And as I may not forget saint Augustines  
words, which are these: 'generale pactum est  
'societatis humanæ regibus suis obtemperare:'  
so I may not wrong the iudges of the common  
lawe of England so much, as to suffer an im-  
putation to bee cast vpon them, that they, or  
the common lawe doe not attribute as great  
power and authoritie to their souveraignes the  
kings of England, as the Romane lawes did  
to their emperours: (a) for, Bracton, the chiefe  
iustice in the time of king Henry the 3rd. hath  
these direct wordes, 'de chartis: regijs et factis  
'regum, non debent, nec possunt iusticiari  
'nec priuata personæ disputare. Nec etiam,  
'si in illa dubitatio oriatur, possunt eam inter-  
'pretari. Et in dubijs et obscuris, vel si aliqua  
'dictio duos contineat intellectus, domini regis  
'erit expectanda interpretatio et voluntas;  
'cum eius sit interpretari cuius est condere.'  
And Britton in the time of king Ed. 1. writeth  
as much in effect.

So as now if this question seem difficult, that  
neither direct law, nor examples and prece-  
dents, nor application of like cases, nor dis-  
course of reason, nor the graue opinion of  
the learned and reuerend iudges, can resolu-  
it, here is a true and certain rule, how both by  
the civile lawe, and the ancient common lawe  
of England it may and ought to be decided:  
that is, by sentence of the most religious, learn-  
ed, and iudicious king that euer this kingdome  
or island had.—But this case is so cleare as  
this needeth not at all.—And in this I would  
not be mis-understoode, as though I spake of  
making of new lawes, or of altering the lawes  
now standing; I meane not so, but I speake  
only of interpretation of the lawe in new ques-  
tions and doubts, as now in this present case:  
neither doe I mean hereby to derogate any  
thing from the high court of parliament; (farre  
be it from my thought) it is the great counsell  
of the kingdome, wherein enery subiect hath  
interest. And to speake of the constitution or

forme of it, or how, or when it was first be-  
gunne, is for busie questionists: it ought to bee  
obeyed and reuerenced, but not disputed; and  
it is at this time impertinent to this question.—  
But certes it is, it hath beene the wisdom-  
e of the kings of this realme to reserve in them-  
selves that supreme power to call their no-  
bles, clergie, and commons together, when they  
sawe great and vrgent causes; and by that  
great counsell to make edicts and statutes for  
the weale of their people, and safetie of the  
kingdome and state, as in anno 10 Edw. 3, the  
assembly at Nottingham for the great wars in  
France: and in anno 20 H. 3, Prouisions  
Merton, which I remembred before:

There haue beene made some obiections of  
inconueniencie, as for bearing of scot and lot,  
and such other charges; and some out of fru-  
galitie, that the king shull lose his profit of  
making denizens, and such like. These are so  
light as I leaue them to the winde; they are  
neither fit for parliament, nor counsell, nor  
court.

Another argument and reason against the  
Postnati hath beene lately made out of dissi-  
dence and mistrust, that they will come into  
England *sans* number, and so as it were to sur-  
charge our common; and that this may be in  
*secula seculorum*. I know not well what this  
meanes. The nation is ancient, noble, and  
famous; they haue many honourable and wor-  
thie noblemen and gentlemen, and many wise  
and worthie men of all degrees and qualities;  
they haue lands and faire possessions in Scot-  
land. Is it therefore to bee supposed, or can  
it in reason bee imagined, that such multitude  
*sans* number will leaue their native soile, and  
all transport themselves hither? Hath the Irish  
done so, or those of Wales, or of the isles of  
Man, Gernesey, and Iersey? Whie should we  
then suspect it now more for Scotland?

Nay, doe you suppose that the kinge of Eng-  
land will ener suffer so great a parte of his do-  
minions, and so great and famous a kingdome  
as Scotland is to be dispeopled? It is a doubt  
imagined without any foundation or ground of  
reason. But if it were to bee doubted, the  
twelue iudges that haue concurred in opinion,  
and that late worthy iudge Popham, had as  
great cause to feare it as any others. They  
are wise; they are learned; they haue faire  
possessions and good estates; they haue pos-  
teritic to care for as others haue.—Yet, ad-  
mit it bee a matter worth the doubting of,  
what is that to the young Postnati that are  
not like in many yeares to come hither in such  
number? Shall we vpon this causelesse feare de-  
prive them of their lawfull birth-right? Haue  
wee seene in these five yeeres past anie more  
of them than this one alone that haue gotten  
any lands in England? And this little that he  
hath is so small and poore a portion, that his  
purchase is not great, and therefore no iust  
cause of offence to any.

Nay, if you looke vpon the Antenati, you  
shall find no such confluence hither, but some  
few (and very few in respect of that great and

(a) This language is surely very unguarded.  
EDITOR.

populous kingdome) that haue done long and worthie seruice to his maiestie, haue, and still doe attend him, which I trust no man mislikes: for, there can bee none so simple, or childish (if they haue but common sense) as to thinke that his maiesty should haue come hither alone amongst vs, and haue left behinde him in Scotland, and as it were caste off, all his ould and worthie seruants.

And if these noble and worthie gentlemen of Scotland, I meane the Antenati, be louingly and brotherly entertained amongst vs, with mutuall loue and beneuolence, that so we may *coalescere*, and be vnited together, by marriage, and otherwise (as in some particular cases wee see it already happily beguine) no doubt God will blesse this vnion of both these nations, and make them, and the king, and Great Britaine to be famous through the world; and feared and redoubted of our enemies, and of all that wish vs ill: for, '*vis vnita fortior, et concordia multos facit vnum.*' But what may follow vpon such arguments of diffidence and suspition, which seeme but to hinder vnion, and to breede discord and dissention, I will not speake. Let euery wise man consider it well: for, '*humana consilia castigantur vbi celestibus se præferunt.*' And remember St. Paules caution, '*si inuicem mordetis, videte ne ab inuicem consumamini.*'

And for the resemblance that hath bin made of this case of Postnati, but indeed for the vnion of both kingdomes, with the houswives cutting of her cloth by a threede, I will say but this, that if shee cut her peece of cloth in length aswell as in breadth, all the threads will be cutte, and the cloth marred. And this cutting in this our case, is, to cutte all aswell in length as in breadth, euen through all the kinges dominions; and so will rent asunder the whole frame of the vnion, and cut in peeces all the threeds of allegiance.

But now I will aske this question: how long shall this suspition and doubt continue? Shall there bee a dis-vnion for euer? If it be saied, no, but vntill the lawes and customes of both kingdomes bee made one and the same: then I aske; how, and when that shall be done? and it may bee, that the constitutions of the countries bee such as there can hardly in all things bee such an absolute and perfect reconciling or vniting of lawes as is fauiced. Is it yet so betwene England and Wales, or betwene Kent and Cornwall, or betwene many other parts of this kingdome? I say no; and I speake it confidently and truly, it is not so, nor well can be so. Therefore let England and Scotland be in like degree now, as England and Wales were for

many hundred yeeres, and in many things are yet still; and yet let vnion and loue increase amongst vs, euen in *secula seculorum*. Let vs not be such as St. Bernard noteth, '*amant quod non decet, timent quod non oportet, dolent vane, gaudent vanis.*' And let vs no longer make question, whether seuerall lawes and customes bee markes of seperation and dis-vnion, or of seuerall allegiances; for certainly they are not.

One other reason remaines against these Postnati, and that is out of a prouident foresight, or as it were a prophelying: what if a seperation of these kingdomes fall hereafter?

Of this I can say but *absit omen*. It is *potentia remota* (as iustice Williams saied) and I trust in God *remotissima*: and I will euer pray to God that it neuer fall so, vntill the king of all kinges resume all scepters and kingdomes into his owne hands. And let vs take heede of sinnes of ingratitude and disobedience; and remember, that Adam and Eue were punished, '*non propter pomum, sed propter vitium.*' And for such prophets, let the prophet Ezechiel, ca. 13. answer them, '*væ prophætis insipientibus, qui sequuntur spiritum suum, et nihil vident.*' And the prophet Esay speaketh to all such with an other *væ*, '*væ illis qui dispergunt.*'

Now then, as M. Solicitor beganne with seeking out the truth; so I will conclude with Eadras words, '*magna est veritas et præualeat:*' and with this further, '*eatenus rationandum donec veritas inueniatur: cum inuenta est veritas, sigendum ibi iudicium: et in victoria veritatis, soli veritatis inimici pereunt.*'

#### THE CONCLUSION.

Thus I haue heere deliuered my concurrence in opinion with my lordes the iudges, and the reasons that induce and satisfie my conscience, that Ro. Caluine, and all the Post-nati in Scotland, are in reason, and by the common lawe of England, naturall-borne subiects within the allegiance of the king of England; and inabled to purchase and haue free-hould and inheritance of lands in England; and to bring reall actions for the same in England.

For, if they haue not this benefit by this blessed and happie vnion, then are they in no better case in England, than the king of Spaines subiects borne in Spaine, &c. And so by this vnion they haue gotten nothing: what they haue lost iustice Yeluerton did well note.

And therefore I must giue iudgement in the Chancerie, that the defendants there ought to make direct answer to Ro. Caluines bill for the lands and euidences for which he complaines.

T. ELLESMERE, Canc.

LE DROIT  
DES GENS.

TOME PREMIER.

# LE DROIT DES GENS,

OU  
PRINCIPES

DE LA

## LOI NATURELLE,

Appliqués à la conduite & aux affaires des  
NATIONS & des SOUVERAINS.

PAR M. DE VATTEL.

*Nil est enim illi principi Deo, qui omnem hunc mundum regit, quod quidem  
in terris fiat, acceptius, quam consilia cætusque hominum jure sociati,  
quæ civitates appellantur. CICERO. Somn. Scipion.*

Nouvelle Edition Augmentée, Revue & Corrigée.  
Avec quelques Remarques de l'Editeur.

TOME PREMIER



A AMSTERDAM,  
Chez E. VAN HARREVELT.  
MDCCLXXV.

CHAPITRE XIX.

De la patrie, & de diverses matieres qui y ont rapport.

**L**a totalité des contrées occupées par une nation, & soumises à ses lois, forme, comme nous l'avons dit, son territoire; c'est aussi la commune patrie de tous les individus de la nation. Nous avons été obligés d'anticiper la définition du terme de patrie (§. 122.), parce que nous avons à traiter de l'amour de la patrie, vertu si excellente & si nécessaire dans un Etat. Supposant donc cette définition connue, il nous reste à expliquer diverses choses relatives à la matiere, & à développer les questions qu'elle présente.

Les citoyens sont les membres de la société civile: liés à cette société par certains devoirs, & soumis à son autorité, ils participent avec égalité à ses avantages. Les naturels, ou indigènes, sont ceux qui sont nés dans le pays, de parens citoyens. La société ne pouvant le soutenir & se perpétuer que par les enfans des citoyens, ces enfans y suivent naturellement la condition de leurs peres, & entrent dans tous leurs droits. La société est censée le vouloir ainsi; par une suite de ce qu'elle doit à sa propre conservation; & l'on présume de droit que chaque citoyen, en entrant dans la société, réserve à ses enfans le droit d'en être membres. La patrie des peres est donc celle des enfans; & ceux-ci deviennent de véritables citoyens, par leur simple consentement tacite. Nous verrons bientôt, si, parvenus à l'âge de raison, ils peuvent renoncer à leur droit, & ce qu'ils doivent à la société dans laquelle ils sont nés. Je dis que pour être d'un pays, il faut être né d'un pere citoyen; car si vous y êtes né d'un étranger, ce pays sera seulement le lieu de votre naissance, sans être votre patrie.

Les habitans, par distinction des citoyens, sont des étrangers auxquels on permet de s'établir à demeure dans le pays. Liés par leur habitation à la société, ils sont soumis aux lois de l'Etat tant qu'ils y restent, & ils doivent le défendre, puisqu'ils en sont protégés, quoiqu'ils ne participent pas à tous les droits des citoyens. Ils jouissent seulement des avantages que la loi ou la coutume leur donne. Les habitans perpétuels sont ceux qui ont reçu le droit d'habitation perpétuelle. C'est une espece de citoyens d'un ordre inférieur: ils sont liés à la société, sans participer à tous ses avantages. Leurs enfans suivent la condition des peres; par cela même que l'Etat a donné à ceux-ci l'habitation perpétuelle, leur droit passe à leur postérité.

Une nation, ou le Souverain qui la représente, peut accorder à un étranger la qualité de citoyen, en l'aggrégeant au corps de la société politique. Cet acte s'appelle naturalisation. Il est des Etats où le Sou-

§. 211.

