# TWO TRACTS

SHEWING,

THAT AMERICANS, BORN BEFORE THE INDEPENDENCE, ARE, BY THE LAW OF ENGLAND, NOT ALIENS.

FIRST,

A DISCUSSION, &c.

SECOND,

A REPLY, &c.

BY A BARRISTER.

*LONDON:*

PRINTED FOR REED AND HUNTER, LAW BOOKSELLERS, BELL-YARD, LINCOLN'S-INN; AND J. HATCHARD, PICCADILLY:

*By T. Davison, Lombard-street, Whitefriars.*

1814.

THE de
at last,
ject, wh
sentatio
become
which m
known
law of
and spe
that suc
and wha
and the
resorted
matter o
Hall.

# PREFACE.

THE design of this Publication is, to provide, at last, some authentic information on a subject, where misapprehension, and misrepresentation have so long prevailed, that it is become necessary to have something in print, which may be referred to, for vindicating the known and long established doctrine of the law of England, against the assumptions and speculations of general reasoners; and that such persons may be apprized, what are, and what are not, the topics of argument, and the principles of decision, that would be resorted to, if this question should become a matter of judicial cognisance in Westminster Hall.

The first of these tracts, entitled A DISCUSSION, arose from an occasion, which required, the subject should be well understood. The result of the inquiry was, during its progress, at several intervals, committed to paper, for the sake of precision, in an earnest pursuit after truth, and not with any view to publication. The manuscript was laid by for some years. An offer having been made to insert it in MR. CHALMERS's COLLECTION OF LAW OPINIONS, the offer was accepted; and it is there printed, in the form of occasional minutes, precisely as it was originally written. It is now reprinted separately, the better to serve the purpose abovementioned.

The second of these tracts, THE REPLY, arose from a paper printed in Mr. Chalmers's Collection, under the title of a RE-STATEMENT of MR. CHALMERS's OPINION, being an argument on the other side of the question.

THE DISCUSSION and THE REPLY con-

tain every thing, which seems necessary for completing the demonstration, that *ante nati* Americans are not aliens; and they are now submitted to the public, in full confidence, that every lawyer, who reads them, will hold the opinion there maintained, and renounce every position, that is contrary to it, as no part of the law of England.

The opinion maintained, is a conclusion from two propositions, that never were disputed. 1st. That a natural-born subject is one born within the king's allegiance; 2d. That an alien is one born out of the king's allegiance; hence it follows, a natural-born subject cannot become an alien, because an alien must be born an alien; an American, therefore, born before the independence was acknowledged, and, of course, born within the king's allegiance, is not an alien. The popular notions, that have been objected to this plain conclusion, are the positions that, I say, make no part of the law of England. The examination, and refutation of such po-

pular notions, constitute the matter of THE DISCUSSION and THE REPLY: It is the combating of error, that has caused so much detail of argument, not the elucidation of truth, which needs no more than the few words I have used, in the two legal definitions and the conclusion upon them.

The difference between the Barrister, and his Opponents is this. He is for maintaining the law as it is, and as it has been long known to be. They are for setting up what is not law, and they would establish it by what is not legal argument.

THE EDITOR.

A

# DISCUSSION

ON

## THE QUESTION,

WHETHER INHABITANTS OF THE UNITED STATES, BORN THERE BEFORE THE INDEPENDENCE, ARE, ON COMING TO THIS KINGDOM, TO BE CONSIDERED AS NATURAL-BORN SUBJECTS?

*Whet*
*there be*
*Kingdo*

I THOU
acknowl
seems t
what is
sition th
be sepa
point th
were bo
realms
remain
that nat
cannot,
wards, b

# DISCUSSION

## ON THE QUESTION

*Whether Inhabitants of the United States, born there before the Independence, are, on coming to this Kingdom, to be considered as Natural-born Subjects?*

I THOUGHT the affirmative of this question was acknowledged by all lawyers. One authority, it seems to me, is sufficient to support it; I mean, what is laid down in Calvin's case, on the supposition that the crown of Scotland might, possibly, be separated from that of England: upon which point the judges resolved, "That all those who were born under one natural obedience, while the realms were united under one sovereign, should remain natural-born subjects, and no aliens; for that naturalization, due and vested by birthright, cannot, by any separation of the crowns afterwards, be taken away; nor he that was by judg-

ment of law a natural subject at the time of his birth, become an alien by such matter, *ex post facto*, and, in that case, upon such an accident, our *post natus* may be *ad fidem utriusque regis*," (7. Rep. 27. b.) or, to apply the words to the present case, our *ante natus*, or American born before the separation, may be *ad fidem regis*, and also a citizen of the United States*.

