THE

NEW YORK LEGAL OBSERVER,

CONTAINING

REPORTS OF CASES

DECIDED IN

THE COURTS OF EQUITY AND COMMON LAW,

AND

IMPORTANT DECISIONS IN THE ENGLISH COURTS;

ALSO,

ARTICLES ON LEGAL SUBJECTS,

PRACTICAL POINTS OF GENERAL INTEREST, REMARKABLE TRIALS,

SKETCHES OF THE BENCH AND THE BAR, ANECDOTES, &c. &c.

WITH

A TABLE OF CASES, A GENERAL INDEX,

AND

A DIGEST OF THE REPORTS.

EDITED BY

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State of New York, except so far as it may operate as an appointment of real estate by a *feme covert* under a valid power for that purpose.

Before the Hon. LEWIS H. SANDFORD, Assistant Vice Chancellor of the First Circuit.

BERNARD LYNCH v. JOHN CLARKE AND JULIA LYNCH.

Heard, *July* 6, 7, 8, 10, and 12, 1843; *and upon briefs as to the question of alienage*, May 6, July 19, and September 17, 1844. Decided, November 5, 1844.

ALIENAGE—CITIZENSHIP BY BIRTH IN THE UNITED STATES, THOUGH OF ALIEN PARENTS TEMPORARILY RESIDING HERE.

The defendant, Julia Lynch, was born in the City of New York in 1819, of alien parents, during their temporary sojourn in that city. She returned with them the same year, to their native country, and always resided there afterwards.

It was held that she was a citizen of the United States.

The rule of the common law, by which aliens are precluded from inheriting lands, still prevails in the State of New York.

The right to real estate by descent, is governed by the municipal law of this state, and the legislature may enable aliens to inherit. But while the law remains as it now is, the question on the right to inherit must turn upon the alienage or citizenship of the person claiming to be the heir.

The right of citizenship, as distinguished from alienage, is a national right or condition. It pertains to the confederated sovereignty, the United States; and not to the individual states.

Under the Constitution of the United States, the power to regulate naturalization is vested in Congress, and since Congress has legislated upon the subject, the states have no power to act in regard to it.

Neither the common law nor the statute law of the State of New York, can determine whether Julia Lynch was or was not an alien.

The policy and legislation of the American Colonies, from their earliest times until the Revolution, was adapted to foster immigration, and to bestow upon foreigners all the rights of natural born subjects. And this policy continued unchanged in the thirteen original states, while they were united by the Articles of Confederation. The uniform course was, to extend, not to abridge, the right of citizenship. The common law by which all persons born within the king's allegiance, became subjects, whatever were the situation of their parents, became the law of the colonies, and so continued, while they were connected with the crown of Great Britain.

It was thus the law of each and all of the states at the Declaration of Independence, and so remained until the National Constitution went into effect, that a child born within their territory and liegeance respectively, though of alien parents, who were abiding temporarily, thereby became a citizen of the state of which he was a native.

The Constitution of the United States, as well as those of all the thirteen old states, pre-supposed the existence of the common law, and was founded upon its principles, so far as they were applicable to our situation and form of government. And to a limited extent, the principles of the common law prevail in the United States, as a system of national jurisprudence.

The subject of alienage under the national compact, became a national subject, which must be controlled by a principle co-extensive with the United States. And as there is no constitutional or congressional provision declaring citizenship by birth, it must be regulated by some rule of national law; and from the necessity of the case, that rule must have been co-eval with the existence of the Union.

The law on this subject which prevailed in all the states, became the governing principle or common law of the United States, when the union of the states was consummated, and their separate legislation on the point was terminated. It is, therefore, the law of the United States, that children born here, are citizens, without any regard to the political condition or allegiance of their parents.

Children of ambassadors, are, in theory, born within the allegiance of the sovereign power represented, and do not fall within the rule.

By the law as established in Great Britain, as well as in this country, there is of necessity in many cases, *a double allegiance*. Thus, where the citizens of the one country are naturalized in the other; and where issue are born in the one, of parents who are citizens of the other country.

Such is the law of Spain and Portugal.

By the common law, children born abroad of English parents, were subjects of the crown. The Stat. 25 Edward, 3 St. 2, *De natis ultra mare*, was declaratory of the old common law.

Semble, that children of citizens of the United States, although born in foreign countries, and not within the provisions of the act of Congress of 1802; are, nevertheless, citizens of the United States.

The benign policy of this country in reference to immigrants, traced historically, and its wisdom and justice maintained.

The principal point, sustained, by reference to the legislation of the states, by state papers, and, by the opinions of emminent statesmen and judges, and writers on constitutional law.

The rule of the national or public law considered. It is derived from the civil law, and is not uniformly held in countries, the jurisprudence of which is founded upon that system; nor is it clearly defined in theory.

THE firm of Lynch & Clarke, formerly so well known as dealers in mineral waters in the city of New York, first brought into general notice the celebrated *Congress Water* at Saratoga Springs. In 1823, a lease of the Congress Spring was obtained in the name of Clarke, and a purchase made of a parcel of land near by. In 1826 and 1829, the title to the spring and several hundred acres of land adjacent, was ob-

tained from the Livingston heirs, in the name of Clarke; and in 1830 another tract was conveyed the same manner. The purchase money in the transaction prior to 1830, was paid by Lynch & Clarke. The sale of the Congress water was continued by the firm from 1823, until the death of the senior partner, Thomas Lynch, in June 1833; by which time the property at the springs had become of immense value, and was yielding a large income.

T. Lynch left no children. His brother, Bernard, was born and always resided in Ireland. He had a brother Patrick, also an alien, who died before Thomas, leaving a daughter, Julia, living in Ireland. Bernard Lynch came to this country in 1834, was naturalized in 1839, and procured from the legislature a relinquishment of the right of the state by escheat to the lands of Thomas Lynch. Mr. Clarke claiming to own the whole of the Congress Spring and the lands purchased as before mentioned, Bernard Lynch filed the bill in this cause to have his title to an undivided half thereof, under Thomas Lynch, maintained and established. He alleged that the purchase was on joint account, and that Clarke was bound to account for the profits since T. Lynch's death, amounting to at least $20,000 a year. And he avered that Julia Lynch had no right or title in the premises.

Mr. Clarke stated in his answer, that the purchases were all made on his sole account, and the deeds for that cause taken in his name. And that the money paid was loaned to him by the firm. He also alleged that Julia Lynch was a citizen of the United States, and inherited all Thomas Lynch's real estate. The answer of Julia Lynch insisted upon her right as a citizen, and as the sole heir of Thomas Lynch.

There was much testimony relative to the purchase of the property, and the resulting trust set up by the complainant. The case however turned on the citizenship of Julia Lynch.

H. S. Mackay and *S. Sherwood*, (with whom was *J. Radcliff*,) for complainant.

G. M. Speir and *Murray Hoffman*, (with whom was *C. F. Grim*,) for defendant Clarke.

A. L. Robertson, for defendant Julia Lynch.

The Assistant Vice Chancellor.—The first question which I will examine in this case, is the political condition of the defendant Julia Lynch, at the death of her uncle, Thomas Lynch. This question stands at the threshold of the cause. For, if, as claimed in her behalf, she were in truth a citizen of the United States at that time, she inherited all the real estate whereof Thomas Lynch was seised, or to which he was entitled, either at law or in equity. Her father died in the lifetime of Thomas. The descent to her, (although the other relations of Thomas were aliens,) was not immediate. *Jackson* v. *Fitzsimmons*, 10 Wend. 9; *Levy's Lessee* v. *McCartee*, 6 Peters', 102. But the Revised Statutes, re-enacting so much of the Act 11 and 12, Will. 3, ch. 6, provide that no person capable of inheriting under our statute regulating descents, shall be precluded from such inheritance by reason of the alienism of the ancestor of such person. 1 *R. S.* 754, § 22. This applies directly to the case, if Julia Lynch were a citizen when her uncle died. See *The People* v. *Irwin*, 21 Wend. 128.

The difficulty of the subject, and its importance intrinsically as well as in reference to the large amount of property involved in this cause, induced me to solicit a further argument on the point, and it has accordingly been argued anew. The respective counsel have presented their views with great ability, and have aided me essentially in my investigation.

The facts bearing upon the alienage or citizenship of Julia Lynch, lie within a narrow compass. Her parents were British subjects, domiciled in Ireland. They came to this country in 1815, remained till the summer of 1819, and then returned to Ireland. Julia was born in the city of New York in the spring of 1819. Her parents took her with them on their return, and she remained in Ireland till after the death of Thomas Lynch. During the sojourn of her father here, Thomas Lynch hired a farm for him and paid the rent. Her father occupied the farm for a time, but it is proved that he was not contented here. One witness testifies that Patrick Lynch (Julia's father) always wished to return to Ireland, and that he thought this country did not agree very well with his health. It does not appear that he ever declared his intention to become a citizen under the act of Congress; or ever expressed any intention to reside here permanently. Some years

after he returned to Ireland, he came here on a visit, without bringing his wife or any of his family; remained short of six months; and then returned to Ireland, where he and his wife continued to reside until their death.

The presumption of Patrick's having had any *animum manendi*, arising from his residing here three or four years, is very much weakened if not overcome, by his speedy return to Ireland, his constant wish to return during his stay, and the absence of any proof of his expressing an intention or even expectation of remaining here, or of his taking any step towards acquiring the character of a citizen of the country.

My conclusion upon the facts proved is, that Julia Lynch was born in this state, of alien parents, during their temporary sojourn. That they came here as an experiment, without any settled intention of abandoning their native country, or of making the United States their permanent abode. They never concluded to remain here permanently, and after trying the country, they returned to their native land, and there ended their lives many years afterwards. They took Julia with them to Ireland; she continued to reside there, and when Thomas Lynch died, she was about fourteen years of age, and a resident of Ireland.

Her right to inherit as the heir of Thomas Lynch, must be tested by the state of allegiance existing at his death, when the descent was cast. It is evident, therefore, that the right depends upon her alienage or citizenship at the time of her departure from this country in her mother's arms in the year 1819; for no act intervened between that time and the death of Thomas, which could alter her political state or condition.

First. It is insisted by the defendants that the rule of the common law is to govern this case on the point of alienage.

It is an indisputable proposition, that by the rule of the common law of England, if applied to these facts, Julia Lynch was a natural born citizen of the United States. And this rule was established and inflexible in the common law, long anterior to the first settlement of the United States, and, indeed, before the discovery of America by Columbus. By the common law, all persons born within the ligeance of the crown of England, were natural born subjects, without reference to the *status* or condition of their parents. So if a Frenchman and his wife, came into England, and had a son during their stay, he was a liege man. This was settled law in the time of Littleton, who died in 1482. *Litt. Tenures*, § 198. And its uniformity through the intervening centuries, may be seen by reference to the authorities, which I will cite without further comment. *Dyer's R.* 224, a; and *S. C.* in *Jenkin's Cent. Cases*, 5 *Cent. Case* 91; *Calvin's Case*, 7 *Reports*, 16, 17, 18, 25, 27; *Co. Litt.* 8, a, 129, a; *Bacon* v. *Bacon*, Cro. Car. 601; *Comyn's Digest Alien*, B. 1; *Bac's. Abridg.* Aliens, A; 1 *Black. Comm.* 366; *Doe* v. *Jones*, 4 Term Rep. 300; *Doe* v. *Ackland*, 2 Barn & Cres, 779; *Chitty's Law of Descents*, 33. 1 *Hallam's Constitutional History of England*, 422, note 1.

Mr. Chitty, *ubi supra*, says that by the common law, all persons born out of the king's dominions and allegiance were deemed aliens; and whatever were the situation of his parents, the being born within the allegiance of the king, constituted a natural born subject.