Ce que c'est que la patrie.

§. 212.

Des citoyens & naturels.

§. 213.

Des habitans.

We have no such class; but all are divided into Citizens & Aliens

§. 214.

Naturalisation.

tion.

546

THE  
LAW OF NATIONS;  
OR  
PRINCIPLES  
OF THE  
LAW OF NATURE:  
APPLIED TO THE CONDUCT AND AFFAIRS  
OF  
NATIONS AND SOVEREIGNS.

By M. DE VATTÉL.

A WORK tending to Display the TRUE INTEREST of POWERS.

Nihil est enim illi principi Deo, qui omnem hunc mundum regit, quod quidem in terris fiat, acceptius, quam concilia cœtusque hominum jure sociati, quæ civitates appellantur.

CICERO. *Scen. Scipion.*

TRANSLATED from the FRENCH.

V O L. I.



L O N D O N

Printed for J. NEWBERRY, J. RICHARDSON, S. CROWDER, T. CARLON,  
T. LONGMAN, B. LAW, J. FULLER, J. COOTE, and G. NEARSLY.

1816

§. 212.  
Of the citi-  
zens and  
natives.

The citizens are the members of the civil society : bound to this society by certain duties, and subject to its authority, they equally participate in its advantages. The *natives*, or *indigenes*, are those born in the country of parents who are citizens. Society not being able to subsist, and perpetuate itself, but by the children of the citizens ; those children naturally follow the condition of their fathers, and succeed to all their rights. The society is supposed to desire this ; in consequence of what it owes to its own preservation ; and it is presumed that each citizen, on entering into society, reserves to his children the right of their becoming members. The country of the fathers is then that of the children ; and these become true citizens, merely by their tacit consent. We shall soon see, whether on their arriving at the age of reason, they may renounce their right, and what they owe to the society in which they are born. I say, that in order to be of the country, it is necessary that a person be born of a father who is a citizen ; for if he is born there of a stranger, it will be only the place of his birth, and not his country.

§. 213.  
Of the in-  
habitants.

The inhabitants, as distinguished from citizens, are strangers, who are permitted to settle and stay in the country. Bound by their residence to the society, they are subject to the laws of the state, while they reside there, and they are obliged to defend it, because it grants them protection, though they do not participate in all the rights of citizens. They enjoy only the advantages which the laws, or custom gives them. The *perpetual inhabitants* are those who have received the right of perpetual residence. These are a kind of citizens of an inferior order, and are united, and subject to the society, without participating in all its advantages. Their children follow the condition of their fathers ; and as the state has given to these the right of perpetual residence, their right passes to their posterity.

§. 214.  
Naturaliza-  
tion.

A nation, or the sovereign who represents it, may grant to a stranger, the quality of citizen, by admitting him into the body of the political society. This is called *naturalization*. There are states in which the sovereign cannot grant to a stranger all the rights of the citizens, for example, that of possessing places of trust, and consequently where he has the power of granting only an imperfect naturalization. It is here a regulation of the fundamental law, which limits the power of the prince. In other states, as in England and Poland, the prince cannot naturalize a single person, without the concurrence of the nation represented by its deputies. In England, however, being born in the country naturalizes the children of a foreigner.

§. 215.  
Of the citi-  
zens born  
in a foreign  
country.

It is asked, whether the children born of citizens in a foreign country, are citizens ? The laws have decided this question in several countries, and it is necessary to follow their regulations. By the law of nature alone, children follow the condition of their fathers, and enter into all their rights (§. 212.) ; the place of birth produces no change in this particular, and cannot of itself furnish any reason for taking from a child what nature has given him ; I say of itself, for the civil law, or politics may order otherwise, from particular views. But I suppose that the father has not entirely quitted his country in order to settle elsewhere. If he has



THE  
LAW OF NATIONS,  
OR,  
PRINCIPLES  
OF THE  
LAW OF NATURE,  
Applied to the Conduct and Affairs  
OF NATIONS AND SOVEREIGNS.

FROM THE FRENCH OF MONSIEUR DE VATTEL.

---

Nihil est enim illi principi Deo qui omnem hunc mundum regit, quod quidem in  
terris fiat, acceptius, quam concilia eorumque hominum jure sociati, quæ civitates  
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A NEW EDITION,

Revised, corrected, and enriched with many valuable Notes never before translated  
into English.

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L O N D O N:

PRINTED FOR C. G. AND J. ROBINSON, PATERNOSTER-ROW.

1797.

We do not therefore deviate from the views of nature in confining the Indians within narrower limits. However, we cannot help praising the moderation of the English puritans who first settled in New England; who, notwithstanding their being furnished with a charter from their sovereign, purchased of the Indians the land of which they intended to take possession\*. This laudable example was followed by William Penn and the colony of quakers that he conducted to Pennsylvania.

When a nation takes possession of a distant country, and settles a colony there, that country, though separated from the principal establishment, or mother-country, naturally becomes a part of the state, equally with its ancient possessions. Whenever therefore the political laws, or treaties, make no distinction between them, every thing said of the territory of a nation, must also extend to its colonies. § 210.  
Colonies.

## C H A P. XIX.

*Of our Native Country, and several Things that relate to it.*

THE whole of the countries possessed by a nation and subject to its laws, forms, as we have already said, its territory, and is the common country of all the individuals of the nation. We have been obliged to anticipate the definition of the term, *native country* (§ 122), because our subject led us to treat of the love of our country,—a virtue so excellent and so necessary in a state. Supposing then this definition already known, it remains that we should explain several things that have a relation to this subject, and answer the questions that naturally arise from it. § 211.  
What is our  
country.

The citizens are the members of the civil society: bound to this society by certain duties, and subject to its authority, they equally participate in its advantages. The natives, or natural-born citizens, are those born in the country, of parents who are citizens. As the society cannot exist and perpetuate itself otherwise than by the children of the citizens, those children naturally follow the condition of their fathers, and succeed to all their rights. The society is supposed to desire this, in consequence of what it owes to its own preservation; and it is presumed, as matter of course, that each citizen, on entering into society, reserves to his children the right of becoming members of it. The country of the fathers is therefore that of the children; and these become true citizens merely by their tacit consent. We shall soon see, whether, on their coming to the years of discretion, they may renounce their right, and what they owe to the society in which they were born. I say, that, in order to be of the country, it is necessary that a person be born of a father who is a citizen; for if he is born there of a foreigner, it will be only the place of his birth, and not his country. § 212.  
Citizens  
and na-  
tives.

\* History of the English Colonies in North America.

new York 25 July 1787

Dear Sir

I was this morning honored with your Excellency's favor of the 22<sup>d</sup> inst: I immediately delivered the letter it enclosed to Commodore Jones, who being detained by business, did not go in the pinch packet, which sailed yesterday.

Permit me to hint, whether it would not be wise & reasonable to provide a strong check to the admission of foreigners into the administration of our national government; and to declare expressly that the Command in Chief of the American army shall not be given to, nor devolve on, any but a natural born Citizen. —

Mr. Jay is obliged by your attention, and assures you of her perfect Esteem & Regard - with similar sentiments the most cordial and sincere I remain

Dear Sir your faithful friend Horst  
John Jay —

The Excellency General Washington

State of New York }  
County of Washington. I Edward Dodd clerk of the court of common  
pleas of the said county, hereby certify that at a term of the  
said court held in and for the said county before the  
Judges thereof at the Court House in the town of Salem  
on the 31<sup>st</sup> day of August 1843 William Arthur personally  
appeared in the said and having in all respects complied  
with the laws of Congress on the subject of naturalization  
was then and there by the said Court admitted and declared  
to be and become a Citizen of the United States

Given under my hand and the seal  
of the said county this 31<sup>st</sup> day of  
August 1843.

Edward Dodd Clerk  


E11,6203

MESSAGE

OF THE

PRESIDENT OF THE UNITED STATES

COMMUNICATED TO THE

TWO HOUSES OF CONGRESS

AT THE

BEGINNING OF THE SECOND SESSION OF THE FORTY-EIGHTH CONGRESS.

---

WASHINGTON:  
GOVERNMENT PRINTING OFFICE.  
1884.

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WASHINGTON:  
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1884.

## MESSAGE.

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*To the Congress of the United States:*

Since the close of your last session the American people, in the exercise of their highest right of suffrage, have chosen their Chief Magistrate for the four years ensuing.

When it is remembered that at no period in the country's history has the long political contest which customarily precedes the day of the national election been waged with greater fervor and intensity, it is a subject of general congratulation that after the controversy at the polls was over, and while the slight preponderance by which the issue had been determined was as yet unascertained, the public peace suffered no disturbance, but the people everywhere patiently and quietly awaited the result.

Nothing could more strikingly illustrate the temper of the American citizen, his love of order, and his loyalty to law—nothing could more signally demonstrate the strength and wisdom of our political institutions.

Eight years have passed since a controversy concerning the result of a national election sharply called the attention of the Congress to the necessity of providing more precise and definite regulations for counting the electoral vote.

It is of the gravest importance that this question be solved before conflicting claims to the Presidency shall again distract the country, and I am persuaded that, by the people at large, any of the measures of relief thus far proposed would be preferred to continued inaction.

Our relations with all foreign powers continue to be amicable.

With Belgium a convention has been signed whereby the scope of present treaties has been so enlarged as to secure to citizens of either country within the jurisdiction of the other equal rights and privileges in the acquisition and alienation of property. A trade-marks treaty has also been concluded.

The war between Chili and Peru is at an end. For the arbitration of the claims of American citizens who during its continuance suffered through the acts of the Chilian authorities a convention will soon be negotiated.

The state of hostilities between France and China continues to be an embarrassing feature of our Eastern relations. The Chinese Government has promptly adjusted and paid the claims of American citizens whose property was destroyed in the recent riots at Canton. I renew the recommendation of my last annual message, that the Canton indemnity fund be returned to China.

The true interpretation of the recent treaty with that country, permitting the restriction of Chinese immigration, is likely to be again the subject of your deliberations. It may be seriously questioned whether the statute passed at the last session does not violate the treaty rights of certain Chinese who left this country with return certificates valid under the old law and who now seem to be debarred from relanding for lack of the certificates required by the new.

The recent purchase by citizens of the United States of a large trading fleet heretofore under the Chinese flag has considerably enhanced our commercial importance in the East. In view of the large number of vessels built or purchased by American citizens in other countries and exclusively employed in legitimate traffic between foreign ports under the recognized protection of our flag, it might be well to provide a uniform rule for their registration and documentation, so that the *bona fide* property rights of our citizens therein shall be duly evidenced and properly guarded.

Pursuant to the advice of the Senate at the last session, I recognized the flag of the International Association of the Congo as that of a friendly government, avoiding in so doing any prejudgment of conflicting territorial claims in that region. Subsequently, in execution of the expressed wish of the Congress, I appointed a commercial agent for the Congo Basin.

The importance of the rich prospective trade of the Congo Valley has led to the general conviction that it should be open to all nations upon equal terms. At an international conference for the consideration of this subject called by the Emperor of Germany, and now in session at Berlin, delegates are in attendance on behalf of the United States. Of the results of the conference you will be duly advised.

The Government of Corea has generously aided the efforts of the United States minister to secure suitable premises for the use of the legation. As the conditions of diplomatic intercourse with Eastern nations demand that the legation premises be owned by the represented power, I advise that an appropriation be made for the acquisition of this property by the Government. The United States already possess valuable premises at Tangier as a gift from the Sultan of Morocco. As is stated hereafter, they have lately received a similar gift from the Siamese Government. The Government of Japan stands ready to pre-

sent to us extensive grounds at Tokio whereon to erect a suitable building for the legation, court-house, and jail; and similar privileges can probably be secured in China and Persia. The owning of such premises would not only effect a large saving of the present rentals but would permit of the due assertion of extraterritorial rights in those countries, and would the better serve to maintain the dignity of the United States.

The failure of Congress to make appropriation for our representation at the autonomous court of the Khedive has proved a serious embarrassment in our intercourse with Egypt; and in view of the necessary intimacy of diplomatic relationship due to the participation of this Government, as one of the treaty powers, in all matters of administration there affecting the rights of foreigners, I advise the restoration of the agency and consulate-general at Cairo on its former basis. I do not conceive it to be the wish of Congress that the United States should withdraw altogether from the honorable position they have hitherto held with respect to the Khedive, or that citizens of this republic residing or sojourning in Egypt should hereafter be without the aid and protection of a competent representative.