Such a plain and explicit authority as this, seems to make it unnecessary to search for any other; however, objections are raised to the claim of such persons, to be considered as British-born subjects.

1st. It is objected that, admitting the common law to be as laid down in the above resolution, there are circumstances in the American revolution, that distinguish it from all other changes of sovereignty. The island of Jamaica, say they, may be ceded by the king, and this being done without the consent of the inhabitants, there is no reason why they should lose their birthright of British subjects; but the Americans, a whole people in arms, claimed to be released from the English government, and the king, at the peace, consented to give up his authority: how can such a people be afterwards considered as British subjects!

2dly. It is objected that there are certain statutes,

* The *post natus* there, that is, one born *after* the union with Scotland, corresponds with the *ante natus* here, that is, one born before the separation from America.

and public acts, which stand in the way of the abovementioned common law principle taking effect.

3dly. It is even objected by some, that no principle of the common law can support so unwarrantable an anomaly, as that the same persons should belong to two states, and that admitting them to levy war against the king in the character of American subjects, without being deemed traitors, and then allowing them to come into this kingdom in the character of British subjects, is an inconsistency, which, they think, cannot be countenanced by the law of England.

To the first of these objections, it may be answered, that the peace which put an end to the American war, ought to be considered as putting an end to all the consequences that might be imputed to the Americans, by reason of their rebellion; and, indeed, there is in the definitive treaty, article 6, an express provision, that no person should, on account of the war, suffer any future loss or damage, either in his person, liberty, or property.

Further, we should inquire, what the Americans could be supposed to relinquish by making war, and what was the result of the king making peace? The Americans could not mean to renounce the privileges of British subjects; because they rebelled and made war, in order to get something which they had not, and not to surrender what they pos-

sessed: it was to release themselves from their allegiance; but no man can throw off his allegiance at his own option, as must be admitted by every one. Did the king, then, make peace with them, in order to take away their rights as British subjects? But, surely, it is well known, that the king alone cannot take away the rights of a British subject from any one. In the peace, therefore, made with the Americans, there seems to have been no legal competency in the contracting parties, to produce the effect supposed, of making the Americans aliens. This must appear even upon general principles only; it will presently be shewn that there was not, *de facto*, any thing in the treaty upon the subject of British rights, that warrants the supposition of their being taken away from the Americans.

There cannot, in a juridical point of view, be any difference between the supposed case of cession of territory, without consent of the inhabitants, and the present case of cession to gratify the wishes of the inhabitants. The allegiance, in both cases, is of the same nature; the allegiance is not to the soil, but to the person of the king; and as no transfer or cession of the soil to a foreign prince, makes any alteration in the allegiance or birthright of the subject, but the same still remains in the person of the subject, it imports nothing, whether such cession is made with or without his consent. In both cases he becomes a British-born

subject, living in a foreign land, and liable to the alteration of circumstances, which every where attends a British subject, when out of the king's dominions.

That going out of the king's dominions, under the charge of criminality, at the choice of the party, and by the king's consent, does not make a British subject an alien, is evinced from the old law of sanctuary, in cases of felony and abjuring the realm to save the felon's life. It is expressly laid down, "*Qui abjurat regnum, amittit regnum, sed non regem; amittit patriam, sed non patrem patriæ;* for notwithstanding the abjuration, he oweth the king his allegiance, and he remaineth within the king's protection; for the king may pardon and restore him to his country again. Allegiance is a quality of the mind, and not confined to any place." (Calvin's case, fol. 9. b.)

As to what is now said, of the Americans being a whole people in arms, demanding to be released from their allegiance, it should be recollected, that the language in this country, during the whole of the American war, was different: it was said, "the thinking part, those who had property and character," and some said, "the majority of the people," were against the violent measures which were driven on by an active minority of agitators. Is it, then, at all reasonable to infer upon those persons, who were friendly to this country, the consequences of such resistance and rebellion? In-

deed there is nothing so unjust in the law of England. The law does not consider the king's subjects in a mass, under the name of *the people*, in any number more or less. They cannot be considered in a legal view, but as individuals; what is the law respecting one, is the law respecting one million, and every man's case stands upon its own ground and circumstances. It is, therefore, utterly inconsistent with the law, to impute to the Americans any disfranchisement as a people: if there is any such extinguishment of rights, it must be in some individual; and if it is not to be discovered in one, it is not to be found in a million.

