THE ALIENIGENÆ OF THE UNITED STATES

By Horace Binney

It does not, probably, occur to the American families who are visiting Europe in great numbers, and remaining there, frequently, for a year or more, that all their children born in a foreign country are Aliens, and when they return home, will return under all the disabilities of aliens. Yet this is indisputably the case; for it is not worth while to consider the only exception to this rule that exists under the laws of the United States, viz., the case of a child so born, whose parents were citizens of the United States, on or before the 14th of April, 1802.

It has been thought expedient, therefore, to call the attention of the public to this state of the laws of the United States, that if there are not some better political reasons for permitting the law so to remain, than the writer is able to imagine, the subject may be noticed in Congress, and a remedy provided.

Chancellor Kent, in adverting to this peculiarity of our laws, in the fourth part of his Commentaries on American Law, holds out, it is true, to the children so born, the possible "resort for aid, to the dormant and doubtful principles of the common law;" for he remarks: "*it is said* that in every case, the children born abroad, of English parents, were capable, at common law, of inheriting as natives, if the father went abroad in the character of an Englishman, and with the approbation of his Sovereign;" and he cites three authorities for this *dicitur,* which will be considered presently; but it is clear, from the Chancellor's context, that he placed little reliance upon this alleged doctrine of the common law; and it can be shown that it was not worthy of the least. There is no reasonable doubt existing at this time, nor has there been in England, for nearly four hundred years, that the common law acknowledges no such principle, but, to use Lord Kenyon's language in *Doe vs. Jones*, 4 Durnf. & East. 308, that "the character of a natural-born subject, anterior to any of the statutes, was incidental to *birth* only. Whatever were the situations of his parents, the *being born within the allegiance* of the King, constituted a natural-born subject;" and consequently, anterior to any of the statutes, the being born out of the allegiance of the king, constituted an *alien*.

It is proper, however, to notice this point more particularly, as it will naturally lead to the consideration of the English statutes which have been passed in remedy of the common law, and from those to the different Acts of Congress, by which the law of the United States, at this time, will appear. The notice will be as brief as possible, but as accurate as the writer's research has enabled him to make it.

The three authorities cited by Chancellor Kent, in 2 Kent's Comm. 51, are *Hyde vs. Hill*, Cro. Eliz. 3, Brooke, tit. Descent, pl. 49, tit. Denizen, pl. 14.

The case of *Hyde vs. Hill*, is a short note, directly contrary to the *dicitur* for which it is cited, except by an implication which would be false if it included the common law, but quite true if it included only the statute of 25 Edw. 3, to be noticed hereafter. The case may be copied in as few words, as it can be described: "*Ejectione firmœ*. It was held upon evidence, that if baron and feme, English, go beyond sea without license, or tarry there after the time limited by the license, and have issue, that the issue is an alien, and not inheritable; contrary to the opinion of Hussey, 1 Ric. 3, p. 4."

The implication that it was otherwise by the common law, is false, for it was that which the Court or the reporter meant to contradict, as will be seen by a reference to Hussey's opinion. But the implication that it would have been otherwise under the stat. 25 Edw. 3, if the parents had not gone beyond sea without license, or tarried there after the time limited by the license, is true; for although that statute says nothing of going beyond sea without license, and by the common law every man might go out of the realm for what cause he pleased, without the King's leave, *Fitz. Nat. Br.* 85, yet the statute 5 Richard 2, Ch. 2, passed in 1381, after the stat. 25 Edw. 3, and which continued in force at the decision of *Hyde vs. Hill*, and until it was repealed by Jac. 1, c. 1, sec. 22, prohibited, under severe pains and forfeitures, the departure from the realm, without license, of "all manner of people, as well clerks as others,--except only the lords and other great men of the realm, and true and notable merchants, and the king's soldiers:" and the case of *Hyde vs. Hill* not being within the exception, the Court held that the issue born abroad during this violation of the statute of 5 Rich. 2, was not within the benefit of the statute, 25 Edw. 3, but an alien. So that *Hyde vs. Hill* does not decide or say that the children born abroad of English parents, were natural-born subjects of England, by the common law; and either the Court or the reporter must be taken to say the contrary, by saying that the judgment was contrary to Hussey's opinion. For Hussey's opinion was as follows:

The case in which that opinion occurs, is in the Year Book, 1 Rich, 3, page 4, pl. 7, and it gives a string of positions by *Hussey*, Chief Justice, which relate, in every instance but one, to this principle of the law of trials,--that if a Court has jurisdiction of the original case of action, questions which arise out of the issue may be tried in the same court, although they originated in a foreign country, or were more particularly under the jurisdiction of another court, putting the case of a suit in the Ecclesiastical Court for a horse bequeathed, and the defendant says that the

horse was given to him by the testator in his lifetime; this gift is triable *per nostre ley*, nevertheless it shall be tried in the Court Christian; and several like cases. And then the report concludes in these words: "*Et son opinion fuit, que celui qui est né per de la, et son père et mère furent anglois, lour issue enherite per le common ley; mes le Statute fait cler,*" &c. The abbreviations in the Year-Book are extended, but this is the whole: *and his opinion was, that he who is born per de la* (meaning beyond sea, or out of the jurisdiction of England), *and his father and mother were English, their issue inherit by the common law, but the Statute makes clear, &c.*

Whether this was more than an *obiter dictum* is entirely uncertain; but it is quite certain that it was a doubting dictum, for the Chief Justice adds, *but the Statute makes it clear*, which it undoubtedly did, if the Chief Justice referred to the 25 Edw. 3, and which made the common law on this particular question of no importance.

Brook's Abridgment, title *Descent*, pl. 47, is the next authority cited by Chancellor Kent. This is nothing more than *Hussey's* opinion or dictum before stated. "And by *Hussey*, he that is born beyond the sea *before the statute*, whose father and mother were English, was inheritable by the common law, yet now this is clear by the statute." But it is rather remarkable, that in citing the opinion of Hussey, the "very reverend judge" who was the compiler of this venerable abridgment, has made the Chief Justice say, what by the Year Book he did not say, and what was clearly against law, if he did say it; for that the statute now *makes it clear*, that he that is born beyond sea *before the statute*, as Brooke has it, whose father and mother were English, is inheritable, is just contrary to what the statute provides; for except in regard to three persons whom the statute names, "and other which the king will name," the statute does not give inheritable blood to any children born out of the ligeance of the King *before the statute*, of fathers and mothers, who at the time of the birth were within the ligeance of the king, but to such only as should be born *after* the statute; and it does not acknowledge the common law to have had or to have any such effect in any case, other than that of the children of the *Kings of England*, who, according to "the law of the Crown of England, in whatsoever part they be born, in England or elsewhere," the King, Prelates, &c., appoint to be "able, and ought to bear the inheritance of their ancestors for ever." The authority of Hussey's opinion is not therefore helped by Brooke's Abridgment.

The third citation is the same Abridgment, title Denizen, pl. 14. This placitum, translated as literally as possible from its barbarous law French is as follows: "By *Newton*. If a man went beyond sea without leave of the King, and had issue, and

dies, and the issue survives, the issue shall not be heir, because he is alien born, and the land shall escheat, and no other shall be his heir. Tamen *contra* libro Doctor and Student: and where the oldest son is alien, and the youngest denizen, then the youngest shall be heir as between bastard and mulier; *contra* when the oldest lawful son is attained in the life of his father of felony, for he was once capable. Contrary of bastard and alien; note the diversity." The marginal reference is to the Year Book, 22 Hen. 6, 38, which sustains the Abridgment, although the Doctor and Student very reasonably holds a contrary opinion, if the father left other heirs. Doctor and Student, 20, 21. But there is nothing in the case that touches the doctrine of the common law, that an alien born may inherit to a natural-born father and mother; or any other doctrine but that of issue born after departure from the realm without license, as required by 5 Rich. 2, ch. 2, which was then in force.

It cannot be said upon such authorities, that the common law on this head is either dormant or doubtful, or that such a principle ever was awake and active in the common law. They do not show that the dictum possesses the least weight; for *Hussey* stands alone, *Hyde v. Hill* is to the contrary, and *Hussey*, according to the best view that can be taken of his opinion, was merely mooting a point, which the statute made unnecessary to the case.

But the authorities against the doubt, if there be a doubt, may be multiplied *ad infinitum.*

And the earliest and best is the stat 25 Edw. 3, stat. 2, before referred to, which recites the doubt, and instead of declaring the law in conformity, enacts it in terms that contradict, exclude, and supply in a qualified manner, the alleged common law.