He states no exception to the latter proposition; although there are some exceptions to the former, in favor of children of British subjects who are born in foreign countries Whether the foreign parents were in England, *in itinere*, or for occasional business, their children born during their stay, were natural born subjects.

Second. Such being the rule of the common law, in the absence of express legislation, the difficult question is presented for decision; is the common law in this respect, the law of this state, or of the United States? If it be the law here, then Julia Lynch was a native born citizen, and inherited the property in controversy; assuming that it was the property of Thomas Lynch, as alleged in the bill of complaint.

It is undoubtedly true that the right to real estate by descent in this state, must be governed by the municipal law of the state. And by the law of this state, which in this respect, is the common law, aliens cannot inherit land. But this does not relieve the case from its difficulty, because we have no state law which in express terms declares who are aliens and who are citizens, either in general, or for the purpose of inheriting land. It thus becomes necessary to inquire who is an alien, according to the

law which must control that subject in this state. No one can dispute the power of this, or any other state in the Union, to regulate the subject of inheritance. The state legislatures, may enable aliens to hold and inherit lands unconditionally, in their respective states. But where they have omitted to legislate, and the common law disability is left to operate against aliens; the right to inherit, when disputed on this ground, must be determined on some general principle or rule of law which ascertains who are aliens and who are citizens.

I think that this general principle is not to be obtained from the mere local or municipal law of the State of New York. This state is a member of a confederation of states, having a common federal executive head, and for many purposes affecting the general interest and convenience of all the states, a national legislature and judiciary. Our internal affairs and government, are almost exclusively reserved to the control of the people of the states. Amongst ourselves, we are twenty-six sovereign and independent states, confederated under a compact or constitution, for limited and prescribed objects of government.

But in reference to all foreign nations, we stand as one single and united people, *The United States of America*. The right of citizenship, a right which is not only important as between the different states, but has an essential bearing in our intercourse with other nations and the privileges conceded by them to our citizens; is therefore, not a matter of mere state concern. It is necessarily a *national right* and character. It appertains to us, not in respect to the State of New York, but in respect of the United States.

In speaking of this right in its proper and enlarged sense, we never say of any one, that he is a citizen of the State of New York; we say he is a citizen of the United States. Our own constitution recognizes the propriety of this mode of expression, in declaring that no person except a native *citizen of the United States*, shall be eligible to the office of governor. A merchant trading in Europe and having occasion to resort to treaty stipulations with foreign powers, would neither be recognized or understood, if he should declare that he was a citizen of the State of New York. It is only in his character as a citizen of the United States, an *American citizen*, as by universal comity we are distinguished from the citizens of other Republics on this continent, that he would be regarded abroad, or received as entitled to the rights and immunities secured to him by the government of his country. I speak now of the relationship of a citizen in its general and enlarged sense. In its particular sense, it is applicable to the rights and duties of our people in and towards the states in which they reside. And in this sense, while a citizen of one state may hold lands in another state, yet he cannot interfere in the elections of the latter, or in any of those rights which from the nature of government belong exclusively to the citizens of such state. As citizens, we owe a particular allegiance to the sovereignty of our state, and a general allegiance to the confederated sovereignty of the United States.

The provisions of the Constitution of the United States demonstrate that the right of citizenship, as distinguished from alienage, is a nationai right or condition, and does not pertain to individual states. And while the constitution recognizes the particular citizenship which I have mentioned, (*Cooper's Lessee* v. *Galbraith*, 3 Wash. C. C. R. 546,) it is evident that the subject of *alienage*, must be controlled by the general, and not by the local allegiance. The constitution declares that the citizen of each state shall be entitled to all the privileges and immunities of citizens in the several states. (Article IVth, Sec. 2.) The effect of this clause in the first instance, was to bring within the fold of citizenship of the United States, and thus of each and every state, all who at the time of the adoption of the constitution, were by birth, adoption or any of their discordant laws of naturalization, citizens of any one of the thirteen states. (See 3 *Story's Comm. on the Constitution*, 674, 5, §. 1800.) It made all alike, citizens of the newly organized nation, and in this respect a homogeneous people. And the very necessity for such a provision to bring all upon a common platform, exhibited in the strongest light the absolute need of guarding against different and discordant rules for establishing the right of citizenship in future. We therefore find that one of the first powers conferred upon Congress, was "*to establish an uniform rule of naturalization throughout the United States.*" (Article I. Sec. 8; § 4.)

A few brief considerations, out of many

which force themselves upon the mind, will illustrate the position that the right of citizenship in its enlarged sense, was after the adoption of the constitution, not only a national right, but from the nature of the case, it must from thenceforth be governed by the law of the whole nation and the acts of the national legislature. The different colonies, while pursuing the same general policy, had manifested very diverse views in their legislation upon the subject of aliens. The same thing was apparent in the legislation of the respective states, after the Declaration of Independence, and during the confederation. As early as in the year 1782, Mr. Madison strenuously urged the adoption of a uniform rule of naturalization by the states. (*Letter to Edmund Randolph*, 1 *Madison papers* 161.) If the states were to be left to themselves, the same diversity would doubtless continue under the constitution. One state would foster immigration, and confer on foreigners all the rights of citizens on their landing upon its shores; while another, with the same general object in view, but cherishing the ancient jealousy of aliens, would require a probation of many years, before conferring those privileges upon the emigrant. Then under the clause of the constitution which I have first cited, interminable and harassing conflicts of state jurisdiction would have speedily ensued. These considerations are forcibly illustrated by Mr. Madison and Mr. Hamilton in the Federalist, Nos. 42 and 32. (And see, 2 *Madison papers*, 712; 3 *Story's Comm. on the Const.* 3, § 1098, 1899.)

The clause in the constitution conferring upon Congress the power to establish an uniform rule of naturalization, was designed to obviate the various evils which were justly anticipated from leaving the subject of citizenship to the control of the several states. Has it had the intended effect? It certainly has not, if there be any portion of the field to legislation on the subject, left open to the action of the several states.

I will next inquire whether there be any such portion left to the states?

The constitution went into full operation on the fourth day of March, 1789. The first Congress assembled under it, at its second session, exercised the power conferred upon that body by the constitution, and on the 26th day of March, 1790, passed an act to establish a uniform system of naturalization. And from that time to the present there has been one or more acts of Congress regulating this subject, constantly in force. After Congress exercised this power, it is well settled that it no longer fell within the scope of *state legislation*.

In *Collet* v. *Collet*, 2 Dallas, 294, decided in 1792, in the U. S. Circuit Court in Pennsylvania, the judges held that the states still had a concurrent power of naturalizing, provided they did not contravene the legislation of Congress. But Judge Iredell expressed a contrary opinion in the same court, as early as 1797, in the *United States* v. *Villato*, 2 Dallas, 370. And in *Chirac* v. *Chirac*, 2 Wheaton, 259, the Supreme Court of the United States held that the power was exclusively in Congress.

The authors of the Federalist, in the numbers before cited, insisted that the power to naturalize must necessarily be exclusive, else there could be no uniform rule. And it seems now to be conceded on all hands, that it is exclusive. (1 *Kent's Comm.* 424, 2d ed.; *Davis* v. *Hall*, 1 Nott & McCord's R., (S. C.) 292; *The State* v. *Manuel*, 4 Dev. & Batt. R., (N. C.) 25; *Rouche* v. *Williamson*, 3 N. Car. Rep., (Iredell's Law,) 141; *Sergeant's Const. Law*, 293; 3 *Story's Comm. on Const.* 3, § 1099; *Rawle on the Const.* 84, 85.)

This is not only true in regard to what Congress has legislated upon expressly, but it holds good for what they have omitted. If the subject matter belong to the national legislation, the fact that Congress has covered only a part of the ground, does not warrant any state in legislating over the residue. This principle is well settled, and upon reasons that are unanswerable. (See the authorities last cited, and *Ogden* v. *Saunders*, 12 Wheaton, 213; *Prigg* v. *The Commonwealth of Pennsylvania*, 16 Peters, 539; *Jack* v. *Martin*, 12 Wend. 311; *Golden* v. *Prince*, 3 Wash. C. C. R. 322.) If, therefore, Congress has omitted to provide in express terms, for any case which may arise in regard to naturalization, it must either await the future action of that body, or be controlled by the principles of the general law of the United States.

It is very clear that there is no act of Congress which applies to the case of Julia Lynch. And it is contended on the one side, either that the common law of this state applies to this and the like cases; or if we must look to the national law, that

the common law furnishes the rule. On the other hand, it is insisted that the national rule is that of the public law, by which a child follows the *status* of its parents.

And first, as to the common law of this state having control. The application of any law of this state, written or unwritten, to the right of citizenship, would conflict with the reason of the thing as a matter of national concern, and with the powers of Congress under the constitution. Citizenship, as I have shown, is a political right, which stands not upon the municipal law of any one state, but upon the more general principles of national law. It constitutes national character, not mere territorial designation. If we may refer to the common law of this state to-day, we may to-morrow, stand upon our statute law on the same subject; for the state legislature may at any time alter the rule of the common law. Therefore, we may just as well claim that our legislature may by law declare that Julia Lynch was a citizen of the United States, as to insist that the common law of this state declares her to be an alien.

At and before the adoption of the Federal Constitution, the case was undoubtedly different. When our National Independence was declared, the citizens of this and the other States were subjects of Great Britain. Upon the Revolution, they were at liberty to continue their allegiance to the crown and retire from the country, or to remain and adhere to the independent states. Those who adhered, were thenceforth citizens of the respective states. Foreigners arriving here intermediate the Declaration of Independence and the adoption of the constitution, became citizens or continued aliens, according to the laws of the several states where they resided; and the children of aliens born here during that interval, became citizens in those states, because, as will presently be shown, the common law was in that respect, the law of all the states.

The articles of confederation between the states, made no provision for naturalizing aliens. Each state was left to its own legislation on that subject; and the laws of the several states in that behalf, prevailed within their own bounds, until the 4th of March, 1789, or until the legislation of Congress in 1790. When the constitution took effect, therefore, it found the existing mass of citizens of the United States ascertained and defined. It was not necessary to enact anything farther in reference to those citizens, than was done in the section which gave them immunities as citizens alike in all the states. But as we have seen, it was necessary to provide for the boundless future. State laws and state legislation could not in the nature of things, be longer permitted to define, abridge or enlarge the important privilege of citizenship in the United States. It was a purely national right, and one which must for the future, be governed by rules operating alike upon every part of the Union.

The rights of the then inhabitants of the United States were guaranteed. The rights as citizens, of those who should succeed them, were to be regulated by national law. On every principle of law, whether natural, public, or the common law of England, the children born in this country of those who were citizens of the country, would also be citizens. Hence there was no occasion for the constitution to speak of them. In reference to another class of the future inhabitants of the country—those who were born here of alien parents—it is claimed that the common law continued in force, which will be a subject for inquiry presently. Whether it did or did not, their condition was to be ascertained by a national law. In reference to aliens, legislation would be necessary; and the power to legislate, was conferred upon Congress. From what has been stated, it follows that such power was intended to be, and necessarily must be exclusive. And being exclusive, it cannot, as we have seen, be controlled by the *unwritten or common law* of one of the states, any more than it can be altered by the statute law of such state. And whether or not the constitution enabled Congress to declare that the children born here of alien parents who never manifested an intention to become citizens, are aliens or are citizens—it is clear that the decision of that question must be by some general rule of law applicable to and affecting our whole nation. It must be determined by what may be called the *national law*, as contra-distinguished from the local law of the several states. It is purely a matter of national jurisprudence, and not of state municipal law.