Secondly, as to the statutes and public acts which are supposed to stand in the way of the abovementioned principle of common law: the principal statute which, I believe, is relied upon, is statute 22 Geo. III. c. 46. This is a parliamentary authority; enabling his majesty to make peace with America; an authority which had become necessary, because the parliament had passed some acts of prohibition and penalty which might stand in the way of peace, as stat. 16 Geo. III. c. 5. and stat. 17 Geo. III. c. 7.* for prohibiting trade and intercourse with America, and for authorising hostilities against the rebels. The American war having thus become a parliamentary

* These acts were afterwards repealed by stat. 23 Geo. III. c. 26.

measure, it required the concurrence of parliament to make peace, which, in ordinary cases, belongs to the king alone.

Accordingly, stat. 22 Geo. III. c. 46. authorises the king to conclude "a peace or truce with the said colonies or plantations, or any of them;" and that the abovementioned prohibitory acts might not be an impediment to the progress of negociation, the statute authorises the king "by letters patent, under the great seal, to repeal, annul, and make void, or suspend the operation or effect of any act, or acts of parliament, which relate to the said colonies or plantations;" meaning under these general words, most probably, the abovementioned prohibitory acts, and none other.

There might be another reason for an act of parliament, namely, some hesitation as to the persons with whom the king's commissioners were to treat, whether they had competency: therefore, the act speaks of treating with *commissioners* named by the colonies, with any *body* or *bodies politic*, with any *assembly* or *assemblies*, or *description of men*, or with any *person* or *persons* whatsoever.

Such are the provisions of the act for making peace with America, which is supposed to give authority to the king, to take away the rights of British-born subjects from the inhabitants of the United States, and make them aliens. I can only ask those who allege this act, to shew us by what words, or by what construction of words, such

power is given to, or is intimated to reside in, the king? And with such appeal I dismiss this statute.

The next document that occurs, in course of time, is the definitive treaty, made in September, 1783, in pursuance of such parliamentary authority. In the first article of this treaty, the king "acknowledges the United States (naming the several colonies) to be free, sovereign, and independent states; and for himself, his heirs, and successors, relinquishes all claims to the government, propriety, and territorial rights of the same, and every part thereof." This leading and general provision being made, there follow in the treaty some few subsidiary stipulations, all tending to give effect to the above relinquishment of sovereignty; and to the confirmation of peace and amity. After reading these, I must again ask the like question as before, where is the provision, in the treaty, for doing that, which I have not yet discovered the king was authorised by the act to do? It appears, from reading the treaty, that the king has not, *de facto*, done that which he was not enabled by the act, nor was otherwise authorised, *de jure*, to do. He has not taken away the rights of British-born subjects residing in the United States, nor has he renounced the allegiance of his natural-born subjects residing there; he has acknowledged the colonies to be free and independent, and relinquished all sovereignty over their territory: in doing so, he has departed with some of his own royal preroga-

tive, and has circumscribed the claims he before had on the allegiance of his natural-born subjects *residing there.* This was his to give, and he has given it, but the rights of British subjects the king had no power to take away; he has not, *de facto,* taken them away; nor was it a time for taking, but a time for giving and conceding: the Americans meant to add to what they already enjoyed. They would have felt it an injury, if it had been proposed to them, no longer to be deemed British-born subjects; and recollecting, as we must, the feeling and speculations in this country, looking forward, as many did, to the colonists quarrelling amongst themselves, and coming back, all, or some of them, to their old connection with us, we may be sure, no one in this kingdom would have ventured to propose, that they should be stripped of the character of British subjects, to which they were born, and be rendered aliens, under circumstances which would indicate, on our part, a disposition to perpetual estrangement and enmity.

So far from this, I think, there is even in the treaty an express saving of the rights of a British-born subject, among other rights and claims. In article 6, it is provided, "That no person shall, on that account, (meaning the preceding war) suffer any future loss or damage, either in his person, liberty, or property." If an American comes to this kingdom, and is treated as an alien under the alien act, he assuredly suffers in his person and liberty;

and such suffering must be on account of the war, which those ought to allow, who make the first of the above objections: he surely cannot be said to suffer by the peace, which was meant for conferring advantages, not for taking them away.