That statute, passed in 1350, sets forth, that the King, "by the assent of the prelates, earls, barons, and other great men, and all the commons of his said realm, summoned to the parliament, hath *ordained* and *established* the things underwritten, *videlicet*: because some people be in doubt, if the children born in parts beyond the sea, *out of the ligeance of England*, should be able to demand any inheritance within the same ligeance or not, whereof a petition was put in Parliament late holden at Westminster, the seventeenth year of our Lord the King that now is, *and was not at the same time wholly assented*, our Lord the King, willing that all doubt and ambiguities should be put away, and the law in this case declared and put in certainty, hath charged the said prelates, &c., assembled in this Parliament, to deliberate upon this point; all which of one assent have said, that the law of the Crown of England is, *and always hath been such*, that the children of the Kings of England, in whatsoever parts they be born, in England or elsewhere, be

able and ought to bear the inheritance after the death of their ancestors; which law our said Lord the King, the said prelates, &c., and all the commons assembled in this Parliament, do approve and affirm for ever;--And in the right of other children *born out of the ligeance of England* in the time of our Lord the King, they be of one mind accorded, that *Henry* son of *John de Beaumond*, *Elizabeth* daughter of *Guy de Bryan*, and *Giles* son of *Ralph Dawbeny*, and other which the King will name, which were born beyond the sea, out of the ligeance of England, *shall be from henceforth* able to have and enjoy their inheritance after the death of their ancestors, in all parts within the ligeance of England, as well as those that should be born within the same ligeance—and that all children, inheritors, which *from henceforth* shall be born without the ligeance of the King, whose fathers and mothers, at the time of their birth, be, and shall be at the faith and ligeance of the King of England, shall have and enjoy the same benefits and advantages, *to have and bear the inheritance* within the same ligeance, as the other inheritors aforesaid in time to come, so always that the mothers of such children do pass the sea by the license and wills of their husbands."

It may be remarked upon part of the language of this statute, that in *Doe vs. Jones*, 4 Durnf. And East, 308, Lord Kenyon says:

---"I cannot conceive that the legislature in passing that act meant to stop short in conferring the right of inheritance, *merely*, on such children, but that they intended to confer on them all the rights of natural-born subjects;" and it may be further remarked, that there is nothing in the statute which would justify the conclusion that it is declaratory of the common law in any but a single particular, namely, in regard to the children of the King; nor has it at any time been judicially held to be so.

The common law has been uniformly held to be otherwise. "An alien is a subject that is born out of the ligeance of the King, and under the ligeance of another, and can have no real or personal action for or concerning land; but in every such action the tenant or defendant may plead, that *he was born in such a country which is not within the ligeance of the King*, and demand judgment if he shall be answered." *Calvin's* case, 7 Rep. 16 a.

"Every subject is either natus born, or datus given or made." 7 Rep. 17 a.

"There be regularly, unless it be in special cases, three incidents to a subject born. 1st, That the parents be under the actual obedience of the King. 2nd, That the *place of his birth be within the King's dominion*. And, 3rd, The time of his birth is chiefly to be considered, for he cannot be a subject born of one kingdom, that was

born under the allegiance of another kingdom, albeit afterwards one kingdom descend to the king of the other." 7 Rep. 18 a.

"The being born under the allegiance of another king, is the touchstone to try whether alien or not." Jenkin's Cent. P. 3, Cent. 1, case 2.

Litt. Sec. 198. "The third is an alien who is born out of the ligeance of our sovereign lord, the King." "Alien, *alienigence*, is derived from the Latin word, *alienus,* and according to the etymology of the word, it signifieth one born in a strange country under the obedience of a strange prince or country; and therefore *Bracton* saith, that this exception, *propter defectum nationis*, should rather be, *propter defectum subjectionis*, or as *Littleton* saith, which is the surest, out of the ligeance of the King." Co. Litt. 128 b.