With France, the traditional cordial relationship continues. The colossal statue of Liberty enlightening the World, the generous gift of the people of France, is expected to reach New York in May next. I suggest that Congressional action be taken in recognition of the spirit which has prompted this gift, and in aid of the timely completion of the pedestal upon which it is to be placed.

Our relations with Germany, a country which contributes to our own some of the best elements of citizenship, continue to be cordial. The United States have extradition treaties with several of the German states, but by reason of the confederation of those states under the Imperial rule, the application of such treaties is not as uniform and comprehensive as the interests of the two countries require. I propose, therefore, to open negotiations for a single convention of extradition to embrace all the territory of the Empire.

It affords me pleasure to say that our intercourse with Great Britain continues to be of a most friendly character.

The Government of Hawaii has indicated its willingness to continue for seven years the provisions of the existing reciprocity treaty. Such continuance, in view of the relations of that country to the American system of States, should in my judgment be favored.

The revolution in Hayti against the established government has terminated. While it was in progress it became necessary to enforce

our neutrality laws by instituting proceedings against individuals and vessels charged with their infringement. These prosecutions were in all cases successful.

Much anxiety has lately been displayed by various European governments, and especially by the Government of Italy for the abolition of our import duties upon works of art. It is well to consider whether the present discrimination in favor of the productions of American artists abroad is not likely to result, as they themselves seem very generally to believe it may, in the practical exclusion of our painters and sculptors from the rich fields for observation, study, and labor which they have hitherto enjoyed.

There is prospect that the long-pending revision of the foreign treaties of Japan may be concluded at a new conference to be held at Tokio. While this Government fully recognizes the equal and independent station of Japan in the community of nations, it would not oppose the general adoption of such terms of compromise as Japan may be disposed to offer in furtherance of a uniform policy of intercourse with Western nations.

During the past year the increasing good-will between our own Government and that of Mexico has been variously manifested. The treaty of commercial reciprocity concluded January 20, 1883, has been ratified, and awaits the necessary tariff legislation of Congress to become effective. This legislation will, I doubt not, be among the first measures to claim your attention.

A full treaty of commerce, navigation, and consular rights is much to be desired, and such a treaty I have reason to believe that the Mexican Government stands ready to conclude.

Some embarrassment has been occasioned by the failure of Congress at its last session to provide means for the due execution of the treaty of July 29, 1882, for the resurvey of the Mexican boundary and the relocation of boundary monuments.

With the Republic of Nicaragua a treaty has been concluded which authorizes the construction by the United States of a canal, railway, and telegraph line across the Nicaraguan territory.

By the terms of this treaty sixty miles of the river San Juan, as well as Lake Nicaragua, an inland sea forty miles in width, are to constitute a part of the projected enterprise.

This leaves for actual canal construction seventeen miles on the Pacific side and thirty-six miles on the Atlantic. To the United States, whose rich territory on the Pacific is for the ordinary purposes of commerce practically cut off from communication by water with the Atlantic ports, the political and commercial advantages of such a project can scarcely be overestimated.

It is believed that when the treaty is laid before you the justice and liberality of its provisions will command universal approval at home and abroad.

The death of our representative at Russia while at his post at St. Petersburg afforded to the Imperial Government a renewed opportunity to testify its sympathy in a manner befitting the intimate friendliness which has ever marked the intercourse of the two countries.

The course of this Government in raising its representation at Bangkok to the diplomatic rank has evoked from Siam evidences of warm friendship and augurs well for our enlarged intercourse. The Siamese Government has presented to the United States a commodious mansion and grounds for the occupancy of the legation, and I suggest that by joint resolution Congress attest its appreciation of this generous gift.

This Government has more than once been called upon of late to take action in fulfillment of its international obligations toward Spain. Agitation in the island of Cuba hostile to the Spanish crown having been fomented by persons abusing the sacred rights of hospitality which our territory affords, the officers of this Government have been instructed to exercise vigilance to prevent infractions of our neutrality laws at Key West and at other points near the Cuban coast. I am happy to say that in the only instance where these precautionary measures were successfully eluded, the offenders when found in our territory were subsequently tried and convicted.

The growing need of close relationship of intercourse and traffic between the Spanish Antilles and their natural market in the United States led to the adoption, in January last, of a commercial agreement looking to that end. This agreement has since been superseded by a more carefully framed and comprehensive convention, which I shall submit to the Senate for approval. It has been the aim of this negotiation to open such a favored reciprocal exchange of productions carried under the flag of either country, as to make the intercourse between Cuba and Porto Rico and ourselves scarcely less intimate than the commercial movement between our domestic ports, and to insure a removal of the burdens on shipping in the Spanish Indies, of which in the past our ship-owners and ship-masters have so often had cause to complain.

The negotiation of this convention has for a time postponed the prosecution of certain claims of our citizens which were declared to be without the jurisdiction of the late Spanish-American Claims Commission, and which are therefore remitted to diplomatic channels for adjustment. The speedy settlement of these claims will now be urged by this Government.

Negotiations for a treaty of commercial reciprocity with the Dominican Republic have been successfully concluded, and the result will shortly be laid before the Senate.

Certain questions between the United States and the Ottoman Empire still remain unsolved. Complaints on behalf of our citizens are not satisfactorily adjusted. The Porte has sought to withhold from our commerce the right of favored treatment to which we are entitled by existing conventional stipulations, and the revision of the tariffs is unaccomplished.

The final disposition of pending questions with Venezuela has not as yet been reached, but I have good reason to expect an early settlement, which will provide the means of re-examining the Caracas awards in conformity with the expressed desire of Congress, and which will recognize the justice of certain claims preferred against Venezuela.

The Central and South American Commission appointed by authority of the act of July 7, 1884, will soon proceed to Mexico. It has been furnished with instructions which will be laid before you. They contain a statement of the general policy of the Government for enlarging its commercial intercourse with American States. The commissioners have been actively preparing for their responsible task by holding conferences in the principal cities with merchants and others interested in Central and South American trade.

The International Meridian Conference, lately convened in Washington upon the invitation of the Government of the United States, was composed of representatives from twenty-five nations. The conference concluded its labors on the 1st of November, having with substantial unanimity agreed upon the meridian of Greenwich as the starting point whence longitude is to be computed through one hundred and eighty degrees eastward and westward, and upon the adoption, for all purposes for which it may be found convenient, of a universal day which shall begin at midnight on the initial meridian and whose hours shall be counted from zero up to twenty-four.

The formal report of the transactions of this conference will be hereafter transmitted to the Congress.

This Government is in frequent receipt of invitations from foreign states to participate in international exhibitions, often of great interest and importance. Occupying as we do an advanced position in the world's production, and aiming to secure a profitable share for our industries in the general competitive markets, it is a matter of serious concern that the want of means for participation in these exhibitions should so often exclude our producers from advantages enjoyed by

those of other countries. During the past year the attention of Congress was drawn to the formal invitations in this regard tendered by the Governments of England, Holland, Belgium, Germany, and Austria. The Executive has in some instances appointed honorary commissioners. This is, however, a most unsatisfactory expedient, for without some provision to meet the necessary working expenses of a commission it can effect little or nothing in behalf of exhibitors. An international inventions exhibition is to be held in London next May. This will cover a field of special importance, in which our country holds a foremost rank, but the Executive is at present powerless to organize a proper representation of our vast national interests in this direction.

I have in several previous messages referred to this subject. It seems to me that a statute, giving to the Executive general discretionary authority to accept such invitations, and to appoint honorary commissioners, without salary, and placing at the disposal of the Secretary of State a small fund for defraying their reasonable expenses, would be of great public utility.

This Government has received official notice that the Revised International Regulations for preventing collisions at sea have been adopted by all the leading maritime powers except the United States, and came into force on the 1st of September last. For the due protection of our shipping interests, the provisions of our statutes should at once be brought into conformity with these Regulations.

The question of securing to authors, composers, and artists copyright privileges in this country in return for reciprocal rights abroad is one that may justly challenge your attention. It is true that conventions will be necessary for fully accomplishing this result, but until Congress shall by statute fix the extent to which foreign holders of copyright shall be here privileged, it has been deemed inadvisable to negotiate such conventions. For this reason the United States were not represented at the recent conference at Berne.

I recommend that the scope of the neutrality laws of the United States be so enlarged as to cover all patent acts of hostility committed in our territory and aimed against the peace of a friendly nation. Existing statutes prohibit the fitting out of armed expeditions and restrict the shipment of explosives, though the enactments in the latter respect were not framed with regard to international obligations, but simply for the protection of passenger travel. All these statutes were intended to meet special emergencies that had already arisen. Other emergencies have arisen since, and modern ingenuity supplies means for the organization of hostilities without open resort to armed vessels or to filibustering parties.

I see no reason why overt preparations in this country for the commission of criminal acts, such as are here under consideration, should not be alike punishable, whether such acts are intended to be committed in our own country or in a foreign country with which we are at peace.

The prompt and thorough treatment of this question is one which intimately concerns the national honor.

Our existing naturalization laws also need revision. Those sections relating to persons residing within the limits of the United States in 1795 and 1798 have now only a historical interest. Section 2172, recognizing the citizenship of the children of naturalized parents, is ambiguous in its terms and partly obsolete. There are special provisions of law favoring the naturalization of those who serve in the Army or in merchant vessels, while no similar privileges are granted those who serve in the Navy or the Marine Corps.

"An uniform rule of naturalization," such as the Constitution contemplates, should, among other things, clearly define the status of persons born within the United States subject to a foreign power (section 1992) and of minor children of fathers who have declared their intention to become citizens but have failed to perfect their naturalization. It might be wise to provide for a central bureau of registry, wherein should be filed authenticated transcripts of every record of naturalization in the several Federal and State courts, and to make provision also for the vacation or cancellation of such record in cases where fraud had been practiced upon the court by the applicant himself or where he had renounced or forfeited his acquired citizenship. A just and uniform law in this respect would strengthen the hands of the Government in protecting its citizens abroad, and would pave the way for the conclusion of treaties of naturalization with foreign countries.

The legislation of the last session effected in the diplomatic and consular service certain changes and reductions which have been productive of embarrassment. The population and commercial activity of our country are steadily on the increase, and are giving rise to new, varying, and often delicate relationships with other countries. Our foreign establishment now embraces nearly double the area of operations that it occupied twenty years ago. The confinement of such a service within the limits of expenditure then established is not, it seems to me, in accordance with true economy. A community of sixty millions of people should be adequately represented in its intercourse with foreign nations.

A project for the reorganization of the consular service and for recasting the scheme of extraterritorial jurisdiction is now before you. If the limits of a short session will not allow of its full consideration, I trust that you will not fail to make suitable provision for the present needs of the service.

It has been customary to define in the appropriation acts the rank of each diplomatic office to which a salary is attached. I suggest that this course be abandoned and that it be left to the President, with the advice and consent of the Senate, to fix from time to time the diplomatic grade of the representatives of this Government abroad as may seem advisable, provision being definitely made, however, as now for the amount of salary attached to the respective stations.

The condition of our finances and the operations of the various branches of the public service which are connected with the Treasury Department are very fully discussed in the report of the Secretary.

It appears that the ordinary revenues for the fiscal year ended June 30, 1884, were—

|                                      |                         |
|--------------------------------------|-------------------------|
| From customs .....                   | \$195, 067, 489 76      |
| From internal revenue .....          | 121, 586, 072 51        |
| From all other sources .....         | 31, 866, 307 65         |
| <b>Total ordinary revenues .....</b> | <b>348, 519, 869 92</b> |

The public expenditures during the same period were—

|                                                                                                         |                         |
|---------------------------------------------------------------------------------------------------------|-------------------------|
| For civil expenses .....                                                                                | \$22, 312, 907 71       |
| For foreign intercourse .....                                                                           | 1, 260, 766 37          |
| For Indians .....                                                                                       | 6, 475, 999 29          |
| For pensions .....                                                                                      | 55, 429, 228 06         |
| For the military establishment, including river and harbor improvements and arsenals .....              | 39, 429, 603 36         |
| For the naval establishment, including vessels, machinery, and improvements at navy-yards .....         | 17, 292, 601 44         |
| For miscellaneous expenditures, including public buildings, light-houses, and collecting the revenue .. | 43, 939, 710 00         |
| For expenditures on account of the District of Columbia .....                                           | 3, 407, 049 62          |
| For interest on the public debt. ....                                                                   | 54, 578, 378 48         |
| For the sinking fund .....                                                                              | 46, 790, 229 50         |
| <b>Total ordinary expenditures .....</b>                                                                | <b>290, 916, 473 83</b> |
| <b>Leaving a surplus of .....</b>                                                                       | <b>57, 603, 396 09</b>  |

As compared with the preceding fiscal year there was a net decrease of over \$21,000,000 in the amount of expenditures. The aggregate receipts were less than those of the year previous by about \$54,000,000. The falling off in revenue from customs made up nearly \$20,000,000 of this deficiency, and about \$23,000,000 of the remainder was due to the diminished receipts from internal taxation.