The next document, where we are to look for something which is to control the above principle of the common law, is the commercial treaty, 19th of November, 1794. But in this I can find nothing to the effect supposed, and I must put the like interrogation as before; yet with still less expectation of an answer, because, in this treaty, we have something more than negative evidence, we have here express testimony, that the rights of British-born subjects were intended to be continued to the Americans by the first treaty, and that it was intended, by the commercial treaty, to give them a longer continuance to their posterity. By the 9th article it appears, that the American citizens then held lands in the dominions of his majesty; but they must be British-born subjects to hold lands, and not aliens. It appears, therefore, that his majesty, in November, 1794, eleven years after the treaty of peace, recognized the citizens of the United States as British-born subjects. I lay this stress upon the declaration of the fact, because I cannot suppose a public and solemn instrument, as this treaty is, would speak of lands being holden in any other sense than that of being *lawfully* holden.

The framers of the treaty certainly understood it in that sense, because the provision they intended to make was, to fortify the titles to these lands in future times, when, certainly, the title to them would become not lawful. They foresaw that, although the present possessors were British-born subjects, their descendents, born in the United States, out of the king's allegiance, would be aliens*. It was accordingly stipulated, "that neither they nor their *heirs* or assigns shall, so far as may respect the said lands, and the legal remedies incident thereto, be regarded as aliens." If it should be objected, that the provision here speaks as well of the present possessor as the heirs, the answer is, that it would not have been so well worded, if the present possessor had not been named; and if he had not been named, as well as the heirs, it might have been construed into an implication, that he was to be excluded from the protection intended for the heirs only.

Another more probable reason for this stipulation was, to bind the two nations, not *to make* any disqualifying law, that by rendering the others aliens, would disable them from holding lands. This future possibility, without any doubt about

* They might, for their sons, and grandsons, have the benefit of stat. 7 Ann. c. 5. stat. 4 Geo. II. c. 21. and stat. 13 Geo. III. c. 21. but for later descendents, they needed a new provision.

the then present state of the law, might be sufficient reason for such a cautionary provision.

Whatever observation may be indulged on this part of the article, the averment in the beginning of it remains unaffected; and this averment, ot Americans being British-born subjects, is again published, ratified, and confirmed by parliament, in stat. 37 Geo. III. c. 97. sect. 24, 25, which was made for carrying into execution the treaty. This article of the treaty is there recited at length, and the two clauses, sect. 24. and 25. purport to carry it into execution.

If there is any thing in this statute to control the effect of the common law position so often alluded to, I think it should be in these two clauses; yet I have not been able to discover such a meaning, and I must leave it to be demonstrated by those who have found it out. The clauses appear to me to have something particular in them; they omit the naming of *heirs*, which was the enactment most wanted, and they supply this omission by a winding wordiness in the proviso, that is not easily evolved. There is a grudging caution in the whole conception of these clauses: I believe the framers of them did not like the matter of them, being unwilling to bear this parliamentary testimony to the legal conclusion, that *ante nati* Americans are British-born subjects, so as to hold lands.

As to the third objection, the anomaly and inconsistency of Americans being citizens of the

United States while there, and being British-born subjects when here; 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 shewn, *ad fidem utriusque regis**. British subjects may voluntarily put themselves in such a situation; it is part of the privileges of a British subject to be at liberty so to do. Have we not British subjects who are naturalized in Holland, in Russia, in Hamburgh, in various places on the continent of Europe? Do not British subjects become citizens of the United States? Some persons are born to such double character; children and grandchildren, 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.

Thus far of individuals; the like may happen to a whole community, a whole people. When the king relinquished his sovereignty over the United States, the land became foreign, while the inhabitants remained all British subjects. When the king's forces took Surinam, and the other Dutch colonies, the land became British, but the inhabitants still continued aliens. The personal character of alien, with which the Dutch colonists

* Vid. ant. pa. 2.

were born, still remains to them, and the indelible character of British subject, with which the Americans were born, remained to them after their country was made foreign.

I am aware of the difficulties which such persons may labour under, with these double claims of allegiance upon them. Such difficulties must be got through, as circumstances will allow, and consideration should be had for the parties, according to their respective situations; more especially with a distinction between those who brought themselves into such embarrassing situation voluntarily, and those who were born in it; and more particularly with regard to the difference between that, which is the act of private individuals, and that, which is a national proceeding, involving a whole people. In weighing such circumstances, it will soon appear, that these are all objections which relate more to facts than to the law of the case; they are inconveniences in the way of full exercise and enjoyment of the rights in question, but detract nothing from the rights themselves. On the one hand, the king cannot reckon upon the full and absolute obedience of such persons, because they owe another fealty besides that due to him; on the other hand, the subject cannot have full enjoyment of his British rights. Indeed, it will be found, he will have as little of his own rights, as the king has of his obedience; for if the rights of a British subject are examined, it will appear, that almost all of

them depend on a residence in the king's dominions, and that when he removes into a foreign country, as they are without exercise, or application, they are suspended, and have no apparent existence.