"If a man, seized of lands in fee, hath issue an alien, that is born out of the King's ligeance, he cannot be heir, *propter defectum subjectionis*, although he be born within lawful marriage." Co. Litt. 8 a. Lord Coke is here speaking of the common law. The note in Hargrave and Butler's edition, refers to the modern statute of Anne, by which, by which, if the father was a natural-born subject, the child would also be natural born; and then to 25 Edw. 3, stat. 2, "which," the editors say, *"declares* that at common law the children of the King, wherever born, may inherit. The same statute *enables* children born abroad to inherit, if, at their birth, *both* their parents are within the King's allegiance, and their mothers pass beyond sea with the license of their husbands." Note 1 to Co. Litt. 8 a. Then the common law did not *enable* them. It was in Doe vs. Jones, 4 Durnf. & East, 300, before referred to, that this interpretation of the 25 Edw. 3, was enforced, that both the parents must be of the faith and ligeance of the King; and it was held that the son of an *alien* father and *English* mother, born out of the King's allegiance, at Marseilles in France, could not inherit to his *mother* in England, contrary to *Rex vs. Eaton*, Litt. Rep. 23, 29, which seemed to decide that the words, "fathers and mothers," in the statute, might be taken in the disjunctive, fathers or mothers. But there is evidence at the close of the report, that it was not so decided with the approbation of the judges generally.

The doctrine, that a person born out of the dominions of the King of England, and under the actual obedience of a foreign king, is by the common law, an alien, though his parents were English, may be found in all the abridgments. See 1 Bac. Abr. 193, Alien; 1 Com. Dig. 552, Alien; for, "being born out of the King's ligeance," has this meaning by common law.

Blackstone says that the common law stood *absolutely* so, with only a very few exceptions, 1 Black. Comm. 372; and these exceptions, perhaps, are confined to the cases of the children born abroad, of ambassadors and their wives, natives of England, Calvin's case, 5 Rep. 18 a; persons who are born within the places possessed by the Kings army, if he enters the territories of another prince in a hostile manner, and the parents are subjects and not hostile, *Craw vs. Ramsay*, Vaugh. 281; and persons born subject to a prince, holding his kingdom as homager and liegeman to the King of England, during the time of his being homager, Calvin's case, 7 Rep. 21 b. As to the cases of persons born within the territories appertaining to the King, in foreign countries, as Calais, Tournay, Guienne, Normandy, and the like, while they belonged to the Crown, that such persons were natural-born subjects of England, was not so much an exception, as a part of the common law, and was so declared by more than one statute; see 42 Edw. 3, c. 10; 13 Hen. 4, Nu. 22; 17 Edw. 2, De Prærog. Reg. c. 12; Calvin's case, 7 Rep. 20 b.

The common law being thus made clear, a reference to the remedies which have been provided by English and British statutes, does not concern the present purpose, except as they all manifest the omission of the common law to provide for the case.

A reference to these statutes, may, however, be an useful admonition to us; for Great Britain, a nation that never yields the strict common law principle of allegiance, except to promote her interest, has relaxed it with that view, in a particular in which this nation at present sanctions no effective relaxation whatever.

The statute 25 Edw. 3, has been already cited.

Statute 29 Car. 2, ch. 6, 1676, enacted, that all persons born out of the King's dominion between the 15th of June, 1641, and the 24th of March, 1660, whose parents were subjects, should be deemed natural-born subjects, on condition that within a limited time they should receive the sacrament, and take the oath of allegiance and supremacy. The statute 25 Edw. 3, probably did not comprehend these cases, in consequence of the peculiar condition of the country, under a divided allegiance, though the reason of these particular dates cannot be easily ascertained. There is no doubt, however, that the interval comprehended the term of the Long Parliament, the dissolution of which, in March, 1660, preceded the return of Charles II, but two months.

7 Anne, ch. 6, 1708, was a general act to naturalize all foreign Protestants who should qualify themselves in the manner directed by the act; and it especially

declared to be natural-born subjects, "the children of all natural-born subjects, born out of the ligeance of her majesty," without limitation of time. But the general provision of this statute, in regard to foreign Protestants, excited a great fermentation, and it was repealed by 10 Anne, ch. 5, 1711, excepting the section relating to the children of the natural-born subjects, which, by statute 4 Geo. 2, c. 21, 1731, was explained to mean, and it was enacted to the effect, that all children born out of the ligeance of the crown of England or Great Britain, or which should thereafter be born out of such ligeance, whose *fathers* were or should be natural-born subjects, at the time of the birth of such children respectively, should and might, by virtue of the recited clause in 7 Anne, and of the explanatory act, be adjudged and taken to be natural-born subjects, to all intents, considerations, and purposes, whatever.

In 1773, 13 Geo. 3, c. 21, the privilege was extended to children whose fathers or *grandfathers* by the father's side, were natural-born subjects.