The Secretary estimates the total receipts for the fiscal year which will end June 30, 1885, at \$330,000,000, and the total expenditures at \$290,620,201.16, in which sum are included the interest on the debt and the amount payable to the sinking fund. This would leave a surplus for the entire year of about \$39,000,000.

The value of exports from the United States to foreign countries during the year ending June 30, 1884, was as follows:

|                                              |                 |
|----------------------------------------------|-----------------|
| Domestic merchandise .....                   | \$724, 964, 852 |
| Foreign merchandise.....                     | 15, 548, 757    |
| <hr/>                                        |                 |
| Total merchandise ..                         | 740, 513, 609   |
| Specie .....                                 | 67, 133, 383    |
| <hr/>                                        |                 |
| Total exports of merchandise and specie..... | 807, 646, 992   |
| <hr/>                                        |                 |

The cotton and cotton manufactures included in this statement were valued at \$208,900,415; the breadstuffs at \$162,544,715; the provisions at \$114,416,547, and the mineral oils at \$47,103,248.

During the same period the imports were as follows:

|                      |                 |
|----------------------|-----------------|
| Merchandise .....    | \$667, 697, 693 |
| Gold and silver..... | 37, 426, 262    |
| <hr/>                |                 |
| Total .....          | 705, 123, 955   |
| <hr/>                |                 |

More than 63 per cent. of the entire value of imported merchandise consisted of the following articles:

|                                                                       |                 |
|-----------------------------------------------------------------------|-----------------|
| Sugar and molasses .....                                              | \$103, 884, 274 |
| Wool and woolen manufactures.....                                     | 53, 542, 292    |
| Silk and its manufactures.....                                        | 49, 949, 128    |
| Coffee .....                                                          | 49, 686, 705    |
| Iron and steel and manufactures thereof .....                         | 41, 464, 599    |
| Chemicals .....                                                       | 38, 464, 965    |
| Flax, hemp, jute, and like substances, and manufactures thereof ..... | 33, 463, 398    |
| Cotton and manufactures of cotton ..                                  | 30, 454, 476    |
| Hides and skins other than fur-skins.....                             | 22, 350, 906    |
| <hr/>                                                                 |                 |

I concur with the Secretary of the Treasury in recommending the immediate suspension of the coinage of silver dollars and of the issuance of silver certificates. This is a matter to which, in former communications, I have more than once invoked the attention of the National Legislature.

It appears that annually for the past six years there have been coined, in compliance with the requirements of the act of February 28, 1878, more than twenty-seven million silver dollars. The number now out-

standing is reported by the Secretary to be nearly one hundred and eighty-five million, whereof but little more than forty million, or less than 22 per cent., are in actual circulation. The mere existence of this fact seems to me to furnish of itself a cogent argument for the repeal of the statute which has made such fact possible.

But there are other and graver considerations that tend in the same direction.

The Secretary avows his conviction that unless this coinage and the issuance of silver certificates be suspended, silver is likely at no distant day to become our sole metallic standard. The commercial disturbance and the impairment of national credit that would be thus occasioned can scarcely be overestimated.

I hope that the Secretary's suggestions respecting the withdrawal from circulation of the one-dollar and two-dollar notes will receive your approval. It is likely that a considerable portion of the silver now encumbering the vaults of the Treasury might thus find its way into the currency.

While trade-dollars have ceased, for the present at least, to be an element of active disturbance in our currency system, some provision should be made for their surrender to the Government. In view of the circumstances under which they were coined and of the fact that they have never had a legal-tender quality, there should be offered for them only a slight advance over their bullion value.

The Secretary, in the course of his report, considers the propriety of beautifying the designs of our subsidiary silver coins and of so increasing their weight that they may bear their due ratio of value to the standard dollar. His conclusions in this regard are cordially approved.

In my annual message of 1882, I recommended the abolition of all excise taxes except those relating to distilled spirits. This recommendation is now renewed. In case these taxes shall be abolished, the revenues that will still remain to the Government will, in my opinion, not only suffice to meet its reasonable expenditures, but will afford a surplus large enough to permit such tariff reduction as may seem to be advisable, when the results of recent revenue laws and commercial treaties shall have shown in what quarters those reductions can be most judiciously effected.

One of the gravest of the problems which appeal to the wisdom of Congress for solution is the ascertainment of the most effective means for increasing our foreign trade and thus relieving the depression under which our industries are now languishing. The Secretary of the Treasury advises that the duty of investigating this subject be intrusted in the first instance to a competent commission. While fully recognizing the considerations that may be urged against this course, I am nevertheless of the opinion that, upon the whole, no other would be likely to effect speedier or better results.

That portion of the Secretary's report which concerns the condition

of our shipping interests cannot fail to command your attention. He emphatically recommends that as an incentive to the investment of American capital in American steamships, the Government shall by liberal payments for mail transportation, or otherwise, lend its active assistance to individual enterprise, and declares his belief that unless that course be pursued our foreign carrying trade must remain, as it is to-day, almost exclusively in the hands of foreigners.

One phase of this subject is now especially prominent, in view of the repeal by the act of June 26, 1884, of all statutory provisions arbitrarily compelling American vessels to carry the mails to and from the United States. As it is necessary to make provision to compensate the owners of such vessels for performing that service after April, 1885, it is hoped that the whole subject will receive early consideration that will lead to the enactment of such measures for the revival of our merchant marine as the wisdom of Congress may devise.

The three per cent. bonds of the Government to the amount of more than \$100,000,000 have, since my last annual message, been redeemed by the Treasury. The bonds of that issue still outstanding amount to little over \$200,000,000, about one-fourth of which will be retired through the operations of the sinking fund during the coming year. As these bonds still constitute the chief basis for the circulation of the national banks, the question how to avert the contraction of the currency, caused by their retirement, is one of constantly increasing importance.

It seems to be generally conceded that the law governing this matter exacts from the banks excessive security, and that, upon their present bond deposits, a larger circulation than is now allowed may be granted with safety. I hope that the bill which passed the Senate at the last session, permitting the issue of notes equal to the face value of the deposited bonds, will commend itself to the approval of the House of Representatives.

In the expenses of the War Department the Secretary reports a decrease of more than \$9,000,000. Of this reduction \$5,600,000 was effected in the expenditures for rivers and harbors, and \$2,700,000 in expenditures for the Quartermaster's Department.

Outside of that Department the annual expenses of all the Army bureaus proper (except possibly the Ordnance Bureau) are substantially fixed charges, which can not be materially diminished without a change in the numerical strength of the Army. The expenditures in the Quartermaster's Department can readily be subjected to administrative discretion, and it is reported by the Secretary of War that as a result of exercising such discretion, in reducing the number of draught and pack animals in the Army, the annual cost of supplying and caring for such animals is now \$1,108,085.90 less than it was in 1881.

The reports of military commanders show that the last year has been notable for its entire freedom from Indian outbreaks.

In defiance of the President's proclamation of July 1, 1884, certain intruders sought to make settlements in the Indian Territory. They were promptly removed by a detachment of troops.

During the past session of Congress a bill to provide a suitable fire-proof building for the Army Medical Museum and the library of the Surgeon-General's Office received the approval of the Senate. A similar bill, reported favorably to the House of Representatives by one of its committees, is still pending before that body. It is hoped that during the coming session the measure may become a law, and that thereafter immediate steps may be taken to secure a place of safe deposit for these valuable collections, now in a state of insecurity.

The funds with which the works for the improvement of rivers and harbors were prosecuted during the past year were derived from the appropriations of the act of August 2, 1882, together with such few balances as were on hand from previous appropriations. The balance in the Treasury subject to requisition July 1, 1883, was \$10,021,649.55. The amount appropriated during the fiscal year 1884 was \$1,319,634.62, and the amount drawn from the Treasury during the fiscal year was \$8,228,703.54, leaving a balance of \$3,112,580.63 in the Treasury subject to requisition July 1, 1884.

The Secretary of War submits the report of the Chief of Engineers as to the practicability of protecting our important cities on the seaboard by fortifications and other defenses able to repel modern methods of attack. The time has now come when such defenses can be prepared with confidence that they will not prove abortive; and, when the possible result of delay in making such preparation is seriously considered, delay seems inexcusable. For the most important cities—those whose destruction or capture would be a national humiliation—adequate defenses, inclusive of guns, may be made by the gradual expenditure of \$60,000,000, a sum much less than a victorious enemy could levy as a contribution. An appropriation of about one-tenth of that amount is asked to begin the work, and I concur with the Secretary of War in urging that it be granted.

The War Department is proceeding with the conversion of 10-inch smooth-bore guns into 8-inch rifles, by lining the former with tubes of forged steel or of coiled wrought-iron. Fifty guns will be thus converted within the year. This, however, does not obviate the necessity of providing means for the construction of guns of the highest power, both for the purposes of coast defense and for the armament of war vessels.

The report of the Gun Foundry Board, appointed April 2, 1883, in pursuance of the act of March 3, 1883, was transmitted to Congress in a special message of February 18, 1884. In my message of March 26, 1884, I called attention to the recommendation of the Board that the

Government should encourage the production at private steel works of the required material for heavy cannon, and that two government factories, one for the Army and one for the Navy, should be established for the fabrication of guns from such material. No action having been taken, the Board was subsequently reconvened to determine more fully the plans and estimates necessary for carrying out its recommendation. It has received information which indicates that there are responsible steel manufacturers in this country who, although not provided at present with the necessary plant, are willing to construct the same and to make bids for contracts with the Government for the supply of the requisite material for the heaviest guns adapted to modern warfare, if a guaranteed order of sufficient magnitude, accompanied by a positive appropriation extending over a series of years, shall be made by Congress. All doubts as to the feasibility of the plan being thus removed, I renew my recommendation that such action be taken by Congress as will enable the Government to construct its own ordnance upon its own territory, and so to provide the armaments demanded by considerations of national safety and honor.

The report of the Secretary of the Navy exhibits the progress which has been made on the new steel cruisers authorized by the acts of August 5, 1882, and March 3, 1883. Of the four vessels under contract, one, the *Chicago*, of 4,500 tons, is more than half finished; the *Atlanta*, of 3,000 tons, has been successfully launched, and her machinery is now fitting; the *Boston*, also of 3,000 tons, is ready for launching, and the *Dolphin*, a dispatch steamer of 1,500 tons, is ready for delivery.

Certain adverse criticisms upon the designs of these cruisers are discussed by the Secretary, who insists that the correctness of the conclusions reached by the Advisory Board and by the Department has been demonstrated by recent developments in ship-building abroad.

The machinery of the double-turreted monitors *Paritan*, *Terror*, and *Amphitrite*, contracted for under the act of March 3, 1883, is in process of construction. No work has been done during the past year on their armor for lack of the necessary appropriations. A fourth monitor, the *Monadnock*, still remains unfinished at the navy-yard in California. It is recommended that early steps be taken to complete these vessels and to provide also an armament for the monitor *Miantonomoh*.

The recommendations of the Naval Advisory Board, approved by the Department, comprise the construction of one steel cruiser of 4,500 tons, one cruiser of 3,000 tons, two heavily-armed gunboats, one light cruising gunboat, one dispatch-vessel armed with Hotchkiss cannon, one armored ram, and three torpedo boats. The general designs, all of which are calculated to meet the existing wants of the service, are now well advanced, and the construction of the vessels can be undertaken as soon as you shall grant the necessary authority.

The act of Congress approved August 7, 1882, authorized the removal

to the United States of the bodies of Lieutenant-Commander George W. De Long and his companions of the Jeannette Expedition. This removal has been successfully accomplished by Lieutenants Harber and Schnetze. The remains were taken from their grave in the Lena Delta in March, 1883, and were retained at Yakutsk until the following winter, the season being too far advanced to admit of their immediate transportation. They arrived at New York February 20, 1884, where they were received with suitable honors.

In pursuance of the joint resolution of Congress approved February 13, 1884, a naval expedition was fitted out for the relief of Lieut. A. W. Greely, United States Army, and of the party who had been engaged under his command in scientific observations at Lady Franklin Bay. The fleet consisted of the steam sealer *Thetis*, purchased in England, the *Bear*, purchased at St. John's, Newfoundland, and the *Alert*, which was generously provided by the British Government. Preparations for the expedition were promptly made by the Secretary of the Navy, with the active co-operation of the Secretary of War. Commander George W. Coffin was placed in command of the *Alert*, and Lieut. William H. Emory in command of the *Bear*. The *Thetis* was intrusted to Commander Winfield S. Schley, to whom also was assigned the superintendence of the entire expedition.