Third. The next inquiry is, therefore, what is the national law of the United States on this subject?

1. At the formation of our present national government, the common law prevailed as a system of jurisprudence, in all the thirteen states which then constituted the nation. In *Wheaton* v. *Peters*, (8 Peters R. 591, 658,) Thompson, J., said that when the American Colonies were first settled by our ancestors, it was held, as well by the colonists as by the judges and lawyers of England, that they brought with them as a birth-right and inheritance, so much of the common law as was applicable to their local situation and change of circumstances; and that each colony judged for itself, what parts of the common law were applicable to its new condition. And see *Van Ness* v. *Pacard*, (2 Peters, 137-144; *Patterson* v. *Winne*, 5 id. 233-241; 1 *Kent's Comm.* 472, 3, 2d ed.; *Commonwealth* v. *Knowlton*, 2 Mass. R. 534, 5.) Most, if not all the colonial charters recognized and provided for the benefits of the common law. Both the former, and the present constitutions of this state declared in effect, that the common law was the basis of the law of this state. (*Const.* of 1777, Art. 35; *Const.* of 1821, Art. 7, § 13.)

I need not dwell more at large upon this unquestionable proposition. It is true that one learned judge has spoken of the adoption of the common law in the colonies, as being only to a limited extent. And some have deemed it derogatory to us as a people, to assume that we inherited the common law of England. It is indifferent whether we say that we inherited the *common law*, or the *principles* of the common law. There is no doubt but that in all the thirteen colonies, it was the common origin of our jurisprudence. And any one who will take the trouble to compare the whole mass of statute law of general application, which, up to the era of the Revolution, had been enacted in the Colony of New York, with the immense extent of the principles of the common law which were then in actual force and operation here, regulating the rights of persons and property; will be satisfied that we, as colonists, had drawn almost exclusively from that source; and with us, at least, the common law had been adopted to no very limited or restricted extent.

2. As the common law prevailed in all colonies, and was the basis of their laws and jurisprudence, it follows that all persons born in the colonies while in the ligeance of the King of England, became subjects of the Crown of England; unless it be made to appear that the rule of the common law was incompatible with the situation of the colonists, or unsuited to their circumstances; or that it was altered by legislation.

Instead of abridging the rule, all the colonial legislation which has come under my observation, proceeded on the assumption that it was the settled law of the land. In almost every colony, great efforts were made to promote the introduction of foreigners, by the passage of laws giving to them all the rights and privileges of native subjects in respect of property. And in some colonies, they were after a very short probation, fully naturalized. The tendency of the colonial legislation generally, was to increase in every practicable mode, the number of the inhabitants of the country, and to break down the feudal and early common law barriers against aliens.

Judge Tucker says that an alien in America was entitled to many more rights than an alien in England. 1st. By the very act of emigrating to and settling in America, he became *ipso facto* a denizen, under the express stipulations of the colonial charters, (or nearly all,) whereby it was stipulated for the better encouragement of all who would engage in the settlement of the colonies, that they and every of them that should be thereafter inhabiting the same, should and might have all the privileges of free denizens, or persons native of England. (*See the charter of Queen Elizabeth to Sir Walter Raleigh.*) 2nd. By the same act of migrating, he had a right (in Virginia,) to be naturalized under the sanction of the pre-existing law, made not only for the benefit, but for the encouragement of all in a similar situation with himself. The operation of these laws was immediate, not remote. (1 *Tucker's Blackstone*, p. 2, Appendix 99. *Laws of Virginia*, ch. 11, ed. 1769.)

So in the Colony of New York, by an act passed in 1683, and by another passed July 5, 1715, all foreigners theretofore residing in the colony who had been freeholders, were to be deemed as having been naturalized; and all the Protestants of foreign birth then residing in the colony, were declared to be natural subjects, and entitled to all the rights, privileges and advantages of natural born subjects, on taking

the oath of allegiance, &c. (1 *Van Schaack's Col. Laws*, 97-100;) and by 14 several statutes passed subsequently, the last of which was in 1773, an immense number of aliens were naturalized by name, on taking the same oaths.

In Pennsylvania an act for naturalization was passed in 1700; and after the British statue 13 Geo. 2. ch. 7, had provided for naturalizing all foreign Protestants then in America, on taking the test oaths, &c.; the General Assembly of Pennsylvania on the 3d of February, 1742-3, passed an act to naturalize such foreign Prostestants as conscientiously refused taking any oath. (See 1. *Laws of Penn.* (*Carey* v. *Bioren's* ed. 8, 272.)

So in the Colony of Delaware, a statute was enacted in 1700, which naturalized all resident foreigners who were settled there at the date of the proprietor's letters patent in 1680; and authorized the governor to give certificates of naturalization to all foreigners, on their taking the oath of allegiance &c.; and conferred upon them the same rights, privileges, &c., as were enjoyed by any of the *king's natural born subjects.* (1 *Laws of Delaware*, 52 ch. 5. a. ed. of 1797.)

I have already quoted from Judge Tucker in reference to the colonial laws of Virginia upon this subject. Similar acts were passed in that colony in 1680, 1705, and 1769.

In South Carolina a statute was passed March 10, 1696-7, for the *making of aliens free of that province.* It conferred upon them all the rights and privileges of inhabitants born of English parents, on taking the oath of allegiance.

On the 4th November, 1704, a like statute was enacted, which expressly gave to them the right to vote for members of Assembly, and continued in force for eighty years. In the act regulating the election of members of Assembly, passed in 1721, the same right of voting was declared; while the qualifications of members was, that they should *be free born subjects* of the British dominions, or a foreigner naturalized by act of Parliament. (2 *So. Car. Stat. at Large*, 131, 251; 3 *ibid* 135.)

These examples suffice to show the current of colonial legislation from the earliest periods of our history. And they also show Mr. Dane's error in saying that there were no naturalizations in the colonies before the Revolution, but such as took place under the acts of Parliament. (4 *Dane's Abr.* 708, ch. 131. Art. 5.)

In most of the colonial statutes on the subject, will be found recitals, setting forth the importance of encouraging aliens to resort to, and settle in the colonies, and the great benefits which had already accrued to the colonies from that source, in their advancement in wealth, prosperity and character.

It was made one of the grounds of complaint against the colonies, by those who desired to merge the colonial liberties in the royal prerogative, that by fostering the number and wealth of their inhabitants, they were creating formidable antagonists to English industry, and nursing a disposition to rebellion. (3 *Bancroft's History of the U. S.* 380.) And in the Declaration of Independence, one of the injuries to the states, which were charged upon the King of Great Britain, was, "He has endeavored to prevent the population of these states; for that purpose obstructing the laws for naturalization of foreigners; refusing to pass others to encourage their migration hither, and raising the conditions of new appropriations of lands."

President Madison, in the debates in the Federal Convention in 1787, declared that America was indebted to emigration for its settlement and prosperity, and that part of America which had encouraged foreigners most, had advanced most rapidly in population, agriculture and the arts. (3 *Madison papers*, 1300.)

I have referred somewhat at large to the usages and legislation of the colonies, to show that so far from limiting, or abridging in any mode, the common law rule of claiming allegiance and conferring rights as subjects; the whole scope and tendency of their legislation and their acts, were to obtain for their infant communities all the population and all the citizens that could be brought within their territory. They invited in all nations to multiply the people, which laboriously employed, are the true riches of any country. With this view, they not merely claimed as citizens all who were born in the British dominions, but transformed into citizens with a prompt and liberal facility, all foreigners who were willing to unite their fortunes with those of the colonists.

It may then be safely assumed, that at

the Declaration of Independence, by the law of each and all the the thirteen states, a child born within their territory and ligeance respectively, became thereby a citizen of the state of which he was a native.

This continued unchanged to the time when our National Constitution went into full operation. There is no evidence of any alteration of the rule in any of the states during the period that intervened; and the references which will be made under another head, show conclusively that there had been no intermediate change in their policy.

3. I will next inquire whether there be any common law of the United States, or whether as a nation, we have to any extent, the principles of the common law in force.

Some discrepancies in the opinion of learned judges, and consequent confusion, have arisen from the use of general language when speaking of this subject. For instance, it is said by a judge whose opinion is entitled to great respect, that "it is clear there can be no common law of the United States," and "the common law could be made a part of our federal system only by legislative adoption." (McLean, J., in *Wheaton* v. *Peters*, 8. Peters R. 591, 658.) He was then speaking of rights of property which are purely questions of state law and regulation, and he applied the rule which had long been established in the United States courts, that where a common law right was asserted, they must look to the state in which the controversy originated. Not that all possible cases, falling within the cognizance of those courts, must or could be thus determined; or that the principles of the common law had no application whatever to the people of the United States and their relations and government as a whole.

A great and well founded jealousy on this point, arose soon after the adoption of the constitution, in consequence of the federal courts in a few instances, assuming that certain crimes or offences at common law, might be punished as offences against the *United States*, without their being made criminal by act of Congress. This jealousy was strikingly exhibited in the memorable debate in Congress on the judiciary, in the session of 1801-2, when the judiciary act of February, 1801, was repealed. Its immediate cause was long since put at rest by decisions against such jurisdiction. (*United States* v. *Hudson*, 7 Cranch, 32; *The same* v. *Coolidge*, 1 Wheat. 415; 1 *Kent's Comm.* 339, 2d ed.)

Before the constitution was adopted, the feeling was generally the other way. Thus in the Colonial Declaration of Rights, adopted unanimously on the 14th of October, 1774, the Congress declared "that the respective colonies are entitled to the common law of England." (*Jour. of Congress*, 1774, p. 27, &c.)

In the convention of the people of Pennsylvania, which was held in November, 1787, to take into consideration the adoption of the Federal Constitution, it was objected because the word "appeals" was used in that instrument, that the *trial by jury* was intended to be given up, and the civil law introduced in its stead. (See *Wilson's Works*, and 4 *Hall's Amer. Law Journal* 321, 423, 426.) In other states, similar objections were made on account of the omission of common law safeguards and privileges. And this rooted partiality for the common law, resulted in the adding of the express provisions securing to the people the right of trial by jury, and other common law rights, which are to be found in the amendments to the Constitution of the United States.

The Constitution of the United States, like those of all the original states, (and in fact, of all the states now forming the Union, with the exception of Louisiana,) presupposed the existence and authority of the common law. The principles of that law were the basis of our institutions. In adopting the state and national constitutions; those fundamental laws which were to govern their political action and relations in the new circumstances arising from the assumption of sovereignty, both local and national; our ancestors rejected so much of the common law as was then inapplicable to their situation, and prescribed new rules for their regulation and government. But in so doing, they did not reject the body of the common law. They founded their respective state constitutions and the great national compact, upon its existing principles, so far as they were consistent and harmonious with the provisions of those constitutions. A brief reference to the Constitutian of the United States will illustrate this idea. It gives the sole power of *impeachment* to the House of Representatives, and the sole power of trying an

impeachment to the Senate. *Impeachment* is thus treated as a well-known, defined and established proceeding. Yet it was only known to the common law, and could be understood only by reference to the principle of that law. The Congress was authorized to provide for the punishment of *felonies* committed on the high seas, and for punishing certain other crimes. The common law furnished the only definition of *felonies*. The trial of all crimes, except in cases of impeachment, was to be by jury; and the constitution speaks of *treason, bribery, indictment, cases in equity, an uniform system of bankruptcy, attainder, and the writ of habeas corpus;* all which were unknown even by name, to any other system of jurisprudence than the common law. In like manner, the amendments to the constitution make provisions in reference to the *right of petition, search warrants, capital crimes, grand jury, trial by jury, bail, fines, and the rules of the common law.* In these instances, no legislative definition or exposition was apparently deemed necessary by the framers of the constitution. They are spoken of as substantial things, already existing and established, and which will continue to exist. And the legislation of Congress immediately following its adoption, and in which they proceeded to carry out in detail the new system of government, left most of these things to stand upon the same footing that they previously were, the principles of the unwritten or common law. It has never been deemed necessary for Congress to legislate upon the rules of pleading or evidence, or of the construction of statutes or contracts, or upon any of the multifarious rules and principles of law and equity, which have been daily used and applied in civil cases, in the courts of the United States, from the year 1789 to the present day. So of the rules of evidence, and the proceedings in criminal cases. All these principles, rules and forms of proceeding, have been adopted from the common law, as a matter of course, without doubt or question. The few state trials which we had under our general government, are full of illustrations of this fact.