And in the year 1844, the stat. 7 & 8 Vict., ch. 56, which abridges the disabilities of aliens in some striking particulars, enacted by its 3d section, that every person then or thereafter to be born out of her majesty's dominions of a *mother* being a natural-born subject of the United Kingdom, should be capable of taking any real or personal estate, by devise or purchase, or inheritance of succession; and by its 16th section, that any woman who should be married to a natural-born subject, or person naturalized, should be deemed to be herself naturalized, and have all the rights and privileges of a natural-born subject.

The disability of children born abroad of British subjects, is therefore, largely provided for by Great Britain, even to the second generation of a natural-born *father*; and the natural-born *mother's* child, born abroad, is made capable of taking real estate by descent or purchase, though such child is not naturalized.

The state of the law in the United States is easily deduced. The notion that there is any common law principle to naturalize the children born in foreign countries, of native-born American father *and* mother, father *or* mother, must be discarded. But the common law principle of allegiance, was the law of all the states at the time of the Revolution, and at the adoption of the Constitution; and by that principle the citizens of the United States are, with the exceptions before mentioned, such only as are either born or made so, born within the limits and under the jurisdiction of the United States, or naturalized by the authority of law, either in one of the States before the Constitution, or since that time, by virtue of an Act of the Congress of the United States.

The question remains, what is the present effect of Acts of Congress, on the subject of naturalization; for it is unnecessary to advert to the long-extinct authority of the State.

The first Act upon this subject was passed on the 26th March, 1790. After enacting, that any alien, being a free white person, who has resided within the limits and under the jurisdiction of the United States for a term of two years, might be admitted to become a citizen thereof, on application to any common law court of record, in any one of the States, where he should have resided for the term of one year at least, on making certain proof and taking certain oaths, provides, 1st, that the children of *such persons, so naturalized*, dwelling within the United States, being under the age of twenty-one years at the time of such naturalization, shall also be considered as citizens of the United States. 2dly, that the children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural-born citizens---with a proviso, that the right of citizenship shall not descend to persons whose fathers have never been resident in the United States. 2 U. S. Laws, 83.

This Act, while it affirms the deficiency of the common law, supplies it to a greater extent than any statute of England or Great Britain. It puts native and *such* naturalized citizens upon the same footing, so far as to naturalize their children, born out of the limits of the United States. It did not comprehend the children of persons admitted to citizenship by the States; and, for reasons that were obvious, the proviso did not apply to citizens naturalized under that Act, who *must* have been resident within the United States at the time of their naturalization, but only to such native citizens, or citizens naturalized by British law, as had left the country before or during the Revolution, and had never returned.[1] And it must be remarked, that it is not clear that the children of a citizen father and alien mother, any more than the children of an alien father and citizen mother, were, if born beyond the sea, entitled to the benefit of the Act. It uses the obscure expression of "children of *citizens* of the United States."

This Act was wholly repealed by the Act of 29th January, 1795, 2 U. S. Laws, 496, sec. 4; but the third section of the Act re-enacted the clauses of the Act of 26th March, 1790, above referred to, in the same or precisely equivalent terms.

These clauses were not repealed by the next naturalization Act, of 18th June, 1798, 3 U. S. Laws, 61, which altered the terms of naturalization prescribed by the Act of 29th January, 1795; and they continued in force until the 14th of April, 1802, when an Act of Congress of that date, 3 U. S. Laws, 475, repealed all preceding Acts

respecting naturalization, and by its 4th section enacted the only provision now existing upon the subject. The section is in the following terms:---

"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 upon that subject by the government of the United States, may have become citizens of any one of the said 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; and the children of persons who now are or have been citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States; *provided*, that the right of citizenship shall not descend to persons whose *fathers* have never resided within the United States; *provided also*, that no person heretofore proscribed by any State, or who has been legally convicted of having joined the army of Great Britain, during the late was, shall be admitted a citizen as aforesaid without the consent of the legislature of the State in which such person was proscribed."

The obscurity of the expression "children of citizens," still remained and remains, although the Act has in a great degree become inoperative; and Chancellor Kent seems to have been of opinion, that the proviso, excluding the children whose *fathers* had never resided within the United States, removes the doubt whether the children referred to by the enactment, must be the children of both father and mother citizens; 2 Kent's Comm. 53; but if so, it does it by language almost equally doubtful; and the Chancellor very properly remarks, "that the whole statute provision is remarkably loose and vague in its terms, and it is lamentably defective in being confined to the case of children whose parents were citizens in 1802, or had been so previously."