Immediately upon its arrival at Upernavik, the fleet began the dangerous navigation of Melville Bay, and in spite of every obstacle reached Littleton Island on June 22, a fortnight earlier than any vessel had before attained that point. On the same day it crossed over to Cape Sabine, where Lieutenant Greely and the other survivors of his party were discovered. After taking on board the living and the bodies of the dead, the relief ships sailed for St. John's, where they arrived on July 17. They were appropriately received at Portsmouth, N. H., on August 1, and at New York on August 8. One of the bodies was landed at the former place. The others were put on shore at Governor's Island, and, with the exception of one which was interred in the National Cemetery, were forwarded thence to the destinations indicated by friends. The organization and conduct of this Relief Expedition reflects great credit upon all who contributed to its success.

In this, the last of the stated messages that I shall have the honor to transmit to the Congress of the United States, I cannot too strongly urge upon its attention the duty of restoring our navy as rapidly as possible to the high state of efficiency which formerly characterized it. As the long peace that has lulled us into a sense of fancied security may at any time be disturbed, it is plain that the policy of strengthening this arm of the service is dictated by considerations of wise economy, of just regard for our future tranquillity, and of true appreciation of the dignity and honor of the Republic.

The report of the Postmaster-General acquaints you with the present condition and needs of the postal service.

It discloses the gratifying fact that the loss of revenue from the reduction in the rate of letter-postage recommended in my message of December 4, 1882, and effected by the act of March 3, 1883, has been much less than was generally anticipated. My recommendation of this reduction was based upon the belief that the actual falling off in receipts from letter-postages for the year immediately succeeding the change of rate would be \$3,000,000. It has proved to be only \$2,275,000.

This is a trustworthy indication that the revenue will soon be restored to its former volume by the natural increase of sealed correspondence.

I confidently repeat, therefore, the recommendation of my last annual message that the single-rate postage upon drop letters be reduced to one cent wherever the payment of two cents is now required by law. The double rate is only exacted at offices where the carrier system is in operation, and it appears that at those offices the increase in the tax upon local letters defrays the cost not only of its own collection and delivery, but of the collection and delivery of all other mail matter. This is an inequality that ought no longer to exist.

I approve the recommendation of the Postmaster-General that the unit of weight in the rating of first-class matter should be one ounce instead of one-half ounce as it now is. In view of the statistics furnished by the Department it may well be doubted whether the change would result in any loss of revenue; that it would greatly promote the convenience of the public is beyond dispute.

The free-delivery system has been lately applied to five cities, and the total number of offices in which it is now in operation is one hundred and fifty-nine. Experience shows that its adoption, under proper conditions, is equally an accommodation to the public and an advantage to the postal service. It is more than self-sustaining, and for the reasons urged by the Postmaster-General may properly be extended.

In the opinion of that officer it is important to provide means whereby exceptional dispatch in dealing with letters in free-delivery offices may be secured by payment of extraordinary postage. This scheme might be made effective by employment of a special stamp whose cost should be commensurate with the expense of the extra service.

In some of the large cities private express companies have undertaken to outstrip the Government mail-carriers by affording, for the prompt transmission of letters, better facilities than have hitherto been at the command of the Post-Office.

It has always been the policy of the Government to discourage such enterprises, and in no better mode can that policy be maintained than in supplying the public with the most efficient mail service that, with due regard to its own best interests, can be furnished for its accommodation.

The Attorney-General renews the recommendation contained in his report of last year touching the fees of witnesses and jurors.

He favors radical changes in the fee bill, the adoption of a system by

which attorneys and marshals of the United States shall be compensated solely by salaries, and the erection by the Government of a penitentiary for the confinement of offenders against its laws.

Of the varied governmental concerns in charge of the Interior Department, the report of its Secretary presents an interesting summary. Among the topics deserving particular attention I refer you to his observations respecting our Indian affairs, the pre-emption and timber-culture acts, the failure of railroad companies to take title to lands granted by the Government, and the operations of the Pension Office, the Patent Office, the Census Bureau, and the Bureau of Education.

Allusion has been made already to the circumstance that, both as between the different Indian tribes and as between the Indians and the whites, the past year has been one of unbroken peace.

In this circumstance the President is glad to find justification for the policy of the Government in its dealing with the Indian question, and confirmation of the views which were fully expressed in his first communication to the Forty-seventh Congress.

The Secretary urges anew the enactment of a statute for the punishment of crimes committed on the Indian reservations, and recommends the passage of the bill now pending in the House of Representatives for the purchase of a tract of 18,000 square miles from the Sioux reservation. Both these measures are worthy of approval.

I concur with him also in advising the repeal of the pre-emption law, the enactment of statutes resolving the present legal complications touching lapsed grants to railroad companies, and the funding of the debt of the several Pacific railroads under such guaranty as shall effectually secure its ultimate payment.

The report of the Utah Commission will be read with interest.

It discloses the results of recent legislation looking to the prevention and punishment of polygamy in that Territory. I still believe that if that abominable practice can be suppressed by law it can only be by the most radical legislation consistent with the restraints of the Constitution.

I again recommend, therefore, that Congress assume absolute political control of the Territory of Utah, and provide for the appointment of commissioners, with such governmental powers as in its judgment may justly and wisely be put into their hands.

In the course of this communication reference has more than once been made to the policy of this Government as regards the extension of our foreign trade. It seems proper to declare the general principles that should, in my opinion, underlie our national efforts in this direction.

The main conditions of the problem may be thus stated:

We are a people apt in mechanical pursuits and fertile in invention; we cover a vast extent of territory rich in agricultural products and in

nearly all the raw materials necessary for successful manufacture; we have a system of productive establishments more than sufficient to supply our own demands; the wages of labor are nowhere else so great; the scale of living of our artisan classes is such as tends to secure their personal comfort and the development of those higher moral and intellectual qualities that go to the making of good citizens. Our system of tax and tariff legislation is yielding a revenue which is in excess of the present needs of the Government.

These are the elements from which it is sought to devise a scheme by which, without unfavorably changing the condition of the workingman, our merchant marine shall be raised from its enfeebled condition and new markets provided for the sale, beyond our borders, of the manifold fruits of our industrial enterprises.

The problem is complex, and can be solved by no single measure of innovation or reform.

The countries of the American continent and the adjacent islands are for the United States the natural marts of supply and demand. It is from them that we should obtain what we do not produce or do not produce in sufficiency, and it is to them that the surplus productions of our fields, our mills, and our workshops should flow, under conditions that will equalize or favor them in comparison with foreign competition.

Four paths of policy seem to point to this end.

First, a series of reciprocal commercial treaties with the countries of America which shall foster between us and them an unhampered movement of trade. The conditions of these treaties should be the free admission of such merchandise as this country does not produce, in return for the admission free or under a favored scheme of duties, of our own products—the benefits of such exchange to apply only to goods carried under the flag of the parties to the contract; the removal, on both sides, from the vessels so privileged of all tonnage dues and national imposts so that those vessels may ply unhindered between our ports and those of the other contracting parties, though without infringing on the reserved home coasting trade; the removal or reduction of burdens on the exported products of those countries coming within the benefits of the treaties; and the avoidance of the technical restrictions and penalties by which our intercourse with those countries is at present hampered.

Secondly, the establishment of the consular service of the United States on a salaried footing, thus permitting the relinquishment of consular fees not only as respects vessels under the national flag, but also as respects vessels of the treaty nations carrying goods entitled to the benefits of the treaties.

Thirdly, the enactment of measures to favor the construction and maintenance of a steam carrying marine under the flag of the United States.

Fourthly, the establishment of an uniform currency basis for the countries of America, so that the coined products of our mines may

circulate on equal terms throughout the whole system of commonwealths. This would require a monetary union of America, whereby the output of the bullion-producing countries and the circulation of those which yield neither gold nor silver could be adjusted in conformity with the population, wealth, and commercial needs of each. As many of the countries furnish no bullion to the common stock, the surplus production of our mines and mints might thus be utilized and a step taken toward the general remonetization of silver.

To the accomplishment of these ends, so far as they can be attained by separate treaties, the negotiations already concluded and now in progress have been directed, and the favor which this enlarged policy has thus far received warrants the belief that its operations will ere long embrace all, or nearly all, the countries of this hemisphere.

It is by no means desirable, however, that the policy under consideration should be applied to these countries alone. The healthful enlargement of our trade with Europe, Asia, and Africa should be sought by reducing tariff burdens on such of their wares as neither we nor the other American States are fitted to produce, and thus enabling ourselves to obtain in return a better market for our supplies of food, of raw materials, and of the manufactures in which we excel.

It seems to me that many of the embarrassing elements in the great national conflict between protection and free trade may thus be turned to good account—that the revenue may be reduced so as no longer to overtax the people, that protective duties may be retained without becoming burdensome, that our shipping interests may be judiciously encouraged, the currency fixed on firm bases, and above all such an unity of interests established among the states of the American system as will be of great and ever increasing advantage to them all.

All treaties in the line of this policy which have been negotiated or are in process of negotiation contain a provision deemed to be requisite under the clause of the Constitution limiting to the House of Representatives the authority to originate bills for raising revenue.

On the 29th of February last I transmitted to the Congress the first annual report of the Civil Service Commission, together with communications from the heads of the several Executive Departments of the Government, respecting the practical workings of the law under which the Commission had been acting. The good results therein foreshadowed have been more than realized.

The system has fully answered the expectations of its friends in securing competent and faithful public servants and in protecting the appointing officers of the Government from the pressure of personal importunity and from the labor of examining the claims and pretensions of rival candidates for public employment.

The law has had the unqualified support of the President and of the heads of the several Departments, and the members of the Commission

have performed their duties with zeal and fidelity. Their report will shortly be submitted, and will be accompanied by such recommendations for enlarging the scope of the existing statute as shall commend themselves to the Executive and the Commissioners charged with its administration.

In view of the general and persistent demand throughout the commercial community for a national bankrupt law, I hope that the differences of sentiment which have hitherto prevented its enactment may not outlast the present session.

The pestilence which for the past two years has been raging in the countries of the East recently made its appearance in European ports with which we are in constant communication.

The then Secretary of the Treasury, in pursuance of a proclamation of the President, issued certain regulations restricting, and for a time prohibiting, the importation of rags and the admission of baggage of immigrants and of travelers arriving from infected quarters. Lest this course may have been without strict warrant of law, I approve the recommendation of the present Secretary that the Congress take action in the premises, and I also recommend the immediate adoption of such measures as will be likely to ward off the dreaded epidemic, and to mitigate its severity in case it shall unhappily extend to our shores.

The annual report of the Commissioners of the District of Columbia reviews the operations of the several departments of its municipal government. I ask your careful consideration of its suggestions in respect to legislation—especially commending such as relate to a revision of the civil and criminal code, the performance of labor by persons sentenced to imprisonment in the jail, the construction and occupation of wharves along the river front, and the erection of a suitable building for District offices.

I recommend that, in recognition of the eminent services of Ulysses S. Grant, late General of the Armies of the United States and twice President of this nation, the Congress confer upon him a suitable pension.

Certain of the measures that seem to me necessary and expedient I have now, in obedience to the Constitution, recommended for your adoption.

As respects others of no less importance, I shall content myself with renewing the recommendations already made to the Congress, without restating the grounds upon which such recommendations were based.

The preservation of forests on the public domain, the granting of Government aid for popular education, the amendment of the Federal Constitution so as to make effective the disapproval by the President of particular items in appropriation bills, the enactment of statutes in regard to the filling of vacancies in the Presidential office, and the determining of vexed questions respecting Presidential inability are measures which may justly receive your serious consideration.

As the time draws nigh when I am to retire from the public service, I cannot refrain from expressing to the members of the National Legislature with whom I have been brought into personal and official intercourse my sincere appreciation of their unfailing courtesy and of their harmonious co-operation with the Executive in so many measures calculated to promote the best interests of the Nation.

And to my fellow-citizens generally I acknowledge a deep sense of obligation for the support which they have accorded me in my administration of the Executive Department of this Government.

CHESTER A. ARTHUR.