I have heard it asked, if the king was to send his writ to command the attendance of Mr. Jefferson in this kingdom?—I agree he would not come; but that would be no test of the law upon the subject; it is an inconvenience in point of fact. The law, in the execution of it, is liable to many obstructions which prevail, and yet the judgment of law is not deemed thereby invalidated. If the king had sent such a writ to general Washington, at the head of his army, I suppose he would not have obeyed it, and yet no one would have deemed it a demonstration, that he was not amenable to our law: Why then should a pacific refusal from Mr. Jefferson have in it more of the force of a legal argument? And yet, I think, Mr. Jefferson might decline obedience to such a command, admit himself to be a British subject, and have the law on his side too.

Mr. Jefferson might answer such a call upon him by saying, true it is, I was born a British subject, and I myself have done nothing to put off that character. But your majesty has, by the treaty of 1783, relinquished all sovereignty over the United States; and, as your majesty, and all the world know, it was thereby intended that your

subjects here should form a government of their own; we have so done, under the faith of your majesty's grant and covenant; and it has happened, in the progress of events, that I am now exercising an office in that government which necessarily requires my presence here. I am brought into this situation in consequence of an act of your majesty, by which it was designed that myself, or some other of your subjects here, should come into such a situation: being so circumstanced, I am no longer at liberty to make a choice of my own. There is a moral and political necessity, that makes it impossible, at present, to obey the commands of your majesty; I pray your majesty's forbearance; I plead your majesty's own covenant and good faith; and I rely upon them as a justification, or excuse, for my disobedience.

Surely this would be a good plea in point of law, and Mr. Jefferson might have the benefit of his American citizenship, in perfect compatibility with the claims upon him from British allegiance. Such *scintilla juris* in the king of England, can, I should think, raise no flame in any American bosom.

There are much stronger cases, of a similar kind, that have never startled any one with their anomaly or incompatibility. Mr. J. and other American citizens have entered into their offices, their engagements, and their situations, under the faith of the king and the parliament. But how many British subjects have become citizens,

burghers, burgomasters, and have taken other offices in foreign countries, voluntarily, upon speculations of private interest, and from various inducements, all of them of an individual and personal nature! If such persons had been called upon by the king's writ, they would not have had so good a plea as Mr. J. and yet, probably, none of them would have moved from their station. Was it ever heard that such persons, when returned to this kingdom, were deemed to be less of British subjects, because they had lived, and risen to public stations, in foreign states? No, certainly, they are considered as having exercised the liberty belonging to all British subjects, respecting whom there is no restraint but the considerations of prudence which are suggested by the occasion; and yet none of these volunteers in foreign service have so much to say for themselves as an American citizen, who chuses to leave the United States, and to spend the remainder of his days in this kingdom. The local allegiance he has acknowledged to a foreign government, is recognized by the king and parliament: he has never lived wholly out of the view of the sovereign power under which he was born; and the language, law, and manners he has been conversant with during the whole of his residence in the ceded states of America, restore him to this kingdom, and to his original and natural allegiance, unchanged, and quite British. Why should a person of this description, an American citizen,

be the only one rejected and excluded from the rights of a British subject, because he owes a local allegiance in another country?

There is a parliamentary record, testifying instances of such contumacy. In stat. 14 & 15 Henry VIII. c. 4. it is recited, that Englishmen living beyond sea, and becoming subjects to foreign princes and lords, "will obey to none authority under the great seal of England; but they give themselves over to the protection and defence of those outward princes to whom they be sworn subjects." It is herein recorded by parliament, that Englishmen thus expatriated themselves, and refused obedience to the king's writ; and yet no declaration or enactment was made by parliament on that point of disobedience, so as to disfranchise them, and make them aliens; but there is by that act imposed on them merely a penalty in one particular article, that of importation of goods. Such persons, it seems, had abused their privilege as Englishmen, and had lent their name to cover the goods of persons of the foreign country where they resided. To put an end to such impositions, they were in future to pay alien duties, as the subjects of the country where they resided.