The reason of these very restrictive words in the enactment, "now are or have been," the writer has not been able to ascertain. They could hardly have passed without notice, and the bill was certainly debated, both in the House of Representatives, where it originated, and also in the Senate, where it was amended and returned to the House, where the amendments were agreed to. The main feature of the law, that which abridged the period of residence required by the Act of 1798, from fourteen to five years, was, however, of so much greater political interest than the details, that it would not be surprising if it were found that the restrictive words had received less consideration than they deserved. As they stand now, they make us, perhaps, the narrowest people upon earth, on this subject, while, at the same time, we are among the most liberal in admitting foreigners to

citizenship; and England, immemorially jealous of attempts by foreigners to obtain a lodgment upon her soil, on the same footing as natural-born subjects, has opened her doors wide to the foreign-born children of her natural-born subjects, even to the second generation.

France, by the *Code Civil*, has also adopted provisions on the subject, which, though, perhaps, not so large as to French natives, as those of England, are larger than our own. "Tout enfant né d'un Français en pays étranger, est Français." Chap. 1, Liv. 1, art. 10.

But the law of France rejects the principle of the English law, and of our own laws, that birth within the limits and jurisdiction of France, makes a Frenchman, or a natural-born citizen or subject of France, absolutely, and provides only for the acquisition of that character by the child so born, on his complying with certain formalities in the course of the year that ensues his arrival at the epoch of his majority.

"Tout individu né en France d'un étranger, pourra, dans l'année qui suivra l'èpoque de sa majorité, réclamer la qualité de *Français*; pourvuque, dans le cas où il résiderait en France, il dèclare que son intention est d'y fixer son domicile, et que, dans le cas où il résiderait en pays étranger, il fasse sa soumission de fixer en France son domicile, et qu'il l'y établisse dans l'année, à compter de l'acte de soumission." Chap. 1, Liv. 1, Art. 9.

Until he makes his declaration after attaining his majority, and fixes his domicil in France, he is not a French citizen or subject; and if he omits to comply with the formalities within the time prescribed, he loses even his contingent title. If he is the child of an American father, what is he under these circumstances? Not a citizen or subject of any country whatever. There are many cases of children in this predicament, which have recently occurred, the children born in France of American fathers who themselves have been born since the 14th of April, 1802; and there will probably be many more.

The subject has not escaped the attention of Congress altogether, but nothing has been done to supply the defect. In 1841 a bill was reported to the Senate by Mr. Wall from the Judiciary Committee, and having been read a second time it was ordered to be engrossed for a third reading, and it was then engrossed and read a third time, and ordered to lie on the table; and was not afterwards taken up. It provided "that persons heretofore or hereafter born out of the limits of the United States, whose *fathers* were at the time of their birth citizens of the United States of America, shall be deemed and considered citizens of the said United States;

provided, however, that the rights of citizenship shall not descend to persons whose fathers never resided in the United States of America."

This Bill does not seem to be obscure in its terms, and perhaps is as comprehensive as the interests of the public require. There would be no propriety in an enactment, that the child of a citizen mother and of an alien father should be deemed a citizen of the United States. This is farther than any previous enactment has gone, unless that construction be given to the clause before cited of the Act of 14th April, 1802, that "the children of persons who now are or have been citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States." If the clause does not require that both the parents be citizens, which may be doubted, then the child of a citizen mother and alien father, is as well comprehended as the child of a citizen father and alien mother; and the proviso that follows, "that the right of citizenship shall not descend to persons whose fathers have never *resided* within the United States," would have little bearing upon that construction; for an alien father might have resided in the United States, and still have been an alien when a child of the marriage was born out of the limits of the United States. All such descriptions as "the children of persons who are citizens of the United States," ought most carefully to be avoided in such a statute; for as the words "children" must be taken distributively to comprehend any child, so "persons who are citizens" may be understood as also used distributively to comprehend any person, whether father or mother, and thus to make the child of an alien father and citizen mother a citizen.

Another bill was introduced by Mr. Webster into the Senate in 1848, was read twice and referred to the Committee on the Judiciary, by whom it was reported with amendments, and ordered to be printed as amended, but no further action was taken upon it than to print it.

The first section provided, "that the children of citizens of the United States born out of the limits and jurisdiction of the United States shall be considered as citizens of the United States: Provided, that the rights of citizenship shall not descend to persons whose fathers have never been resident in the United States."