WASHINGTON, *December 1, 1884.*

# IS MR. CHARLES EVANS HUGHES A “NATURAL BORN CITIZEN” WITHIN THE MEANING OF THE CONSTITUTION?

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Chicago Legal News, Vol. 146-148, pp. 220-222

Author: **Breckinridge Long** (1881-1958)

## **A Legal Examination of the Subject by Breckinridge Long, of the St. Louis Bar.**

Whether Mr. Hughes is, or is not, a “natural born” citizen within the meaning of the Constitution, so as to make him eligible or ineligible, to assume the office of President, presents an interesting inquiry.

He was born in this country and is beyond question “native born.” But is there not a distinction between “native born” and “natural born”? At the time he was born his father and mother were subjects of England. His father had not then been naturalized. The day after Mr. Hughes was born his father had a right, as an English subject, to go to the British consul, at New York, and to present his wife and infant and to claim any assistance he might need from the consul as the representative of the English government.

If war had broken out between this government and England this government would have had a right to intern the father, the mother and *the son* as subjects of an enemy power.

The Constitution of the United States puts a particular qualification upon those who shall become President and Vice-President. For all other offices it requires that they be “citizens of the United States,” but for the Presidency and Vice-Presidency it requires that they be “Natural Born citizens.” The word “natural” means “of the nature of”; “naturally a part of”; “by the laws of nature an integral part of” a system. Following that line of thought, a “natural born” citizen would be one who was naturally, at his birth, a member of the political society; naturally, a part of the political system into which he was born; by the laws of nature a citizen of the society into which he was born. It would mean, further, that no other government had any claim upon him; that his sole allegiance was to the government into which he had been born and that that government was solely, at the time, responsible for his protection. “Native born” does not mean quite the same thing. He might be born in a country under conditions similar to the conditions under which Mr. Hughes was born, and subsequently become a citizen of that Country. In that case, after he became a citizen, he would be a “native born” citizen, but he would not have been a “natural born” citizen. From the instant of his birth this government would not be solely responsible for his protection.

Mr. Hughes was born before the adoption of the Fourteenth Amendment to the Constitution, so the status of his citizenship must be considered as under the laws existing prior to the time of the adoption of that Amendment.

The only reference in the Constitution to the subject (except that Section specifying the qualifications for President) is that Congress shall have the power to make uniform laws to provide for naturalization. Congress under that authority enacted the following law: “The children of persons who have been duly naturalized under any law of the United States, 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.” That Statute says that children born of persons who have been duly naturalized become citizens, but become so by virtue of the act of the parent. That is, they become naturalized citizens. They are citizens by operation of law. They were not born so, but, because of the act of their father, are invested with all the rights of citizens. If they are born in this country and their father subsequently becomes naturalized, they then, upon the naturalization of the father, become citizens. After becoming citizens they are “native born” citizens; but they are not “natural born citizens.” That is, they are not born, in the nature of things and by the laws of nature, a citizen of this Republic. If the father becomes naturalized before the birth of the child and is at the time of the birth of the child a citizen of the United States, then the child is a “natural born” citizen. But in the case of Mr. Hughes the father was not naturalized at the time the son was born, and was at that time a subject of England. How could the son be a “natural born” citizen of the United States? If you had been born in England of American parents, would it be necessary for you to be naturalized if you came to this country to reside? No. If he, born in this country of English parents, had returned to England to reside, would it have been necessary for him to be naturalized there? No. If it was not necessary for him to be naturalized in England, would he be a “natural born citizen” of the United States?

The Statute above referred to announced the law of this country to be that the children of persons who should be naturalized became citizens by virtue of the act of their father. And obversely, that they were not to be considered as citizens until their father was naturalized. “...The naturalization of the father operates to confer the municipal right of citizenship upon the minor child...” (Secretary Blaine, February 1<sup>st</sup>, 1890.)

It is admitted that the legal status of the child, under the circumstances we have to deal with, is not explicitly defined by the Statutes. But any question which the reading of the Statute does not clear up is elucidated and illuminated by the courts (113 U.S. Supreme Court 94 *infra*) and by official documents written by men in authority and vested with the administration of the law.

In this connection it will be pertinent to make a few allusions to the recommendations made to Congress urging them to clarify the situation. President Arthur, in his Fourth Annual Message, in 1884, said: “Our existing naturalization laws also need revision. \* \* \* Section 2172, recognizing the citizenship of the children of naturalized parents, is ambiguous in its terms\* \* \*.”

“An uniform rule of naturalization, such as the Constitution contemplates, should, among other things, clearly define the status of persons born within the United States subject to a foreign power and of minor children of fathers who have declared their intention to become citizens\* \* \*.”

President Cleveland, in his First Annual Message, in 1885, said: “The laws of certain states and territories admit a domiciled alien to the local franchise conferring upon him the rights of

citizenship to a degree which places him in the anomalous condition *of being a citizen of a state and yet not of the United States within the purview of Federal and International law.*”

The United States Supreme Court has said: “The existing provisions leave much to be desired and the attention of Congress has been called to the condition of the laws with reference to the election of nationality; and to the desirability of a clear definition of the status of minor children whose fathers had declared their intention to become citizens \* \* \*.” (143 U.S. 178.)

Again the United States Supreme Court says, in the same case: “clearly minors acquire an inchoate status by the declaration of intention on the part of their parents. If they attain their majority before the parent completes his naturalization, then they have an election to repudiate the status which they find impressed upon them, and determine that they will accept allegiance to some foreign potentate or power rather than hold fast to some citizenship which the act of the parent has initiated for them.”

These opinions indicate where the doubt and uncertainty may be.

On the other hand, Willoughby, in his work on the Constitution (Vol. I, page 283), makes the positive statement that: “The naturalization of a father operates *as a naturalization* of his minor child, if they are dwelling in the United States.

We find the positive declaration of the court that the “citizenship of the father is that of his child.” (1 Ruling Case Law, 796.) There is no dispute on the facts that the father in 1862 was an English subject. There can hardly be, under the law just quoted, any dispute that Mr. Hughes was at the time of his birth an English subject. If he was at that time an English subject, he became a citizen of the United States by a process of naturalization, and is not a “natural born” citizen of the United States. He became a citizen by virtue of the subsequent act of his father. He became a citizen by operation of law, but he was not at the instant of birth, by right and of the nature of things, a “natural born” citizen of the United States.

And, Willoughby, further on, says: “A declaration of a father of an intention to become naturalized gives to his children, who attain their majority before their father’s naturalization is complete, an inchoate citizenship which, upon majority, may be repudiated.”

These point clearly to the fact that the child of un-naturalized parents is an alien and that he becomes a citizen by virtue of the subsequent act of the father. That is, that the child is a naturalized citizen; that he becomes a citizen by operation *of law* and that he is not a “natural born” citizen within the meaning of the Constitution.

It might be supposed that the Statute above quoted applies to children born in foreign countries and brought to the United States by the father. A careful reading of the Statute will permit of no such discrimination and, directly on that point, is a document written by Mr. Fish, when Secretary of State, under date of February 11<sup>th</sup>, 1874, in answer to an official inquiry. The document reads as follows: “The laws of the United States on the subject of naturalization provide, in relation to persons situated as your sons are ‘that the children of persons duly naturalized under any law of the United States \* \* \* being under the age of twenty-one years, at the time of their parents being so naturalized, or admitted to the rights of citizenship, shall, *if dwelling in the United States*, be considered as citizens of the United States.’ Assuming that your three sons were born in France \* \* \* accompanied you to this

country and have continued to reside here, they, *together with your son born here*, are, under the provisions just cited, *to be considered, when dwelling in the United States*, citizens of the United States. \* \* \*

It will be noted that the eminent Secretary of State not only drew no distinction between the children born abroad and the child born here, but that he included all together in the same category and as to be considered, when dwelling in the United States, as citizens of the United States. What would happen if they did not dwell within the United States? What would happen if the father took them back to the country from which he emigrated? Under the Statute, and under the opinion just cited interpreting the Statute, they would, in that case, not be citizens of the United States; and if they were not to be considered citizens of the United States, when they left the boundaries of the United States, how could they be “natural born” citizens of the United States who would owe allegiance to no other power and who would have a right to the protection of this Government no matter where they might find themselves?

The Supreme Court of the United States has construed that Statute and the Constitution, and has passed directly on the point in issue. It has said that one born of alien parents in the territorial limits of the United States is not a “natural born citizen” within the meaning of the presidential qualification clause and, further, said that “such (persons) not being citizens can only become citizens \* \* \* by being naturalized in the United States.” (Elk v. Wilkins, 112 U.S. 94.) Such naturalization can be accomplished by the son on his own account or through the subsequent act of the parent.

Mr. Blaine, as Secretary of State, in an official document to the United States Minister to Germany, again, under date of February 1<sup>st</sup>, 1890, construed the law pointing out the status of the child if it left the United States. The facts in that case were as follows: A husband and wife, both natives of Prussia, came to the United States. A son was born in the State of Pennsylvania *six months before* the naturalization of the father. Later the father died and the mother returned to Germany, taking her son with her, and they were residing in Germany at the time of the inquiry.

While in Germany, that Government made some claim upon the son for military service, and a ruling was requested from the Secretary of State. Mr. Secretary Blaine wrote as follows: “The words, ‘if dwelling in the United States,’ whether meaning residence at a particular moment or contemplating a settled abode, apply to Carl Heisinger, who, being now nineteen years of age, has for about eleven years been dwelling in Germany. It is not known that the government of that country has made any claims upon him. But, if the German Government should, under a provision of law similar to that in force in the United States in relation to the foreign-born children of citizens, seek to exact from him the performance of obligations as a natural-born subject, the Department would be bound to consider the provisions of Section 2172 of the Revised Statutes.”

Mr. Blaine’s reference to Section 2172 of the Revised Statutes means that this Government would recognize that child as a citizen of the United States if he lived in the United States, but would not recognize him as a citizen of this country if he lived in Germany. Was that boy “a natural born” citizen of the United States? If he was, then why would not the government of the United States recognize him as a citizen of the United States whether he were in Germany, England or China? The only conclusion is that he was not a “natural born” citizen of the United States; that some other government beside that of the United States had some claim

upon his allegiance; that he was not exclusively and by operation of the laws of nature a citizen of the United States.

The boy that Mr. Blaine referred to in the above quotation was not only born in this country but born to a male parent who had not only expressed his desire to become an American citizen, but who had proceeded to perfect his naturalization and who actually was naturalized six months subsequent to the birth of the child. The rulings under the statute hold that the child became a citizen of the United States by virtue of the naturalization of his father, but that his citizenship during his minority, was only inchoate and that if he continued to reside in the United States he would be recognized as a citizen of the United States (not a “natural born” citizen) but that if he went to Germany he would not be, by our Government, considered one of its citizens. How does this case differ from that of Mr. Hughes except in this: that Mr. Hughes and his parents continued to reside in this country? Their domicile affected his citizenship. Had they taken him back to England, he would not have been considered by the government of the United States as a citizen of the United States. The mere circumstances that he continued to live here, and, upon the attainment of his majority, to exercise his political rights perfected the inchoate citizenship which he inherited by the naturalization of his father. Only from the time of the actual naturalization of his father was he considered to be a citizen of the United States, and only upon the adoption of the Fourteenth Amendment did he actually become a citizen of the United States. But what was the status of that boy at the time of his birth, and immediately following his birth? The government of England might have exercised jurisdiction over him. That government had some claim which, under certain conditions, it might have exercised. Had he been a “natural born” citizen of the United States, no government on earth, but that of the United States, would have had any claim upon his allegiance. The law of England at the time of his birth was “once an Englishman, always an Englishman.” Not until 1872 did England change that law.

It must be admitted that a man born on this soil, of alien parents, enjoys a dual nationality and owes a double allegiance. A child born under these conditions has a right to elect what nationality he will enjoy and to which of the two conflicting claims of governmental allegiance he will pay obedience. Now if, by any possible construction, a person at the instant of birth, and for any period of time thereafter, owes, or may owe, allegiance to any sovereign but the United States, he is not a “natural born” citizen of the United States. If his sole duty is not to the United States Government, to the exclusion of all other governments, then, he is not a “natural born” citizen of the United States.

The doctrines of dual citizenship and of double allegiance are too well known and too well founded in international law to be doubted or disputed.

“The doctrine of ‘Election’ necessarily implies the existence of a double allegiance. This condition naturally arises where a person is born in one country to a father who is a citizen of another country. By rules of municipal law, which generally prevail, such a person has citizenships by birth—(1) citizenship by virtue of the place of birth (*jure soli*) and (2) citizenship by right of blood (*jure sanguinis*) i.e., by virtue of the father’s nationality. Unless this be so, the child on attaining his majority has nothing to elect.” (Moore, *International Law Digest*, III, 524-525.)