Compare these recusant absentees alluded to in the statute, with the American now in question. The former voluntarily leave the kingdom, make themselves subjects of a foreign state, refuse obedience to the king's writ, abuse their privilege of

natural-born subjects to defraud the revenue. The latter is born under the king's allegiance, in a country which the king has since ceded, and made a foreign land. It does not appear, this particular person had any concern in the public affairs of the country, till it was so settled by his majesty's solemn covenant and grant. He chuses, in the latter part of his life, "to go home," (for such is the phrase in the United States to the present moment,) and end his days here. No act of recusancy, or contumacy, is imputed to him.

Now compare the consequences in the two cases: the former, though solemnly noticed and censured by parliament, is not marked by any penalty of disfranchisement, though thus alienated from his native country, but is merely mulct in the payment of alien duties; the latter is told he is an alien, and has lost his right of a natural-born subject.

The further we go, the more we find of precedent and principle against such a sentence of disfranchisement.

These are the answers which, I think, may be made to the above three objections *. These answers seem to me sufficient, and nothing further need be done but to come round to the place from

* I recollect another objection: how is the question of American citizens to be tried? I see this was an objection in Calvin's case: it is the second of the five inconveniencies, and it is answered in the Report, fol. 26, b.

whence we set out, namely, the position of law resolved by all the judges in Calvin's case, according to which the *ante nati* in the United States continue still British-born subjects, and, coming here, are entitled to all the privileges of such. The plain and explicit principle laid down, on that occasion, has, I suppose, governed the minds of lawyers, whenever they have been consulted on the application of it to American citizens. It is owing, no doubt, to this uniformity of opinion, that the question has never been brought to argument in any court. During the space of 25 years, since the independence of America was declared, there has never been so much doubt on this claim, as for any lawyer to advise a contest by suit. I deem this want of judicial determination, coupled with what follows, to be a great testimony for the affirmative of the question.

In the mean time lawyers have been consulted, no doubt, very frequently, and written opinions are in the possession of many. I have been able to obtain a sight only of two. I have seen an opinion of Mr. Kenyon, in 1784, where he declares, in few words, and without hesitation, or qualification, that American citizens may hold lands as British-born subjects. I have seen an opinion of the attorney-general Macdonald, in Feb. 1789, that engaging American seamen for foreign service, should be prosecuted as the offence of enticing British seamen into a foreign service: the pro-

secution was commenced, the indictment found, but the attorney-general entered a *noli prosequi* upon the party paying the costs.

Among the opinions of lawyers, I must mention what I received from Mr. ———, to whom I sent a statement of the case, with the view of learning, whether any alteration had taken place in the opinions of lawyers of late days: I knew I should have from him the current opinion of Westminster-hall; he at once wrote with pencil, on the back of the paper, that such persons are British subjects; he seemed to answer it, as if it was as known and as established, as that the eldest son is the heir in fee simple.

I made enquiry at the Custom-house, where, I was told, I might possibly find notes of some decisions at *nisi prius* in the Exchequer, which conveyed the chief baron's opinion, that a domiciliation in America took away the British character from a seaman, employed in navigating a British ship. The solicitor said, he knew of no such cases, nor of such opinion; on the contrary, he said, it was the usage of the Custom-house to consider the *ante nati* in America, as British-born subjects, and they were registered as owners of British ships: he informed me also of the above prosecution for enticing British seamen, and he gave me copies of the papers.

These authorities from the opinions of lawyers, and the practice of a public office, cannot be closed

better than by an authority superior to all of them; I mean what has been already mentioned, the 9th article of the treaty of commerce, and sect. 24 and 25 of stat. 37 Geo. III. c. 97. where there is a solemn declaration by the king and the parliament, that American citizens did then hold lands; which they could not lawfully do, unless they were deemed British natural-born subjects.

After such authorities, there does not seem to me any need to add a word more.

*Dec.* 9, 1808.

*December* 15, 1808.

Since writing the above, I have been told, that the subject of *ante nati* is no part of the present question, and, that what the objectors mean to urge, is as follows: First, That the Americans, at the time of making stat. 22 Geo. III. c. 46. were in a state of legitimate war, bearing the character of foreign enemies, and not that of rebels. This is implied in the passing of such an act, and in the wording of it:—*Peace* and *Truce*—was not the language to hold to rebels; nor did the king need the authority of an act of parliament to proceed with traitors: the act has no object, if the Americans are not admitted to be foreigners in this transaction. Secondly, That after the peace made, it still remained for Americans, if they chose, to adhere to the British character; and it is not meant to deny, that *primâ facie*, the Americans are to be deemed British subjects. But those who domici-

liated themselves in the United States, showed thereby a determination to become American citizens; and after such choice, they cease to be British subjects, and cannot resume that character.