In 1795, Judge Wilson, of the Supreme Court of the United States, in delivering his charge to the grand jury, in the Virginia Circuit, went into an elaborate dissertation on the jurisdiction of the federal courts over crimes, and after enumerating such as he deemed cognizable by the circuit court, he continued as follows: "In the foregoing catalogue, murder, manslaughter, robbery, piracy, forgery, perjury, bribery and extortion, are mentioned as crimes and offences; but they are neither defined nor described. For this reason we must refer to some *pre-existing* law for their definition or description. To what pre-existing law should this reference be made? This is a question of immence importance and extent. It must receive an answer, but I cannot, in this address, assign my reasons for the answer which I am about to give. The reference should be made *to the common law.* To the common law then let us resort for the definition or description of the crimes and offences which in the laws of the United States have been named, but have not been described or defined. You will in this manner, gentlemen, be furnished with a legal standard, by the judicious application of which you may ascertain with precision the true nature and qualities of such facts and transactions as shall become the objects of your consideration and research." (3 *Wilson's Works*, 357, 371.) And in the debates on the judiciary in 1802, to which I have before alluded, Mr. Bayard, of Delaware, in an able speech in the House of Representatives, said on this subject, (what was not disputed, so far as facts were concerned,) that "the judges of the United States have held generally that the Constitution of the United States was predicated upon an existing common law. Of the soundness of that opinion I never had a doubt. I should scarcely go too far were I to say, that stript of the common law, there would be neither constitution nor government. The constitution is unintelligible without reference, to the common law. And were we to go into our courts of justice with the mere statutes of the United States, not a step could be taken, not even a contempt could be punished. There would be no form of pleading, no principles of evidence, no rule of property. Without this law the constitution becomes a dead letter. For ten years it has been the doctrine of our courts that the common law was in force." (*Debates on the Judiciary*, 1802, p. 372. And see 1 *Story's Comm. on the Const.*, 140, 141,; § 157, 158, and note 2; 2 ibid, 262 to 267; § 794 to 797; *Rawle on the Const.* 258.)

Mr. Du Ponceau, in his well reasoned and clear illustration of the jurisdiction of the federal courts, comes to the conclusion: "1. That the common law is the law of the United States in their national capacity, and is recognized as such in many instances by the Constitution of the United States and the statutes made in pursuance of it. 2. That those courts can derive no *jurisdiction* from the common law. 3. That in the territories of the United States, they have common law jurisdiction." (*Du Ponceau on Jurisd.*, 101. And see ibid. 86, 88; and pp. 10, 15, of the Preface.)

In my judgment there is no room for doubt, but that to a limited extent the common law (or the principles of the common law, as some prefer to express the doctrine,) prevails in the United States as a system of national jurisprudence To what *extent* it is applicable, I need not hazard an opinion, either in general terms or in particular instances, beyond the case in hand. But it seems to be a necessary consequence from the laws and jurisprudence of the colonies and of the United States under the articles of confederation; that in a matter which, by the union, has become a national subject, to be controlled by a principle co-extensive with the United States; in the absence of constitutional or congressional provision on the subject, it must be regulated by the principles of the common law, if they are pertinent and applicable.

The power of naturalization is one of the express concessions from the states to the United States. The right of *citizenship*, aside from naturalization, was either a known and recognized right, as applicable to the then and future inhabitants of the country, or necessarily, and by the very act of organizing the nation, became a subject of national law and regulation. It could no longer continue a state right in its enlarged sense as applicable to the United States.

4. The Constitution of the United States contains no clause declaring who shall be deemed citizens, nor is there any act of Congress which applies to the case of Julia Lynch. The necessity for a rule or principle applicable to this subject, and co-extensive with the nation, has existed ever since the adoption of the constitution, and cases to which it is applicable, have been arising constantly since that period. The states parted with their control of the matter to the federal government. Therefore, there must have been a national principle or rule of law, co-eval with the existence of the Union, governing the subject. And the question whether Julia Lynch was or was not a citizen, must be determined by the national unwritten law.

5. It is a necessary consequence, from what I have stated, that the law which had prevailed on this subject, in all the states, became the governing principle or common law of the United States. Those states were the constituent parts of the United States, and when the union was formed, and further state regulation on the point terminated, it follows, in the absence of a declaration to the contrary, that the principle which prevailed and was the law on such point *in all the states*, became immediately the governing principle and rule of law thereon in the nation formed by such union. If there had been any diversity on the subject in the state laws, it might have been difficult to ascertain which of the conflicting state rules was to become, or did become, the national principle. And if such diversity had existed, it is reasonable to believe that the framers of the constitution would have borne in mind, and enacted a uniform rule, or authorized Congress to establish one. The entire silence of the constitution in regard to it, furnishes a strong confirmation, not only that the existing law of the states was entirely uniform, but that there was no intention to abrogate or change it. The term *citizen*, was used in the constitution as a word, the meaning of which was already established and well understood. And the constitution itself contains a direct recognition of the subsisting common law principle, in the section which defines the qualification of the President. "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," &c. The only standard which then existed, *of a natural born citizen*, was the rule of the common law, and no different standard has been adopted since. Suppose a person should be elected President who was native born, but of alien parents, could there be any reasonable doubt that he was eligible under the constitution? I think not. The position would be decisive in his favor that by the

rule of the common law, in force when the constitution was adopted, he is a citizen.

Moreover, the absence of any avowal or expression in the constitution, of a design to affect the existing law of the country on this subject, is conclusive against the existence of such design. It is inconceivable that the representatives of the thirteen sovereign states, assembled in convention for the purpose of framing a confederation and union for national purposes, should have intended to subvert the long established rule of law governing their constituents on a question of such great moment to them all, without solemnly providing for the change in the constitution; still more that they should have come to that conclusion without even once declaring their object. And what is true of the delegates in the convention, is equally applicable to the designs of the states, and of the people of the states, in ratifying and adopting the results of their labors.

Much stress was laid in the very able argument in behalf of the complainant, on the rigorous and grasping character of the rule of the common law; and the absurdity of the doctrine by which it claims as a subject every human being who happens to draw his first breath upon British soil, while it exacts the same allegiance from the children of British subjects born in foreign countries. And it was urged, that the United States, a government based upon perfect freedom and equality, should adopt, and intended to adopt and establish, what was called in the argument, the more just, rational and liberal principle of the inter-national and public law. In this connection the much vexed question of the right of expatriation, was pressed into the argument; and it was urged that if we adopt the common law rule of allegiance by birth, we must also adopt that of perpetual allegiance, which it was said, has been repudiated in this country. The authorities in our courts are much divided upon that question, and many which are of great weight, are adverse to the right to expatriate. I do not intend to discuss that great question in any of its aspects. It does not stand upon the same reason or principle as the common law doctrine of allegiance by birth, and does not follow from the adoption of the latter. A diversity of opinion and of practice on the subject of perpetual allegiance prevailed in the colonies and in the states, under the old confederation.

The right to expatriate was recognized in Pennsylvania and Virginia, while they were colonies. The Constitution of Pennsylvania prohibited the passage of laws restraining emigration from the State; and Virginia enacted a law as recently as the year 1792, providing for expatriation and prescribing its forms. Kentucky, the daughter of Virginia, followed her doctrines in this, as well as in many other questions of national policy. (*Alsbury* v. *Hawkins*, 9 Dana, 178.) This diversity prevailing in the colonies and states prior to 1789, would afford strength to the argument that in the national government, the common law rule of perpetual allegiance did not prevail; while the universal prevalence of the rule of allegiance by birth in all the colonies and states up to that time, would be a convincing argument that such rule became the national law.

In regard to the effect of birth upon the right of citizenship, it is my duty not to *establish* the rule of law for the first time, but to ascertain a rule which has been in force from the era of the Federal Constitution, and which has affected the rights of persons and property constantly from that period to the present. Were this, however, to be determined solely on its intrinsic propriety and adaptation to our circumstances, I am not sure that any rule different from that of the common law, ought to be adopted in our country. It is indispensable that there should be some fixed, certain and intelligible rules for determining the question of alienage or citizenship. The place of nativity, furnishes one as plain and certain, and as readily to be proved, as any circumstance which can be mentioned. If we depart from that, and adopt the rule of some of the continental nations, we have two more remote and difficult tests introduced. We are to ascertain first, by evidence of facts removed one generation from the time of the inquiry, the *status* or citizenship of the parents at the time of the birth of the *propositus*; and next, the election or intention of the *propositus* himself, in reference to his adoption of the country where he was born, or that of which his parents were citizens. And oftentimes, as in this case, the question will arise, before he attains to the age of election. In harmony with the certainty

of the common law rule respecting natives born, are our statutory provisions for the admission of aliens to the rights of citizenship. Such admission is a judgment of a court of record. Thus in almost every instance, we have an unerring guide or test, capable of ready investigation and authentication. The exceptions are the children of ambassadors, (who are deemed to be born within the allegiance of the sovereign represented,) and the children of our own citizens born abroad. And this brings me to another of the objections to the rule of the common law: That while Great Britain claims as subjects, all born in her dominions, she claims the children born elsewhere of her own subjects; and that we, holding to the common law rule, are subject to great inequality in this grasping and selfish game, because our act of Congress, declaring the children of our citizens born abroad to be citizens of the United States, is limited to the children of parents who were citizens when it passed, in 1802, and is nearly spent in its operation.

The inconsistency of holding that Julia Lynch is a citizen here, when it is conceded on all hands that by reason of her parents being British subjects she is also a British subject; was strongly urged. The inconsistency, however, is nothing but the occurrence of a *double allegiance*, which exists in the tens of thousands of instances of our naturalized citizens, who were once subjects of the crown of Great Britain. We recognize its existence, because we adopt them as citizens, with full knowledge that by the law of their native country, they never can put off the allegiance which they owe to its government.

With regard to the act of 1802, I do not think that the children of our citizens born abroad, are aliens. Not that I subscribe to the argument of the complainant's opening counsel, that the terms of the act itself embrace the children of all future citizens. But as at present advised, I believe it to have been the common law of England that children born abroad of English parents, were subjects of the crown. The statute, 25 Edward III., St. 2, *De natis ultra mare*, appears to have been declaratory of the old common law. In *Dyer's Reports*, 224, *a*, note, it is said to have been adjudged in the king's bench in 7th Edward III, that children of subjects born beyond the sea, in the service of the king, shall be inheritable: and that this was resolved in Parliament in the 17th Edward III. The fact of being in the king's service, does not import being in his dominions, or within his ligeance. It was Lord Bacon's opinion that the act was declaratory of the old common law. Mr. Reeves says it was made to remove some doubt which was entertained about the denization of children born of English parents out of the kingdom. (2 *Reeves' Hist. of the English Law*, 400.) In *Bacon* v. *Bacon*, Cro. Car., 601, two of the judges, Croke and Brampton, held that by the common law, a child born in Prussia of English parents, was a denizen, entitled to inherit and a liege subject. Berkeley J., said it was rather by force of the statute 25 Edward III. In *Doe dem. Thomas* v. *Ackland*, 2 B. & C., 779, 790 to 793, Ch. J. Tindal says, that this was so by the common law, and to that effect he cites *Hussey Justice in* 1 *Rich.* 3, 4. Parke, Justice, in the same case, says that the 25 Edward III., was a declaratory act. (And see 22 Hen. 6, 38, *per Newton*, *J.*) Chancellor Kent appears to entertain the same opinion. (2 *Kent's Comm.* 50, 51, 2 ed.)