The subject of double allegiance and dual citizenship is a well recognized doctrine of international law, and one with which all nations have to deal. The question has been

presented many times and in many different ways to the government of the United States. That it has taken official cognizance of the existence of double allegiance is not only not questioned, but is too well known to need references. It may, however, be elucidated by citing a few of the instances.

An application was made for a passport for a youth of seventeen, whose father desired to send him to Germany as a student. Mr. Freslinghuysen, then Secretary of State, in regard to him, wrote the following: “The young man referred to, under the Constitution of the United States, having been born in this country, is, *while subject to the jurisdiction of the United States*, a citizen of the United States, notwithstanding the fact of his father being an alien. As such citizen he is entitled to a passport. This, of course, would be a sufficient protection to him in every other country but that of his father’s origin—Germany. There, of course, as the son of a German subject, it may be claimed that he is subject to German military law, and that, not being then subject to the jurisdiction of the United States, he cannot claim the rights secured to him, etc.” (Moore, International Law Digest, III., 532.)

That young man had a divided allegiance. A double allegiance necessarily implies a divided allegiance. His allegiance is not exclusively to one country or to one flag, and a man born with a double allegiance cannot be a “natural born” American.

Again, Mr. Gresham, Secretary of State, held that: “While a person born in the United States, though of alien parents, is by the laws thereof a citizen, yet, should he be taken by his parents while a minor to the country of which they are subjects, he becomes amenable to the laws of that country and subject to a claim of allegiance thereunder *jure sanguinis*.” On this ground the Department of State refused to issue a passport for the protection of a minor, born in the United States, whose parents proposed to return with him “for a brief period” to the country (Russia) of which they were subjects. (March 9<sup>th</sup>, 1893.)

How could the government of the United States refuse the issuance of a passport to a “natural born” citizen under those circumstances? That child was not considered a “natural born” citizen of this country, and yet his parents proposed to return with him to the country from which they had emigrated only “for a brief period.”

In 1866 a son was born in the State of Massachusetts to a father who was a Frenchman. In 1885, he, the parent, went back to France with him family, including his son, then nineteen years of age. Two years later the son was notified to perform military duty and, on failing to respond, was arrested and imprisoned. He appealed to the government of the United States, through the American Ambassador in France. Mr. Bayard, the Secretary of State at that time, instructed the American Embassy to use “its good offices” to obtain the young man’s release from military service, but added: “You will, however, advise him that his remaining in France after he becomes of age may be regarded as an election of French nationality and that his only method of electing and maintaining American nationality is by a prompt return to this country.” (December 28<sup>th</sup>, 1887.)

All these young men were born in the United States, but had the right to elect whether they should be a citizen of a foreign country or a citizen of this country. If they had the right to elect to which government they would pay allegiance, they were not exclusively the subjects of this country; they were not “natural born” citizens of this country.

Again, a citizen of Prussia immigrated to the United States and had a son born to him. Later he returned to Germany, with his family, including the son. On reaching the military age, the son was called upon by the German government to perform military duty. The father invoked the intervention of the American Legation at Berlin. In that case it was held that the son, being a minor, acquired, under the laws of Germany, the nationality of his father, but did not thereby lose his right to claim American nationality, and that, upon attaining his majority, the son might, at his own election, return and take the nationality of the place of his birth, or remain in Germany. But that, during his minority and while domiciled with his father in Germany, he must submit himself to the claim of military duty on the part of the German Government. (Edwards Pierrepont, Attorney-General, and U.S. Grant, 15 Op. 15.)

The only difference in the case of Mr. Hughes and in the case of the subject above examined, is that Mr. Hughes' father did not take him back to England. But if he had, the English Government would have had a claim upon him, which they might have exercised, and if the English Government did have a claim upon him, then the United States did not have exclusive jurisdiction over him and he did not owe to the United States exclusive allegiance and he was not a “natural born” citizen within the meaning of the Constitution because he was not naturally a part of the Government under the jurisdiction of which he happened to be born. Particularly is this so in view of the declaration of Mr. Porter, Acting Secretary of State, under date of September 14<sup>th</sup>, 1885, when he says: “By the law of nations an infant child partakes of his father's nationality and domicile.”

It is not disputed that Mr. Hughes is not a citizen of the United States, but if he had the right to elect, he must have had something to choose between. He was *native* born because he was born in this country, and he is now a *native born* citizen because he is now a citizen of this country; but, had he been a “natural born” citizen, he would not have had the right to choose between this country and England; he would have had nothing to choose between; he would have owed his sole allegiance to the government of the United States, and there would have been no possible question, whether he found himself in the United States or in any other country in the world, that he would be called upon to show allegiance to any Government but that of the United States.

That it was the intention of the men who framed the Constitution to provide that no person should be President except those who were *naturally a part* of this government can hardly be doubted by an examination of documents contemporary with the framing of the Constitution.

It was originally proposed in the Constitutional Convention that the presidential qualifications be a “citizen of the United States.” It was so reported to the Convention, by the Committee which had it in charge, on the 22<sup>nd</sup> day of August, 1787. It was again referred to a Committee, and the qualification clause was changed to read “*natural born citizen*,” and was so reported out of Committee on September the 4<sup>th</sup>, 1787, and adopted in the Constitution. There is no record of debates upon the subject, but the Federalist contains a contemporary comment on it written by Alexander Hamilton. It reads: “Nothing was more to be desired, than that every practicable obstacle should be opposed to cabal, intrigue, and corruption. These most deadly adversaries of Republican government, might naturally have been expected to make their approaches from more than one quarter, but chiefly from the desire in foreign powers to gain an improper ascendant in our councils. How could they better gratify this, than by raising a *creature of their own* to the chief magistracy of the Union?” (Federalist, LXVIII.)

The interpretation of their position, as expressed in the Federalist, is corroborated by Mr. Story, in his work on the Constitution, in the following words: “It is indispensable, too, that the president should be a *natural born* citizen of the United States \* \* \* . The general propriety of the exclusion of foreigners, in common cases, will scarcely be doubted by any sound statesman. It cuts off all chances for ambitious foreigners, who might otherwise be intriguing for the office; and interposes a barrier against those corrupt interferences of foreign governments in executive elections, which have inflicted the most serious evils upon the elective monarchies of Europe.” (Story on the Constitution, Vol. 2, page 353-54.)

Of course, these articles are not used with the idea of suggesting that Mr. Hughes’ affiliations and sympathies and *present* allegiance are to any government but to that of the United States. Any such idea is disclaimed. They are used, however, to show the reason that underlay the constitutional provision requiring a person to be a “natural born” citizen if he would assume the presidency of the United States. If, with full knowledge of the meaning of the phrase “natural born,” the framers of the Constitution used those words to express a certain idea and to necessitate a certain qualification, then their meaning is the law of the land. That they did use them is undoubted; that they knew what they were writing hardly seems possible to doubt, in view of the contemporary expressions on the subject and the actual change in the phraseology of the proposed constitution.

The records of the Constitutional Convention of 1787, the Federalist, Story, the eminent commentator on the Constitution, all agree that only a “natural born citizen” should ever become President of the United States.

The Supreme Court of the United States, several Presidents of the United States, numerous Secretaries of State and an Attorney-General, each vested with authority in connection with the law, have commented upon and interpreted the only existing statute in such words as to disqualify from the presidency a person born under such circumstances as surround Mr. Hughes’ birth on the ground that he is not a “natural born citizen” of the United States.

Take one more authority. In view of the military draft proposed in 1862, on account of the Civil War, under the head of “*aliens*,” it was declared by the government at Washington that the following persons were exempt from draft for military service in the armies of the United States: (1) All foreign born persons who have not been naturalized; (2) All persons born of foreign parents and who have not become citizens. (Papers relating to foreign affairs, 1862, p. 283.) The very year Mr. Hughes was born, the government to which he *now* pays allegiance officially recognized that it had not the right to call his father to defend the flag and that it had not the right to call him to defend the flag. The government he now aspires to preside over classed him under the general head of “Aliens” the year he was born and drew a line of distinction between him and “natural born citizens”—between him and those to whom it owed protection and from whom it had a right to claim protection.

Is Mr. Hughes a “natural born citizen” of the United States?

## About Breckinridge Long (1881-1958)

An affluent Democrat from Missouri whom FDR appointed ambassador to Italy in 1933, Breckenridge Long was born in St. Louis in 1881 and studied at Princeton University and Washington University Law School. After receiving his law degree, Long deepened his involvement in Democratic politics, both in Missouri and elsewhere, and in 1917 he was rewarded with an appointment to the position of third assistant secretary of state.



Long remained with the State Department until 1920 when he resigned his position to run for the U.S. Senate from Missouri. Losing the election, Long was also defeated in a second bid for the Senate in 1922. Notwithstanding his electoral setbacks, Long remained an avid supporter of Democratic candidates and contributed generously to FDR's 1932 campaign, earning himself the Italian ambassadorship in the process.

Long returned to private life after three years at the embassy in Rome, only to rejoin the State Department in 1940 at which time he assumed supervision over the Department's Immigrant Visa Section – a position Long would use to impede the ability of Jews and other victims of Nazi persecution to seek refuge in the United States.

Eleanor Roosevelt, who received an avalanche of petitions from Europeans desperate to flee German occupation, had a tense relationship with Long. ER found him not only unsympathetic but also opposed to the policies she supported and, as much as possible, she tried to work around Long (through working with Sumner Welles or appealing to FDR directly) to respond to the petitioners. Long left the State Department in 1944 and died in 1958.

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### Sources:

*The Concise Dictionary of American Biography*. vol. I. 5<sup>th</sup> ed. New York: Charles Scribner's Sons, 1997, 745.

Dallek, Robert. *Franklin Roosevelt and American Foreign Policy, 1932-1945*. New York: Oxford University Press, 1980, 66-67, 125-126, 446-448.

Lash, Joseph. *Eleanor and Franklin*. New York: W.W. Norton & Company, 1971, 667.

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## About Chicago Legal News, Co.

In 1868, **Myra Colby Bradwell** started the “Chicago Legal News.” In her weekly newspaper, she wrote about Illinois state court decisions, session laws, and legal reforms. Myra also reported on federal court decisions and legislative news. Her paper was a huge success and became the most widely-read legal newspaper in the country.

In 1869, Mrs. Bradwell passed the Illinois Bar Exam with honors. Her qualifications were approved by a prominent judge and a states attorney. With their encouragement, she went on to obtain her law license, yet she never did practice law.

Mrs. Bradwell was well-established in the newspaper industry, and doing quite well, when, in 1880, she was admitted to the Illinois state bar. In 1882, she was also admitted to the United States Supreme Court bar. Despite becoming an attorney, Bradwell died at the age of 63 in 1894 without ever having practiced law in the court system.

The Chicago fires of 1871 destroyed her offices, but she rebuilt her empire. After Myra Bradwell's death, her daughter, Bessie, continued publication of the newspaper until 1925.

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ALLAN BENNY v. WILLIAM J.  
O'BRIEN.

[NO NUMBER IN ORIGINAL]

NEW JERSEY SUPREME  
COURT

58 N.J.L. 36; 32 A. 696; 1895 N.J. Sup.  
Ct. LEXIS 62; 29

Vroom 36

February 1, 1895,  
Argued  
June 15, 1895, Decided

DISPOSITION: [\*\*\*1] Reversed.

#### HEADNOTES

Persons born in the United States of parents who are domiciled here are citizens of the United States, and of the state wherein they reside. Children born of persons resident here in the diplomatic service of foreign governments are excepted.

COUNSEL: For the relator, Charles C. Black.

For the defendant, Thomas F. Noonan.

JUDGES: Before BEASLEY, CHIEF JUSTICE, and Justice VAN SYCKEL. The opinion of the court was delivered by VAN SYCKEL, J.

OPINION BY: VAN SYCKEL

## OPINION

[\*36] In error to the Hudson Circuit.

The opinion of the court was delivered by  
[\*\*697] VAN SYCKEL, J. The question in this case is whether the contestant, Allan Benny, or William J. O'Brien is entitled to a seat in the board of councilmen of the city of Bayonne.  
[\*37] I see no reason to dissent from the finding of fact by the court below, which was that each candidate had received an equal number of votes. One of the votes cast and counted for Benny, it is admitted, was voted by himself, and that vote the court below refused to count, on the ground that Benny was not entitled to the elective franchise.

The facts are undisputed. Allan Benny was born in the city of Brooklyn in 1867, and has lived in the city of Bayonne, in this state, continuously since 1868.

His parents came from Scotland to this country in 1855, and have continued to reside here since that time. His father declared his intention to become a citizen, in December, 1893, [\*\*\*2] but has not been naturalized.