If I have not stated the above points quite correctly, nor with all the advantage that belongs to them, I hope I shall be pardoned by those who made them, and who rely upon them: they were communicated to me, in a rapid conversation only; for nothing, on that side of the question, has been put into writing: I have done my best to retain what I heard, and to state it fairly and fully.

I am totally at a loss to comprehend, at what period of the war, or by what modification of carrying it on, either on one side or the other, or by what events or circumstances, that which was once rebellion ceased to be so, and the traitors became changed into aliens waging legitimate foreign war. As to the words *peace* and *truce*, I do not understand, why they are not as applicable to war, coupled with rebellion, as to war not coupled with it. For war is still war, whatever may give rise to it; and I do not see why the war of rebels is not legitimate, *quatenus* war, and, therefore, needing every consideration, that attends all wars. Surely, in the time of Charles I. there were *treaties*, and *truces*, and *peace* too; there was a peace, for a short time, I think, in 1645, and yet, the lord-chancellor Clarendon intitled the narrative of these transactions, a "History of the Rebellion;" and no

man has ever doubted, be he law-man, or layman, that the war levied against Charles I. was treason and rebellion; although it was attended with success, and could command names, and although many amongst us have long agreed in applying to it the qualified appellation of *civil war*.

As to the necessity of making such act of parliament, and giving thereby power to the king to make peace and truce, because the Americans were become alien enemies, and ceased to be traitors and rebels; it is very curious, that a different reason for making it was given by the makers of the act; that reason is recorded in the parliamentary debates of the time; and the reason so given, seems to me to supersede the necessity of inventing any new one, like the present.

The bill was called "the Truce Bill," and was brought into the house of commons, on February 28, 1782, by the attorney-general Wallace. It does not appear, that it became a subject of debate in any of its stages; the nation and parliament were bent upon peace, and any measure tending to bring it about was too welcome to be questioned or criticised.—[See Debrett's Debates, vol. vi. p. 341, 363.]

However, this act, which came into existence without a struggle, afterwards was made a subject of discussion. When it had been carried into execution, and the provisional articles with America, together with the other preliminary treaties, came

to be considered in parliament, in February 1783, this act was brought in question, and there was expressed great difference of opinion, as to its original design, the construction to be put on it, and the effect it produced. In the first debate, it was objected to the provisional articles, that the king has no right, by his prerogative, nor by the act of last session, viz. stat. 22 Geo. III. c. 46, to alienate territories not acquired by conquest during the war. The gentlemen of the law being called upon by this objector*, Mr. Mansfield answered, that, certainly by the act of last session, the king was authorised to alienate for ever the independence of America.—[Debrett's Debates, vol. ix. 280.]

On a subsequent day, the same gentleman [Debrett's Debates, vol. ix. 312.] again raised a question upon this act. It appeared to him, that no such power was given to the king by the act; that any power to alienate part of his dominions, or abdicate the sovereignty of them, should be conveyed in express words, and not left to implication and construction. This brought up Mr. Wallace, who was the framer and mover of the bill, and who declared, that such power was given by the act: he said, he knew of no power in the king, to abdicate part of his sovereignty, or declare any number of his subjects free from obedience to the laws in being.

* Sir W. Dolben.

As soon, therefore, as the resolution for peace had passed the house, he had, with a view to enable his majesty to make peace, drawn the bill; and as the subject matter of it was extremely delicate, he had been exceedingly cautious in wording it as generally as possible; but the whole aim of it was, to enable his majesty to recognize the independence of America; and that it gave the king such a power, was, he said, indisputable, because by the wording of it that power was vested in the king, any law, statute, matter, or thing to the contrary notwithstanding.

This explanation, by the mover of the act, did not satisfy the objector, who had been the seconder of it, but who now declared, he had never supposed such an interpretation could be put on the bill; and if he had thought it could, he would not have seconded it: but it was defended by the attorney-general Kenyon*, who said the act clearly gave authority to the king to recognize the independence of the Americans; adding, that it was obvious, the Americans, standing in the predicament of persons declared to be rebels at the time of passing the act, it was necessary to word it in the general and cautious manner in which it stood upon the statute book.