If such were the common law, it was in force in the colonies, and was one of the rights which the citizens of the United States retained and still hold under the constitution. The provisions in the acts of Congress of 1790, 1795 and 1802, to secure these rights to children born abroad, were in this view, a superabundant caution. But the circumstance of two different national legislatures having passed such laws, is strong proof that they did not suppose the natural or public law controlled the case. For the very principle of public law which is insisted on here to establish the alienage of Julia Lynch, *Proles sequitur sortem paternam*, would apply to the cases provided for in these acts of Congress. If the common law was considered in force on this subject, the national legislature might well act upon the doubt which prevailed as long ago as the time of Edward III., in regard to children born abroad of citizen parents, and which has ever since prevailed. But in the civil and public law, if the complainant's ground be tenable, there was no doubt whatever.

In reference to the argument that the United States should establish a rule on proper principles, and which shall be just to other nations, it may be said that this is

purely a matter of municipal regulation, in every country. Vattel treats it as being legitimately within the control of each nation acting for itself. The rule of the common law is not unjust to other nations, in claiming as citizens those who are born here under the protection of our institutions and government. The other rule is more liable to the charge of injustice, viz.: claiming as American citizens those born in other countries of American parents. Yet no one questions, that justice to our own citizens demands this principle.

The monopolizing spirit of the British nation was alluded to. We have inherited a goodly portion of the Saxon and Norman thirst for territorial and national aggrandizement; and we may, as we have heretofore done, gratify it to the enlargement of the bounds of civil liberty, and of the happiness of mankind. And the adoption of both of the rules of the common law which I have discussed, while they promote those noble objects, do no injustice to other nations. The principal foreign nation affected by those rules, if applied in our country, is Great Britain. Both rules are in full force there, as against our own people and government. And there is a moral certainty that their law, fastening the duty of allegiance upon the simple circumstance of nativity in their dominions, which has been undisturbed for centuries, will never be changed. Why then should the United States make a change, which, if it were ever so desirable, can never be reciprocal?

The policy of our nation has always been to bestow the right of citizenship freely, and with a liberality unknown to the old world. I hold this to be our sound and wise policy still, notwithstanding the religious intolerance which partially obscured it in some of our colonial legislation, and the hostility which has occasionally prevailed against it in some parts of our country. And I cannot refrain from expressing the more surprise at this partial relapse from the progressive and ameliorating influence of free institutions, and of the immense increase of commercial and literary relations and intercourse between different countries, because it is contemporary with the passage of a law in Great Britain, strongly indicative of the force of those influences, and at a single step making greater progress than she has made on that subject for nearly 500 years. I refer to the act to amend the laws relating to aliens, passed August 6th, 1844. (Stat. 7 and 8, Vict., Sess. 4th, ch. 66.) An act which, in its concessions to aliens, goes far beyond most of the existing legislation in this country.

Some evidences of the colonial encouragement to foreigners have been mentioned. The same principle has animated the legislation of the states down to the present day. In Pennsylvania and North Carolina, it was made in the first instance a *constitutional provision*. In Illinois, the constitution confers on aliens the right of suffrage. (*Spragins* v. *Houghton*, 2 Scammon's R. 370.) In truth, the celebrated *Ordinance*, passed July 13, 1787, "For the Government of the Territory of the United States, Northwest of the Ohio River," permitted alien inhabitants to vote, if they were freeholders. (3 *Story's Laws of the U. S.* 2073-2075; *Spragins* v. *Houghton*, 2 Scam., 377, 393, 399.) The same policy was continued throughout our national legislation in regard to that territory. The same class of aliens was authorized to vote for members of the conventions to form the state goverment of Ohio in 1802, of Indiana in 1816, and Illinois in 1818. When Illinois was made a separate territory in 1812, aliens who paid taxes and resided a year, were constituted voters. And Michigan was admitted into the Union in 1836, with a constitution which permitted all aliens then residing there to vote, and which was approved by Congress. (2 *Story's Laws of the U. S.*, 869, 1250; 3 ib. 1565, 1674; 4 ib. 2442.) In this state, naturalized citizens are eligible to every public office, except that of governor.

In most of the states, laws have been enacted to give aliens all or most of the rights of citizens, in respect of the acquiring, holding and transmission of property; and I believe in all of the states, there are frequent instances of such laws for the benefit of particular aliens and classes of aliens; while in several of them, the disability to inherit lands is entirely done away.

Without taking time to enumerate all the aditional statutory evidence of this prevalent colonial and national policy which are before me, I will refer to our statutes of February 28, 1789 (2 *Greenleaf's Laws* 279;) and of March 26, 1802, ch. 49, (3 *Kent and Rad.* 46.) The statute of treason in Massachusetts in 1777. (2 Mass.

Laws, ed. of 1801, p. 1046; Act of June 11, 1788, ch. 173, b., in Delaware; 2 Laws of Del., 921; Acts of March 26, 1784, and March 22, 1786, in South Carolina; 4 *So. Car. Statutes at Large* 600; 746.)

Our policy, in this respect, and its happy results, were forcibly vindicated in the convention of 1787, by Dr. Franklin, Mr. Madison, Gen. Hamilton and Judge Wilson. (3 *Madison papers*, 1273, 1299; 1 *Wilson's Works*, 163; 2 ibid, 446 to 450. And see the Message of President Jefferson to Congress, Dec. 8th, 1801.)

With these various and conclusive illustrations of the uniform, wise and beneficial policy of the United States, for nearly two centuries past; a policy which embraced every legitimate means for increasing the number, not merely of its inhabitants, but of its *citizens;* it is impossible to hold that there has been any relaxation from the common law rule of citizenship by means of birth within our territory.

6. Upon principle, therefore, I can entertain no doubt, but that by the law of the United States, every person born within the dominions and allegiance of the United States, whatever were the situation of his parents, is a natural born citizen. It is surprising that there has been no judicial decision upon this question. None was found by the counsel who argued this cause, and so far as I have been able to ascertain, it never has been expressly decided in any of the courts of the respective states, or of the United States. This circumstance itself, in regard to a point which must have occurred so often in the administration of justice, furnishes a strong inference that there has never been any doubt but that the common law rule was the law of the land. This inference is confirmed, and the position made morally certain, by such legislative, judicial and legal expositions as bear upon the question. Before referring to those, I am bound to say that the general understanding of the legal profession, and the universal impression of the public mind, so far as I have had the opportunity of knowing it, is that birth in this country does of itself constitute citizenship. Thus when at an election, the inquiry is made whether a person offering to vote is a citizen or an alien, if he answers that he is a native of this country, it is received as conclusive that he is a citizen. No one inquires farther. No one asks whether his parents were citizens or were foreigners. It is enough that *he was born here*, whatever were the *status* of his parents. I know that common consent is sometimes only a common error, and that public opinion is not any authority on a point of law. But this is a question which is more important and more deeply felt in reference to political rights, than to rights of property. The universality of the public sentiment in this instance, is a part of the historical evidence of the state and progress of the law on the subject. It indicates the strength and depth of the common law principle, and confirms the position that the adoption of the Federal Constitution wrought no change in that principle.

The legislative expositions speak but one language on this question. Thus the various acts on the subject of naturalization which have been passed by Congress presuppose that all who are to be benefited by their provisions were born abroad. They abound in expressions of this sort, viz.: the country "from which he came;" all "persons who may arrive in the United States;" the country whence they migrated is to be stated, and the like. This language is inappropriate to a person who was born here, and wholly inapplicable to one who has always resided in the country. If Julia Lynch had remained here till she was of age, the argument in regard to her citizenship would be no different, because during the intervening time she would have been incapable of election. In this state, the constitution adopted by the people in 1822, provides that no person except *a nativr citizen of the United States* shall be eligible to the office of governor. *Native citizen* is used as contradistinguished from citizens of foreign birth, and as a term perfectly intelligible and definite. It is based upon the assumption that there was a known rule of law, ascertaining who were native citizens of the United States; and as has already been shown that there was no such rule known, except that of the common law. In various statutes which have been enacted from time to time for more than fifty years past, to authorize aliens to take, purchase, hold and convey real estate, the expression used by the legislature in declaring the extent of the rights granted, is that they are to be as full as those of "any natural born citizen," or of "natural born citizens." (*See Laws*

of 1806, ch. 164, § 1, 3; of 1807, ch. 123; of 1808, ch. 175; of 1812, ch. 240; of 1825, ch. 310; 1 *Rev. Stat.*, 720; and many others, both general and particular in their application.) In one statute, passed April 27, 1836, *Laws of* 1836, ch. 200, the alien was to hold land as fully as if he had been a naturalized or natural born citizen; as if those two constituted all the clases of citizens known to our laws. In the numerous colonial statutes of naturalization to which I have already referred, the expression which is used, is "*natural born subjects.*" Both expressions assume that birth is a test of citizenship; and the continuance of the language subsequent to the Revolution and to the Federal Constitution, shows that the effect of birth continued to be the same as it was before.

The statutes in favor of aliens, enabling them to take, hold and dispose of real estate, have been very general throughout the United States. I refer to the following as exhibiting the similar use of the term "natural born citizen of the United States," in contradistinction to aliens, or foreigners not naturalized. In New Jersey, the act of January 22, 1817. (*Elmer's Digest*, 6.) In Pennsylvania, the act of February 11, 1789; which says natural born *subjects*, instead of citizens. This act was continued in 1792 and again in 1795. (3 *Carey and Bioren's Laws*, 299.) In 1799, a similar statute, using the same language as in those of New York, (6 ib., 38.) So in 1807; (Act of February 10th;) and again March 24, 1818. (*Purdon's Digest*, 39, 40: Ed. 1836.) In Delaware, act of 1811, ch. 172: 4 *Laws of Delaware*, 483. On the 11th of June, 1788, a statute was enacted in Delaware, giving to all foreigners then or thereafter residing there, on taking the oath prescribed, all the rights and privileges "of *natural born subjects* of this state," except the holding of offices, to which they were entitled after five years residence. (2 *Laws of Delaware*, 921, ch. 174, b.) For similar laws, using the same language—See *Laws of Georgia to* 1820, p. 182, Act of Feb. 7, 1785; *Revised Statutes of Indiana*, 1838, p. 67; *Rev. Stat. of Wisconsin*, 1833–9, p. 179; *Laws of Michigan*, ed. 1833, p. 282, Act of March 31, 1827.

In Pennsylvania, the old plan or frame of government, adopted at the revolution, (sec. 42,) gave to every foreigner of good character who came to settle in the state, having first taken the oath of allegiance, the right to hold land, &c., and after one year's residence he was to be deemed a free denizen of the state, "and entitled to all the rights of a *natural born subject*" of that state. (1 *Carey & Bioren's Laws of Pa.*, 8, note a.) In a statute of that state, passed August 31, 1778, to validate titles, &c., it was enacted that heirs of persons not naturalized, or *born out of the allegiance* of the crown of Great Britain, might hold, &c., as if the deceased had been born in allegiance, &c. (*Purdon's Digest*, 38.) The same assumption in regard to citizenship by birth, is to be found in the statute of Pennsylvania regulating elections, passed February 15, 1799. In order to prove his right to vote, the elector is to take an oath, 1. That he is a natural born citizen of the state, &c. 2. Or that he is a natural born citizen of some other of the United States, &c. Or 3. That having been a foreigner or alien, he has been naturalized, &c. (*Purdon's Dig.* 223; 3 *Carey & Bioren*, 340.)