Allan Benny has voted at every election held in Bayonne since he became twenty-one years of age.

The question presented is whether a person born in this country of alien

parents, who prior to his birth had their domicil here, is a citizen of the United States.

In *Lynch v. Clarke*, 1 Sandf. Ch. 583, Vice-Chancellor Sandford, after an exhaustive discussion of the subject, declared that every person born within the dominion and allegiance of the United States was a citizen thereof. This decision was rendered in 1844, before the adoption of the fourteenth amendment to the constitution of the United States.

That amendment, passed in 1865, provides "that all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside."

In 1884, in *Re Look Tin Sing*, in the Circuit Court of the United States, Mr. Justice Field held that a person born within the United States of Chinese parents residing therein, and not engaged in any diplomatic or official capacity under the emperor of China, is a citizen of the [\*\*\*3] United States. 10 Sawy. 353, 21 F. 905.

Some expressions of Mr. Justice Gray, in *Elk v. Wilkins*, 112 U.S. 94, 28 L. Ed. 643, 5 S. Ct. 41, appear to be in conflict with the views of Mr. [\*38] Justice Field in the case above cited, and upon the authority of that case the court below rejected the ballot of the plaintiff in error.

Elk v. Wilkins related to the status of the Indians, who have always been regarded as a class by themselves, and the first section of the Civil Rights act of April 9th, 1866, which declares that "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are citizens of the United States," had a controlling effect in the decision of the case.

Indians not taxed are excluded by that act from deriving any right to citizenship through birth, and can become citizens, as Justice Gray observed, only by naturalization.

That this case has not been understood to be inconsistent with the views of Mr. Justice Field, in 10 Sawy. 353, 21 F. 905, is evinced by the fact that the latter case has been repeatedly approved and followed in the federal courts since the promulgation [\*\*\*4] of Justice Gray's opinion in Elk v. Wilkins. Re Chin King, 13 Sawy. 333, 35 F. 354; Re Wy Shing, 13 Sawy. 530, 36 F. 553; Re Yung Sing Hee, 13 Sawy. 482, 36 F. 437; Re Gee Fook Sing, 49 F. 146.

All white persons, or persons of European descent who were born in any of the colonies, or resided or had been adopted there before 1776, and had adhered to the cause of independence up to July 4th, 1776, were, by the declaration, invested with the privileges of citizenship.

Since that time the right to citizenship has been derived through birth or

naturalization.

It is manifest, therefore, that those whose ancestors came to this country since the adoption of the federal constitution in 1789, can establish their right to citizenship only by showing that such ancestors were naturalized, unless the right to citizenship can be acquired by birth in this country.

Such a rule would disfranchise a large number of persons born in this country whose parents, or even grandparents, were born here of alien parents.

I think it is clear that it will never be conceded by our government that such persons are subject to any foreign [\*\*\*5] [\*39] power, so as to exclude them from the right to citizenship intended to be conferred upon persons born in this country, by the first section of the Civil Rights bill of April 9th, 1866, hereinbefore referred to.

The language used in this act is, "born in the United States and not subject to any foreign power." The words of the fourteenth amendment are, "born in the United States and subject to the jurisdiction thereof."

These provisions, by implication, concede that there may be instances in which the right to citizenship does not attach by reason of birth in this country. Two facts must concur. The person must be born here and he must be subject to the jurisdiction of the United States

according to the fourteenth amendment, which means, according to the Civil Rights act, that the person born here is not subject to any foreign power.

Allan Benny, whose parents were domiciled here at the time of his birth, is subject to the jurisdiction of the United States, and is not subject to any foreign power. The right of our government to his allegiance, on the one hand, and its duty to protect him, on the other hand, cannot be denied if, in any case, birth here is to be of controlling [\*\*\*6] force under the aforesaid act and [\*\*698] amendment, for, in the absence of their provisions, children born here of parents who are citizens are themselves citizens in virtue of their birth.

Persons intended to be excepted are only those born in this country of foreign parents who are temporarily traveling here, and children born of persons resident here in the diplomatic service of foreign governments. Such children are, in theory, born within the allegiance of the sovereign power to which they belong or which their parents represent.

The object of the fourteenth amendment, as is well known, was to confer upon the colored race the right of citizenship. It, however, gave to the colored people no right superior to that granted to the white race. The ancestors of all the colored people then in the United State were of foreign birth, and could not have been naturalized or in any way have become

entitled to the right of citizenship. [\*40] The colored people were no more subject to the jurisdiction of the United States by reason of their birth here than were the white children born in this country of parents who were not citizens.

The same rule must be applied to both races, [\*\*\*7] and unless the general rule, that when the parents are domiciled here birth establishes the right to citizenship, is accepted, the fourteenth amendment has failed to accomplish its purpose and the colored people are not citizens. The fourteenth amendment, by the language, "all persons born in the United States and subject to the jurisdiction thereof," was intended to bring all races, without distinction of color, within the rule which prior to that time pertained to the white race.

In my opinion, therefore, Allan Benny is a citizen of the United States in virtue of his birth here of alien parents who at the time of his birth were domiciled in this country.

The judgment of the court below should be reversed; the vote being a tie, neither candidate was elected.

## **7 FAM 1116.2 "Subject to the Jurisdiction" of the United States**

### **7 FAM 1116.2-1 Subject at Birth to U.S. Law**

(TL:CON-64; 11-30-95)

a. Simply stated, "subject to the jurisdiction" of the United States means subject to the laws of the United States.

b. In *U.S. v. Wong Kim Ark*, 169 U.S. 649 (1898), the U.S. Supreme Court examined at length the theories and legal precedents on which the U.S. citizenship laws are based and, in particular, the types of persons who are subject to U.S. jurisdiction. After doing so, it affirmed that a child born in the United States to Chinese parents acquired U.S. citizenship even though the parents were, *at the time*, racially ineligible for naturalization. The Court concluded that:

The 14th Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes. The Amendment, in clear words and in manifest intent, includes the children born within the territory of the United States, of all other persons, of whatever race or color, domiciled within the United States.

c. Pursuant to this ruling, it has been *considered* that:

(1) Acquisition of U.S. citizenship *generally* is not affected by the fact that the parents may be in the United States temporarily or illegally; and that

(2) A child born in an immigration detention center *physically located in the United States* is considered to have been born in the United States and be subject to its jurisdiction. This is so even if the child's parents have not been legally admitted to the United States and, for immigration purposes, *may be* viewed as not being in the United States.

### **7 FAM 1116.2-2 Officers and Employees of Foreign Embassies and Consulates and their Families**

(TL:CON-64; 11-30-95)

a. Under international law, *diplomatic agents are immune from the criminal jurisdiction of the receiving state. Diplomatic agents are also immune, with limited exception, from the civil and administrative jurisdiction of the state. The immunities of diplomatic agents extend to the members of their family forming part of their household.* For this reason children born in the United States to diplomats to the United States are not subject to U.S. jurisdiction and do not acquire U.S. citizenship under the 14th Amendment or the laws derived from it.

## **7 FAM 1100**

# **ACQUISITION AND RETENTION OF U.S. CITIZENSHIP AND NATIONALITY**

## **7 FAM 1110**

### **ACQUISITION OF U.S. CITIZENSHIP BY BIRTH IN THE UNITED STATES**

*(CT:CON-314; 08-21-2009)*  
*(Office of Origin: CA/OCS/PRI)*

## **7 FAM 1111 INTRODUCTION**

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- a. U.S. citizenship may be acquired either at birth or through naturalization subsequent to birth. U.S. laws governing the acquisition of citizenship at birth embody two legal principles:
  - (1) **Jus soli** (the law of the soil) - a rule of common law under which the place of a person's birth determines citizenship. In addition to common law, this principle is embodied in the 14th Amendment to the U.S. Constitution and the various U.S. citizenship and nationality statutes.
  - (2) **Jus sanguinis** (the law of the bloodline) - a concept of Roman or civil law under which a person's citizenship is determined by the citizenship of one or both parents. This rule, frequently called "citizenship by descent" or "derivative citizenship", is not embodied in the U.S. Constitution, but such citizenship is granted through statute. As U.S. laws have changed, the requirements for conferring and retaining derivative citizenship have also changed.
- b. **National vs. Citizen:** While most people and countries use the terms "citizenship" and "nationality" interchangeably, U.S. law differentiates between the two. Under current law all U.S. citizens are also U.S. nationals, but not all U.S. nationals are U.S. citizens. The term "national of the United States", as defined by statute (INA 101 (a)(22) (8 U.S.C. 1101(a)(22)) includes all citizens of the United States, and other persons who owe allegiance to the United States but who have not been granted the privilege of citizenship.

- (1) Nationals of the United States who are not citizens owe allegiance to the United States and are entitled to the consular protection of the United States when abroad, and to U.S. documentation, such as U.S. passports with appropriate endorsements. They are **not entitled** to voting representation in Congress and, under most state laws, are not entitled to vote in Federal, state, or local elections except in their place of birth. (See 7 FAM 012; 7 FAM 1300 Appendix B Endorsement 09.)
  - (2) Historically, Congress, through statutes, granted **U.S. non-citizen nationality** to persons born or inhabiting territory acquired by the United States through conquest or treaty. At one time or other natives and certain other residents of Puerto Rico, the U.S. Virgin Islands, the Philippines, Guam, and the Panama Canal Zone were U.S. non-citizen nationals. (See 7 FAM 1120.)
  - (3) Under current law, **only** persons born in American Samoa and Swains Island are U.S. non-citizen nationals (INA 101(a)(29) (8 U.S.C. 1101(a)(29) and INA 308(1) (8 U.S.C. 1408)). (See 7 FAM 1125.)
- c. **Naturalization – Acquisition of U.S. Citizenship Subsequent to Birth:** Naturalization is “the conferring of nationality of a State upon a person after birth, by any means whatsoever” (INA 101(a)(23) (8 U.S.C. 1101(a)(23)) or conferring of citizenship upon a person (see INA 310, 8 U.S.C. 1421 and INA 311, 8 U.S.C. 1422). Naturalization can be granted automatically or pursuant to an application. (See 7 FAM 1140.)
- d. **“Subject to the Jurisdiction of the United States”:** All children born in and subject, at the time of birth, to the jurisdiction of the United States acquire U.S. citizenship at birth **even if their parents were in the United States illegally at the time of birth.**
- (1) The U.S. Supreme Court examined at length the theories and legal precedents on which the U.S. citizenship laws are based in *U.S. v. Wong Kim Ark*, 169 U.S. 649 (1898). In particular, the Court discussed the types of persons who are subject to U.S. jurisdiction. The Court affirmed that a child born in the United States to Chinese parents acquired U.S. citizenship even though the parents were, **at the time**, racially ineligible for naturalization.
  - (2) The Court also concluded that: “The 14th Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our

territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes. The Amendment, in clear words and in manifest intent, includes the children born within the territory of the United States, of all other persons, of whatever race or color, domiciled within the United States.” Pursuant to this ruling:

- (a) Acquisition of U.S. citizenship generally is not affected by the fact that the parents may be in the United States temporarily or illegally; and that
  - (b) A child born in an immigration detention center physically located in the United States is considered to have been born in the United States and be subject to its jurisdiction. This is so even if the child’s parents have not been legally admitted to the United States and, for immigration purposes, may be viewed as not being in the United States.
- (3) **“Blue List” Cases – Children of Foreign Diplomats:** 7 FAM 1100 Appendix J (under development) provides extensive guidance on the issue of children born in the United States to parents serving as foreign diplomats, consuls, or administrative and technical staff accredited to the United States, the United Nations, and specific international organizations, and whether such children are born “subject to the jurisdiction of the United States.”
- f. **Questions:** Guidance should be sought from the Bureau of Consular Affairs (CA) when issues not addressed in this subchapter arise.
  - (1) Posts abroad should consult your counterpart in the Directorate of Overseas Citizens Services, Office of American Citizen Services and Crisis Management (CA/OCS/ACS), which may consult with the Office of Policy Review and Inter-Agency Liaison (CA/OCS/PRI) if necessary and appropriate;
  - (2) Passport agencies and centers should consult the Directorate of Passport Services, Office of Legal Affairs and Law Enforcement, Legal Affairs Division (CA/PPT/L/LA) (CAPPTAdjQ@state.gov).

## 7 FAM 1112 WHAT IS BIRTH “IN THE UNITED STATES”?

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- a. INA 101(a)(38) (8 U.S.C. 1101 (a)(38)) provides that “the term ‘United States,’ when used in a geographical sense, means the **continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States.**”