The provision of the 2d section was, "that every woman married, or who shall be married to a citizen of the United States, and shall continue to reside therein, shall be deemed and taken to be a citizen of the United States."

The language of both these sections is open to criticism for its uncertainty. 1. "The children of citizens," in the first section, may mean any and every child of a citizen whether father or mother, as well as any and every child of citizens, both

father and mother, as well as any and every child of citizens, both father and mother. 2. Though the alien mother is, by the second section, made a citizen by her marriage with a citizen, and thus the child of a citizen father and any mother is within the benefit of the first section, though it be held to mean the children of both father and mother citizens, yet the continuance of the woman's residence in the United States, is a part of the qualification of her citizenship, and if she ceases to reside at any time, her citizenship may be questioned, *ab origine*. And further, her residence in a foreign country at the birth of her child, brings up the question, whether actual residence is meant, or whether constructive residence is not sufficient. Doubtless there may be more said for constructive, than for actual residence, as the true meaning of the words; but why should a law about to be enacted, leave open such questions as these?

A third bill was introduced by Mr. Bradbury, in 1852, read twice, and referred to the Committee on the Judiciary, who reported it with certain amendments, namely, to strike out the 2d section, and to amend the title; and the bill was no further acted upon.

The first section was precisely in the words of the first section of the bill introduced by Mr. Webster, in 1848, and is open to the same remarks. The second section was precisely in the words of the second section of Mr. Webster's bill, and it is this section which the Judiciary Committee recommended to be stricken out. That Committee would seem, therefore, to have been in favor of a provision, the same as the first section of Mr. Webster's bill, without retaining the second, which made the ambiguity of the first less material.

In the opinion of the writer, the best practical measure of the three, is that of the Judiciary Committee in 1841, and it is probably broad enough, without any provision for the citizenship of the mother. But if her citizenship is thought material, as well as that of the father, then, instead of the ambiguous words, "children of persons who are citizens of the United States," other words should be used, such as, "children of parents, both of whom are citizens of the United States at the time of such birth," &c., and then a section may be added or omitted at pleasure, that "a woman married, or who shall be married to a citizen of the United States, shall be deemed and taken to be a citizen of the United States;" and thus the children of a citizen father, and of any mother, of whatever country, will come within the first section. The conditional qualification of continued residence by the wife, seems to be highly exceptionable, since residence was no qualification of the husband's citizenship; and thus her civil condition may alter when his does not; while the principle of the provision is to conform her civil condition to his. The Code

Civil of France, is, that "L'étrangère qui aura épousé un Francais, suivra la condition de son mari." Chap. 1, Liv. 1, Art. 12. "Une femme Francaise qui épousera un étranger, suivra la condition de son mari." Chap. 2, Sec. 1, Art. 19. She may regain her quality of Frenchwoman when she becomes a widow, if she resides in France, and declares that she will fix herself there. The statute of 7 & 8 Victoria, sec. 16, before cited, says that "any woman who shall be married to a natural-born subject or person naturalized, shall be deemed to be herself naturalized, and have all the rights and privileges of a natural-born subject." The provision of this statute seems to be made in the best terms, if any provision upon the subject is adopted.

The great object of such provisions should be, to give clearly and unambiguously, the rights which it means to give; for no ambiguities are more pernicious than such as tend to disturb individuals and families in regard either to succession to property, or to the exercise of political franchises.

It is with the view of promoting the security of such interests, that the writer submits the foregoing remarks for public consideration.

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1. Note. Upon further consideration, this construction of the Act seems very doubtful. The Proviso "that the right of citizenship shall not *descend* to persons whose fathers have never been resident in the United States," seems intended to prevent the foreign-born child of a citizen from becoming himself a root, or *stirps* of citizenship to *his* foreign-born child, if the father had never been resident in the United States. Without such a restriction, it might have followed, that the foreign-born child upon whom the enacting clause first operated, being made by it a citizen himself, *his* foreign-born child would be the foreign-born child of a citizen, and come within the enacting clause; and so on successively the foreign-born children of that line forever; and thus a race of foreign-born citizens would be established , who, perhaps, had never been within any of the United States, nor possessed any relation to them except that of remote origin. The *Proviso* was probably intended to prevent this consequence, and to have no other effect. The term of residence required by the Proviso, and the character of it, whether occasional or domiciliary, are, however, not defined or described, but left to construction.