The constitution of Vermont, adopted July 4, 1793, (§ 39,) contained a provision like that of the Pennsylvania frame of government, except that the limitation as to holding offices was restricted to the highest in the state, and as to those, was at an end after two years residence. The same words were used to illustrate the rights conferred, viz: "*natural born subjects of the state.*"

In Virginia, an act was passed in 1792, entitled "an act declaring who shall be citizens of this commonwealth," and providing for acquiring and relinquishing the right of citizenship. The first section provides, "That all free *persons born within the territory of this commonwealth;* all persons *not being natives*, who have obtained a right of citizenship under former laws, and also all children, wheresoever born, whose fathers or mothers are or were citizens at the time of the birth of such children, shall be deemed citizens of this commonwealth," &c. (1 *Rev. Code of Va.*, 1819, p. 65. And see *Barzizas* v. *Hopkins*, 2 Randolph's Rep., 278, 281, 282.) This was a substantial re-enactment of a statute passed in May, 1779, ch. 55; (except that the latter was limited to free *white* persons,) another in October, 1783, ch 16, 17; and another in October, 1786, ch. 10. These statutes in Virginia were

in part declaratory. They were enacted, because of the confusion and doubts on the subject growing out of the revolution, and the adherence of some of the colonists to the British government, their subsequent return in some instances, and that of their children in others.

In South Carolina, the act of 1721, prescribing the qualification of members of the assembly, required them to be "*free born subjects*" of the British dominions. (3 *S. Car. Statutes at Large*, 137, § 8th.)

In Tennessee a statute passed in 1819, recites that the policy of the United States has always been to encourage emigration from foreign countries, to increase their population and strength, and that the act enables aliens to take by descent. The first section commences thus: "*All persons not having been born in the United States*, or otherwise citizens thereof." &c., as if they had been "*native citizens*" of the United States. (*Statute Laws of Tenn., by Caruthers and Nicholson*, ed. of 1836, p. 87.)

These instances from the constitutions and statutes of the various states might be multiplied to a great extent. Those already given, will suffice to show that the universal understanding of the representatives of the people of the states in establishing their fundamental and statutory laws, was that every person born within their territory, was by that circumstance alone, a citizen; and in some of the states, the recognition of the doctrine is express.

I find an illustration of the point by negative testimony, in the state papers which grew out of the memorable and atrocious outrage committed by the British ship Leopard on the U. S. frigate Chesapeake, in June, 1807. It was alleged that three of the seamen taken from the Chesapeake, were American citizens. Not that their national character made any difference in the principle involved in that affair, but it aggravated the atrocity of the conduct of the British commander. The proofs of the fact of citizenship which were reported by the committee of the House of Representatives, and which were furnished to the British government, consisted of evidence of the birth and subsequent lives of the seamen, one of whom was born in 1784. Nothing was stated in regard to the condition or allegiance of their parents, in any of the reports or correspondence on the subject. It was evidently taken for granted that birth in one of the states, without regard to parentage, constituted those seamen, citizens of the U. States. (*Walt's American State Papers*, 1806, 1808, pages 197, 200, 220, 225, &c.) And see the correspondence between Mr. Madison and Mr. Monroe; Mr. Monroe and Mr. Canning; and Mr. Madison and Mr. Rose. (Ib. 284, 301, 349.)

I will next recur to other legal and judicial authorities on this subject.

Chancellor Kent follows Blackstone in his division of the inhabitants of our country into *aliens and natives*. And he says: "Natives are all persons born within the jurisdiction of the United States;" and "an alien is a person born out of the jurisdiction of the United States." The exceptions which he makes, do not affect the present question. (2 *Kent's Comm.*, 39, 49, 2d ed.)

Judge Wilson, in his law lectures, delivered soon after our national government was organized, says that an alien, according to the notion commonly received as law, is *one borne in a strange country*, and in a foreign society, to which he is presumed to have a natural and a necessary allegiance. He also says, that between a subject natural, and a subject naturalized, the distinction as to private rights is merely nominal: on one they *are devolved by his birth*, on the other by the consent of the nation. (2 *Wilson's Works*, 448, 449.) Speaking of the English rule of law against expatriation and its applicability, he says, "the reasons in favor of it are, that *every citizen as soon as he is born*, is under the protection of the state, and is entitled to all the advantages arising from that protection; he, therefore, owes obedience to that power, from which the protection which he enjoys is, derived. But while he continues in infancy and non-age, he cannot perform the duties of obedience. The performance of them must be respited, until he arrive at the years of discretion and maturity. When he arrives at those years, he owes obedience, not only for the protection which he then enjoys, but also for that which from his birth, he has enjoyed." (1 *Wilson's Works*, 313.)

Judge Tucker says, that "aliens in the United States are at present of two kinds—aliens by birth and by election. First. Aliens by birth are all persons born out of

the dominions of the United States, since the 4th day of July, 1776, with some few exceptions, as children of citizens born abroad, and persons naturalized by acts of Congress," &c. His second class of aliens, are those made by voluntary expatriation, which he insists is reasonable. (1 *Tucker's Blackstone*, Part 2, Appendix, 101.)

Mr. Dane says, "An alien owes a local allegiance while in the country, and is there protected; *and he is one born under a foreign allegiance.*" (4 *Dane's Abr.* 695. *Estate by Aliens*, ch. 131, art. 1.) To the same effect, see *Duer's Outlines of the Const.*, 168, § 652.

Mr. Rawle says explicitly: "Every person *born within the United States*, its territories or districts *whether the parents are citizens or aliens* is a *natural born citizen*, within the sense of the constitution, and entitled to all the rights and privileges appertaining to that capacity." (*Rawle's View of the Constitution of the United States*, 86.)

Other authorities to the same point are, 1 Bouvier's Law Dictionary, title Alien, p. 98, and Allegiance, p. 99. He says natural allegiance is such as is due from all men born within the United States; and an alien is one born out of the jurisdiction of the United States, who has not since been naturalized under their constitution and laws. So in Dr. Lieber's Encyclopædia Americana, title Alien, it is said that by the laws of England and the United States, an alien may be defined to be a person born out of the jurisdiction of the country, and not having acquired the rights of a citizen by naturalization. The exceptions made in these books, need not be repeated.

In the case of *The United States* v. *Isaac Williams*, (4 Hall's Amer. Law Journal, 361,) on an indictment tried in the U. S. Circuit Court in Connecticut, September, 1799, Chief Justice Ellsworth, speaking of another branch of this subject, expatriation, says, "the common law of this country remains the same as it was before the Revolution." He then applies it to the case before him, as to which case I need make no remark.

In *The United States* v. *Gillies*, (1 Peters' C. C. R., 159,) the same subject came before Judge Washington, in the U. S. Circuit Court, in 1815, and he expressed his opinion strongly against the right to expatriate. He said, a citizen of the United States may obtain a foreign domicil which will impress upon him a national character for commercial purposes, &c., "but he does not on this account lose his original character, or cease to be a subject or citizen of the country where he was born, and to which his perpetual allegiance is due."

In *McCreery* v. *Somerville*, (9 Wheaton, 354,) the question arose on the right of three daughters of R. McCreery, an alien not naturalized, to inherit as heirs of their deceased uncle, W. McCreery. The case stated the daughters to be native born citizens of the United States, and the argument and judgment proceeded on that assumption. It was, therefore, a conceded point by the counsel and the court, that the children born here, of alien parents, are native born citizens.

Mr. Justice Story, in his opinion in *Inglis* v. *The Sailor's Snug Harbor*, (3 Peters, 155,) says, "Allegiance by birth, is that which arises by being born within the dominions, and under the protection of a particular sovereign. Two things usually concur to 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."

The judgment of Chief Justice Parsons, in *Ainslie* v. *Martin*, (9 Mass. R., 456, 457, &c.,) is full of instruction on this subject. He says: "Our statutes recognize alienage and its effects, but have not defined it. We must therefore look to the common law for its definition. By this law, to make a man an alien, he must be born without the allegiance of the commonwealth; although persons may be naturalized or expatriated by statute, or have the privileges of subjects conferred or secured by a national compact."

Again, speaking of the colonies renouncing their allegiance to the king, he says: "Until that renunciation, the people of the Province of Massachusetts Bay considered themselves as constituting a political corporation, which possessed exclusively the powers of legislation, which acknowledged the King of Great Britain as sovereign, possessing all the rights, privileges and prerogatives of sovereignty; among which was the right of claiming the allegiance of all persons born within the territory of which he was sovereign." That the people, in the union with those of the other

colonies, considered the aggressions of their sovereign on their essential rights, as amounting to an abdication of his sovereignty. And thereupon the people assumed to themselves, as a nation, the sovereign power, with all its rights and prerogatives. Thus the government became a republic, possessing all the rights vested in the former sovereign; among which was the right to the allegiance of all persons *born within the territory* of the Province of Massachusetts Bay.

The Chief Justice further says: "It was therefore then considered the law of the land, that all persons born within the territories of the government and people, although before the declaration of independence, were born within the allegiance of the same government and people, as the successor of the former sovereign, who had abdicated his throne." "And as the inhabitants of England, born in the reign of the second James, were considered as born within the allegiance of his successor, William the Third; because born in the territory of which he was the sovereign, he having succeeded by parliamentary designation; so all persons born within the territories of the Province of Massachusetts Bay during the reign of the late King, are considered as born within the allegiance of the commonwealth of Massachusetts, as his lawful successor,"

The Chief Justice further says; "From the preceding observations, it is very clear, that the common law, which was in force, had superseded the necessity of defining by statute, alienage or allegiance. And from the definitions of alienage and allegiance, the nature and effect of naturalization and of expatriation are manifest. We now have legal principles, to direct us in pleading alienage. The plea of alien friend, must allege that the supposed alien was born without the allegiance of the commonwealth." "This claim of the commonwealth to the allegiance of all persons born within its territories, may subject some persons who, adhering to their former sovereign and residing within his dominions, are recognized by him as his subjects, to great inconvenience, especially in time of war, when two opposing sovereigns may claim their allegiance. But the inconvenience cannot alter the law of the land. If they return to the country of their birth, they will be protected as subjects."

Many of the observations of the learned Chief Justice, were of course intended only for the case then before him, which was one of the *Ante-Nati*, born there before the Revolution; but the clear position is maintained, that the common law still furnishes the rules of alienage and allegiance, and that one born within the state, is a citizen of the state, without reference to any other circumstance. And see on this point of setting up alienage by plea, *Cox* v. *Gulick*, (5 Halsted's N. J. Rep., 328,) where it is held that the plea must aver as at common law, that the person was an alien, and that he was born out of the allegiance of the state, and within the allegiance of a foreign state. The same form is pursued in this state. (*Clarke* v. *Morey*, 10 Johns. 69; *Bell* v. *Chapman*, ibid 183.)

In 2 *Pickering's R.*, 394, note, is an opinion of the Supreme Court of Massachusetts, drawn up by Chief Justice Parker, upon a question submitted to them by the senate of that state, relative to the citizenship of George Phipps, in which they claim that upon the Revolution the state succeeded to the sovereign power, and all who were born within her limits, owed allegiance to her as their sovereign.

In *Barzizas* v. *Hopkins*, (2 Rand. R., 278, 281,) in the Court of Appeals of Virginia, Green, Justice, says, "the place of birth, it is true, in general determines the allegiance."

In *The State* v. *Manuel*, (4 Dev. and Battle's Law Rep., 25,) Judge Gaston, in delivering the judgment of the Supreme Court of North Carolina, declares that according to the laws of that state, all human beings within it who are not slaves, fall within one of two classes, to wit, aliens and citizens; and all free persons born within the state, are born citizens of the state.

In the face of all these legislative expressions, and these opinions of great and learned judges and authors in various parts of the Union, and in all periods of our national career; some of whom were contemporary with the revolution, and many of them contemporary with the sages who established our national government, and at least one participated in that immortal work; it would be presumptuous in me, even if my own views had inclined the other way, to hold that the birth of Julia Lynch within our dominions did not confer upon her the rights of a citizen of the United States.

7. Before parting with the subject, I will examine further the grounds on which the citizenship of Julia Lynch was denied.

It was assumed to be an indisputable proposition, that by the international or public law, she was an alien; for that by the public law, the child follows the political condition of the parent. It is evident that this rule, without very important qualifications, might lead to the perpetuation of a race of aliens; for if no one of the successive fathers effected his naturalization during the minority of the next in succession, generation after generation would continue in a state of alienage. Accordingly, the difficulty is sought to be obviated, by giving to the child born of alien parents, the election, on arriving at maturity, to become a citizen, either of the state where he was born, or of the state of which his father was a member. In effect, this brings us back to the theory of the formation of states and governments, by voluntary compact of their inhabitants; and yields to every man, the unqualified right of throwing off allegiance by birth, whenever he becomes of age, and attaching himself to any community which pleases him. And if he may do it when he attains his full age, why may he not exercise the same natural right, every successive year of his life? And with these notions of allegiance fully established, a state, with a well appointed army of its citizens in the field to-day, might to-morrow, find itself without citizens, and its troops in the full fruition of a new allegiance, in the ranks of its enemy.

Waiving these considerations, what, in a case like that of Julia Lynch, is to be her political quality and condition, until the period of her right to elect shall have arrived? In her case, (and it will often happen in similar cases,) important events occurred in the meantime, and rights accrued, which must be determined by the state of things then existing. Is it not unwise in the state, and unjust to the infant to withhold the quality of the citizen, or keep it in abeyance, until the years of discretion are attained? Even with the rights of election established, there must be some fixed rule determining the allegiance, until the period for making the election arrives. Shall that rule be founded upon the place of birth, or the place of the parents birth; upon their allegiance at the time of the birth of the *propositus*, or upon their domicil at that time, or during the subsequent period?

The difficulty of answering these inquiries satisfactorily, strikingly exhibits the impracticability of the principle sought to be applied to this case.

I do not find that the rule derived from the public law, is so clearly in favor of the complainant, as was contended by him.—Mr. Justice Story, who is familiar with the Continental writers upon public law, says "that certain principles (relative to national domicil) have been generally recognized by tribunals administering the public law or the law of nations, as of unquestionable authority. First, Persons who are born in a country, are generally deemed to be citizens and subjects of that country. A reasonable qualification of the rule would seem to be, that it should not apply to the children of parents, who were *in itinere* in the country, or who were abiding there for temporary purposes, as for health, or curiosity, or occasional business. It would be difficult, however, to assert, that in the present state of public law, such a qualification is universally established." (*Story's Conflict of Laws*, 47, § 48.)

Thus, the learned commentator sets out with the common law principle; and while he suggests certain modifications of the general rule, which might be deemed reasonable, but which are unknown to the common law; he does not consider them as fully established, even in the public law.

The rule contended for, is one confined to countries which derived their jurisprudence from the civil law, and is more properly a rule of the civil law, than one of the public law, or law of nations. Thus in the Digest, "Filius civitatem, ex qua pater ejus naturalem originem ducit; non domicilium sequitur. (*Digest:* Lib. 10, Tit. 1., Ad Municipalem; et de incolis, 1. 6, § 1, and *ibid* 17, § 11.) And it recognized the right of the son, notwithstanding, to establish his own domicil. (*See note* 25 *to* § 11, *last cited, and ibid*, 1, 27.)

So in France, following the rule of the civil law, they hold that every child born of a Frenchman, in a foreign country, is French. Their code also provides for expatriation, and for an election to become Frenchmen, in behalf of those born in France of a foreigner. (*Code Napoleon* B. 1., tit. 1, ch. 1, § 19; also § 9, and ch. 2.) And such was the law of France three centuries ago. (*Jenk. Cent. Ca.* 5 *Cent. Case.* 91.)

In Spain, however, where the Visigoths nominally excluded the civil law, and really adopted its principles almost in mass, the law concedes the rights of a natural born subject, to all persons born in the kingdom, and to children born elsewhere whose father was a native of Spain. (*De Partidas, 4, Tit. 24, Law 2; Novisima Recopilacion de las Leyes de Espana, Lib. 1, Tit 14, L. 7. Institutes of the Civil Laws of Spain, by Doctors D. Ignatius Jordan de Asso Y Del Rio, and D. Miguel de Manuel Y. Rodriques, Book 1, Tit. 5, Cap. 1, and* §1.*

The writers on public law, are by no means agreed upon the question before me; although they were strongly imbued, by their studies and habits, with the spirit of the civil law.

Vattel says, the natives, or *indigenes*, are those born in the country, of parents who are citizens. 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. (*Vattel's Law of Nations*, B. 1, ch, 16, § 212.) He further says, in reference to the inquiry whether children born of citizens in a foreign country, are citizens, that the laws have decided the question in several countries, and it is necessary to follow their regulations. That in England, being born in the country, naturalizes the children of a foreigner. That by the law of nature alone, children follow the condition of their fathers and enter into all their rights. But he puts forth that opinion, on the supposition, that the father has not entirely quitted his country in order to settle elsewhere. If he has fixed his abode in a foreign country, he is become a member of another society, at least as a perpetual inhabitant, and his children are so too. (*Ibid* § 214, 215. *And see* § 216.) Thus the rule of Vattel, is controlled by the *intention* with which the father takes up his abode in the foreign country.

Pufendorf, who is also cited in support of the civil law rule, says that all those who are born of a citizen, are deemed by that circumstance alone, to submit themselves to the sovereign power on which their parents depend. He however, does not speak of children born of citizens in foreign countries; and from, the context, as well as the residue of the section referred to, it is probable that his observations were intended to be limited to the children born in the state, who were the descendants of those who in theory first formed the civil government. (2 *Pufendorf by Barbeyrac*, 303, *Liv.* 7, *ch.* 2, § 20.)

Schmier, another writer on public law, is more explicit. He says: "Continuatur subjectio, nativitate; natus enim ex subdito vel cive, fit subditus ac civis illius civitatis, cujus pater est membrum et pars." And he cites to the same effect, Hertius, De Modo Constit. et Civit., vol. 1, § 1, subd. 7.—(*Schmier Jurisprud. Publica, Lib.* 5, *cap.* 1, § 3, 42. And see *Boehmer, Introductio in Jus. Digestorum, Germaniæ, Lib* 3, ch. 1, § 15. 2 *Rutherforth's Institutes of Natural Law*, 41, B. 2, ch. 2, § 6.)

On the other hand, Domat says: "Strangers who are likewise called aliens, are those who, being born in another country, and subjects of another kingdom than that of which they are inhabitants, have not been naturalized." And again: "The children of strangers born in a kingdom in which their father was an alien, having their origin in that kingdom, are subjects thereof; and they have in it the rights of naturalization, as if their father had been naturalized a subject of it, and they succeed to him, although he dies an alien." (2 *Domat's Civil Law, by Dr. Strahan*, 376. *Title, Public Law*, B. 1, tit. 6, § 4, subd. 2 & 5.

Burlamaqui, who places the rights of subjection and protection in the case of children, upon mutual consent, says, that on their attaining to the years of discretion, their remaining in their native country is deemed a submission to its government, and they are then members of the state. (2 *Burl*, 31, *Principles of Public Law, Part* 1, ch. 5 § 10, 11, 13.) He does not state the rule as to those born of foreign parents, and it is evident that he would leave them to the same election which he gives to those born of citizens.

* Since writing this opinion, I have been informed by a friend who examined the subject recently while in Europe, (the Hon. John A. Dix:) that these provisions relative to citizenship, are embraced in the new Constitution of Spain. The Constitution provides further, that foreigners who establish their permanent residence in Spain, shall be entitled to the rights of natural born subjects.

He also informs me, that by the last Constitution adopted in Portugal, (that of 1837,) children born in that kingdom of alien parents are native born subjects, and the same rights are conferred on children born abroad, whose father was a native of Portugal.

In 6 Hall's Amer. Law Journal, 30, 37, is to be found: Discussions on the question whether inhabitants of the United States, born there before the Independence, are on coming to this kingdom, (England,) to be considered as natural born subjects. By a Barrister. December 9, 1810. The writer was John Reeves, Esq., the author of the History of the English Law. His conclusion on that question, was not in accordance with the subsequent decisions, either there or here. I cite the work because of his argument on the objection to the inconsistency of Americans being citizens of the United States while here, and being British born subjects when there. He says, "this is not a novelty, nor is it peculiar to Americans. It may happen to any British subject, and it is allowable in our law, which recognizes this double character of a person, being as was before shown, ad fidem utrusque regis." And he asks, "Do not British subjects become citizens of the United States? Some persons are born to such double character; children and grand-children, born of British parents in foreign countries, are British born subjects, yet these, no doubt, by the laws of the respective foreign countries, are also deemed natural born subjects there."

These references show that the rule which the complainant derives from the writers on public, law is not even in theory, clearly defined or uniformly held. That the most approved authorities, do not deviate from the rule of the common law, any farther than Judge Story has suggested that it is reasonable to deviate; and to establish such a departure, would involve the whole subject, as it respects the children of foreigners, in the obscurity ever attendant upon evidence of intention, the *animus manendi*, upon a change of residence; an obscurity the greater in these cases, because the question generally arises after the lapse of many years. The advantages to result from a resort to such an uncertain and fluctuating rule, are more ideal than substantial; and are completely over borne by its inconveniences, when contrasted with the simple and plain rule of the common law. The qualifications mentioned by Judge Story, and which are not universally established in the public law, are certainly unknown to the common law in England, and as established in the United States. There is no authority, and unless Mr. Dane's Abridgement be an exception, not a single work on American law, that asserts the existence of either of those qualifications.

In 4 *Dane's Abridgement*, 701, ch. 131; art. 2, § 8, he says: "And now, if an American citizen goes abroad and marries an alien wife, and have a child by her in a foreign country, that child is not alien, but may inherit his estate in the United States. But if an American woman, a citizen, go abroad and marry an alien husband, and have a child by him so born, that child is an alien, and cannot inherit her estate in the United States. And upon the same principle, if an English subject comes into the United States, and marries an American wife, and has a child by her *born here*, it cannot inherit her estate here, *because this child follows the allegiance of its father, and may inherit his estate in England.*" Manifestly a *non sequitur*, because in the case first put, the child, if born in England of an American father, unquestionably owes allegiance in England, is a subject of that country, and may inherit there. Yet he is, as the author says, a citizen of the United States also. And by the same rule, the child born here of the English father, is a citizen here, and may inherit here as well as in England. In short, both are cases of that double allegiance, which is effected by the rule of the common law, and which Mr. Reeves says is not a novelty, nor peculiar to that law.

With these remarks, I dismiss the argument founded on the rule of the public law, its fitness and adaption to the spirit of our institutions.

The provisions of the naturalization laws enacted by Congress, are urged as decisive, that children born here, of alien parents were not citizens. The act of 1802, § 4, declares that the children of persons duly naturalized under any of the laws of the United States, or who, previous to the passing of any law on that subject by the government of the United States, may have become citizens of any one of the states, under the laws thereof, being under the age of twenty-one years at the time of 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. (2 *Story's Laws of U. S.*, 852, 3.) A similar provision was enacted in the acts of 1790 and 1795. And the second section of the act of 1804, pro-

vided that when any alien who had declared his intention &c., should die before he was actually naturalized, his widow and children should be considered as citizens, and entitled to all the rights and privileges as such, upon taking the oaths prescribed by law. (2 *ib.*, 943.) This section was repealed in 1828, (*ch.* 106.) The acts make no distinction between children born here, and those born abroad, and it is said, this shows that none existed. That if, in fact, there had been any difference, the statutes would have provided only for the latter class.

The general words used, do not prove that general words were necessary. The statutes were necessary, and every part of them is fulfilled, although children born here were already citizens. They operate on the much larger class of the children of aliens, viz: those who were born abroad. With a law which admits aliens to naturalization after five years residence, the children that are born to them in the five years, will usually bear but a small proportion, to the number who come with their parents from abroad. It was just as necessary in the act of 1804, to have distinguished between widows who were already citizens, and those who came here with their alien husbands. For a great many adult aliens come here single men, and marry citizens. Probably as great a proportion of the widows who are provided for in the general words of the act of 1804, are native citzens, as the proportion of the whole number of children embraced by both acts, who are born here; yet no distinction respecting widows who are citizens, is made in the act of 1804. And on this omission, the same argument urged relative to the children, will prove that all the widows of aliens must of necessity be aliens.

Upon the whole, the implication claimed from these statutes, is not a necessary one, and cannot be raised to overturn an established legal principle.

The difficulty in reference to citizens of Louisiana, where the civil law prevails, is readily answered. When the Territory of Louisiana was ceded to this country, our national law was extended over it, in all matters affecting its connection with the nation at large; and when the State of Louisiana was erected and brought into the Union; as one of the consequences of that act, she relinquished to the rule of the national law which was then in force, the future regulation and control of the subject of citizenship within her territory, at least in its primary and national sense. And although before that event, the law in the Louisiana territory may have been such, that children born there of alien parents were aliens, (as to which I express no opinion); yet after she became a state, children born there of alien parents, would undoubtedly be citizens of the United States. And thus no clashing or incongruity could ensue, in the case of Louisiana, from the existence of the national common law rule, and the provisions of the Constitution conferring upon citizens of each State, the privileges of citizens in all the states.

The case of *Inglis* v. *The Sailor's Snug Harbor*, (3 Peters, 99, &c.,) was cited as having been decided on the principle of public law, that the national character of an infant followed the condition of his father. I do not so understand the decision. The infant in that case, was born in the city of New York, before the 4th July, 1776. He remained there with his father (who was a royalist), while the British held possession of the city. When they evacuated it, the father left the country, taking the infant with him. The latter never returned to the United States; and in process of time, became a bishop in the established church, in England, and was domiciled in Nova Scotia. The decision of the Supreme Court of the United States was, that he was born a British subject, and that he continued to be an alien in regard to this country. This, and the case next cited, together with several in the courts of the states, and some in England, hereafter mentioned, were decided upon the novel and peculiar circumstances growing out of the American Revolution, and the dismemberment of the British Empire thereby.

The doctrine settled by these authorities is, that on the separation of the colonies, the United States and Great Britain became respectively entitled, as against each other, to the allegiance of all persons who were at that time adhering to the governments respectively; and that those persons became aliens in respect to the government to which they did not adhere.

In our decisions, the time fixed for the application of the rule, is the Declaration of Independence. In the British authorities, it is applied at the date of the Treaty of Peace in 1783. (2 *Kent's Comm.* 2 ed.,

60; *Inglis Case*, 3 Peters, 121, per Thompson, J.; *Shanks* v. *Dupont*, 3 Peters, 242; *McIlvaine* v. *Coxe's Lessee*, 4 Cranch 209; *Kilham* v. *Ward*, 2 Mass. 236; *Gardner* v. *Ward*, ibid 244; *Phipps' case*, 2 Pick., 394 note; *Chapman's case*, 1 Dallas, 53; *Hebron* v. *Colchester*, 5 Day. 169; *Jackson ex. dem. Russell* v. *White*, 20 Johns., 313; *Doe, dem. Thomas* v. *Ackland*, 2 Barn. and Cress, 779; *Doe* v. *Mulcaster*, 5 ibid, 771; *The Providence*, Stewart's Vice. Adm. Rep. 186.)

On this principle, it is manifest that Bishop Inglis, who at his birth was a British subject, who never adhered to this country, and never, after he became old enough to exercise a discretion, manifested any intention to return here, was an alien in 1783, and continued to be an alien thereafter. He never owed allegiance to this state, or to the confederation. He was not a person *abiding* within this state on the 16th July, 1776, within the meaning of the ordinance of the convention of this state. (*Jackson* v. *White*, 20 Johns. 313, 326.) If Bishop Inglis had been born after July 4, 1776, and before the 15th of September, when the British army took possession of the city of New York, (which was one aspect in which this case was considered,) he would have either owed an allegiance to this state, or, being an infant, and the country in a state of revolution, his *status* would have been indeterminate until the treaty of peace, and then controlled by the principle of his adherence to the one country or the other. Assuming that he owed allegiance to New York, then the events of the Revolution having rendered the application of a new principle necessary to his and the like cases in both countries, it would be reasonable for the courts to hold that on his attaining a suitable age to decide, he might determine for himself as to his future citizenship, and in the meantime, that his father's election should be considered as his own. Such a decision would not be an adoption of the entire doctrine of the civil law as to alienage, nor an abandonment of any of the well settled rules of the common law. It would be merely the resort to first principles in a new case. No case has gone to this extent, if, as I understand the report of the facts in *Inglis* v. *The Sailor's Snug Harbor*, the Plaintiff was born before the Declaration of Independence. In *Trimbles* v. *Harrison*, (1 B. Monroe's Law and Eq. Rep., 140, 146, Kentucky,) the decision was like that in Bishop Inglis' case, on the alienage of one born here before the Revolution.

In *Shanks* v. *Dupont*, (3 Peters, 242, a lady born in South Carolina, (whose father adhered to the United States and died in 1782,) married a British officer in Charleston in 1781, that city being then in possession of the enemy. In 1782 she went with her husband to England, and lived there till her death, in 1801. It was held that at the treaty of Peace in 1783, she was a British subject, within the meaning of the provision of the treaty. That her removal was a voluntary dissolution of her allegiance, and it became fixed to the British Crown by the treaty of Peace. Judge Story, in his opinion, rested upon the grounds that she was not incapacitated by coverture from determining her allegiance on the Revolution in the government, and her removal and the treaty, effected a dissolution of the allegiance to the State of South Carolina. Mr. Justice Johnson dissented, on the ground that the common law disallowed of expatriation, and it was in that respect the law of South Carolina.

These cases, growing out of the anomalous state of allegiance produced by the Revolution, cannot with propriety, be deemed authorities against well established principles, as applicable to the ordinary questions of alienage and allegiance. In the one, the new principle applied to an unprecedented case, happens to be analogous to principles which the civil law applied to all the children of foreigners. It does not, therefore, follow that the Supreme Court of the United States thought the civil law to be right, and the common law wrong, in respect to the citizenship of such children. In the other case, the common law rule as to expatriation was departed from, because the separation of the countries by a revolution, and the construction of the treaty, were supposed to require it. It does not follow that the rule of the common law was therefore abandoned in all cases of expatriation, much less in its application to citizenship by the place of nativity.

In conclusion, I entertain no doubt but that Julia Lynch was a citizen of the United States when Thomas Lynch died. She therefore inherited the property in controversy, if Thomas Lynch had any estate therein, to the entire exclusion of the complainant, who was then an alien, and incapable of taking by descent.

It is unnecessary, in this view of the case, to examine the right of Thomas Lynch to the premises in question.

The complainants bill must be dismissed. The question which I have discussed and decided, was new in our courts. For this reason, and others that arise upon the merits of the case, I will give no costs to the defendants.

IN ADMIRALTY:

U. S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

Before the Hon. SAMUEL R. BETTS, D. J.

THE MUTUAL SAFETY INSURANCE COMPANY, THE AMERICAN INSURANCE COMPANY AND THE JACKSON MARINE INSURANCE COMPANY v. THE CARGO OF THE SHIP GEORGE, AND THE PROCEEDS THEREOF—REYER & SCHLICK, OF TRIESTE, JOSIAH MACY & SON, AND BARCLAY & LIVINGSTON.

CONTRIBUTION.

The ship George, which was insured by three several Companies, sailed in May, 1841, from New Orleans for Trieste with a Cargo of Cotton, consigned to R. & S. When she had been out a few days she met with heavy weather and sprung a leak. The leak increased and the Captain after a fruitless attempt to make the harbor of Nassau, in order to save the Cargo from foundering, ran her ashore on a Reef. The vessel and freight were lost, and after abandonment to the Underwriters, a total loss was paid them. A large portion of the Cotton was saved, and the proceeds came to the hands of M & Son, as the Agents of R & S. On a libel filed on the ground that the proceeds of the Cargo were bound to contribute, held, that the Underwriters by abandonment became clothed with all the rights of the insured in respect to the general average, that a court of admiralty would enforce the lien, and that the proceeds of the Cargo might be pursued by libel or petition to recover general average.

The voluntary stranding of a vessel by the master to save the Cargo, is ground for a general average.

The United States Courts in commercial and maritime cases are governed by the general and not the local law.

The owners of the ship so lost are entitled to contribution on the freight as well as the Cargo.

The adjustment of average in case of sale of the goods at the place of disaster before reaching the port of destination may be in relation to the sale price.

THIS was a libel filed to recover the share of general average alleged to be due by certain cargo shipped on board the George on account of a voluntary stranding of the vessel to save it from foundering in consequence of a leak at sea. The underwriters had paid a total loss on the vessel and freight, and received an abandonment.

The facts are as follows:

The George being insured by the libellants, (all the three companies having underwritten the vessel to the valued amount of twelve thousand dollars—four thousand dollars each, and the Mutual Safety Insurance Company having underwritten the freight to the amount of $4400, on a valuation of $6800,) sailed in May, 1841, from New Orleans for Trieste, with a cargo of cotton consigned to the Respondents Reyer & Schlick. When about six days out the vessel met with heavy weather, and sprung a leak. The leak increased, and the captain after making a fruitless attempt to make the harbor of Nassau, finally, in order to save the vessel and cargo from foundering ran the George on shore on a reef about three quarter of a mile from the shore at the West End of the Grand Bahamas.

The vessel and freight were wholly lost, and after abandonment to the underwriters a total loss was paid by them.

A large portion of the cotton was saved, and the proceeds came to the hands of the Defendants Macy & Son, as Agents of Reyer & Schlick.

This libel was now filed on the ground that the proceeds of the cargo were bound to contribute in general average to the loss of the vessel and freight.

A foreign attachment was prayed for against the Defendants, Reyer & Schlick.

There was little dispute on the facts.

The answer of Barclay & Livingston, the Agents of Reyer & Schlick, insisted that the vessel was run on shore to save the lives of the master and crew, and that the most expedient course had not been pursued in running the vessel on shore. The answer of J. Macy & Son admitted the fund in their hands.

The only witness examined was Thos. S. Minott, Master of the George. He testified that between the 17th and 22nd of May the leak had averaged from 200 to 1200 strokes per hour, that the water was four feet in the hold, and increasing, when he determined on the 28th to run her ashore. The wind was light with little sea. He testified positively that he ran