Though the attorney-general Kenyon thus sup-

* He succeeded Mr. Wallace, on the change of the ministry, in March 1782.

ported the late attorney-general Wallace, in the construction and effect of his act, he, at the same time, denied the position, that the prerogative of the crown needed any such special act of parliament, to empower it to declare the American independence. Mr. Lee joined in opinion, upon that point, with Mr. Wallace. [Debates, p. 314, 315].

A like difference of opinion was discovered among the law lords, in the discussions of the provisional articles, and the preliminary treaties. It was maintained by lord Loughborough, that the king had no authority, without parliament, to cede any part of the dominions of the crown, in the possession of subjects under the allegiance and at the peace of the king; and this, his lordship said, could be proved by the records of parliament. This doctrine was treated by lord Thurlow as unfounded, and he strongly maintained the contrary.—[Debates, vol. ii. p. 88, 89.]

The difference between the two lords had arisen, not upon the independence of the United States, but upon the cession of the Floridas to Spain; and it was on that account, no doubt, lord Loughborough stated his proposition with the words, *under allegiance and at the peace of the king*, which was a proper description of the Floridas; but the same could not be said so fully of the United States, which, though under the allegiance, could not be so well said to be at the *peace* of the king. Lord Thurlow, it is plain, did not admit, that this difference

in circumstances made any difference in the power of the prerogative. It must surely be confessed, that this cession of the Floridas to Spain, at the very moment that the American independence was acknowledged, makes a great breach in the hypothesis of Mr. Wallace, Mr. Lee, and lord Loughborough, who thought stat. 22 Geo. III. c. 46, absolutely necessary for enabling the king to alienate part of his dominions. Indeed, the precedents are all against such a restriction on the prerogative; for when has there been a peace, that some West India island has not been ceded, not only such as has been taken during the war, but those of ancient possession? In truth, this is another distinction that has no solid foundation in law, but is a mere conceit. It is well known, that the laws of navigation attach upon a possession in America or Africa, immediately on a surrender; and the territory is, to all intents and purposes, as much the king's as any ancient colony or plantation. It is therefore wholly assumption to raise the above distinction, and to consider such a conquest as less a part of the dominions of the crown, and less under the protection of parliament, than the more ancient possessions.

But taking the judgment of parliament, (which finally approved all these treaties) for the supreme authority on this question of law, we are obliged to conclude, that the king had power to relinquish to the king of Spain his sovereignty over the two

Floridas, without the special authority of any act of parliament, enabling him so to do. This is a decision, after argument, when the objection had been taken and reasoned upon, and both sides heard openly and fully. It cannot, after that, as I think, be doubted, that the same parliament would have recognized the king's power to relinquish his sovereignty over the United States, although there had been no such act as stat. 22 Geo. III. c. 46. The relinquishing of sovereignty to the king of Spain, whereby he parts with all royal authority over his subjects in the Floridas; and the relinquishing of sovereignty over the colonies of New Hampshire, &c. &c. to the United States, whereby he parts with all royal authority over his subjects in New Hampshire, &c. &c.; where is the difference, in a juridical view, between these two cases? If you analyse them, and bring them down to their first principle, you will find it amounts to the same thing in both cases; to this, and nothing more, namely, that he makes the Floridas, and makes New Hampshire, &c. equally foreign dominions. Every consequence that follows upon the relinquishment of sovereignty, is ascribable to that, and to that only. The inhabitants of the Floridas, and of New Hampshire, &c. &c. become British subjects living in a foreign land, and lose all British advantages, now that British ground is taken from under them, in like manner, and in none other, as if they had removed themselves to the foreign soil of Spanish, or Portu-

guese America. Indeed, no one has ever pretended, that the inhabitants of the Floridas, who were British subjects born, were made aliens by the cession, though some do mistakenly suppose, this deprivation to happen to Americans of the United States, who were put under the same circumstances, at the same time, by the same, or by a similar operation, certainly for the same purpose, that of peace.

I say, that the cession has the single effect of making the Floridas, and the united states of New Hampshire, &c. &c. foreign countries; and, that no alteration is made in the birthrights of British-born subjects, because, what is covenanted, granted, and agreed in the treaty, relates wholly to the former, and there is not a word that relates to the latter. The Floridas are ceded to the king of Spain; that contains in it nothing so particular as to raise a question: the material consideration is, the case of America. The definitive treaty begins by the king acknowledging the united states of New Hampshire, &c. &c. to be free, sovereign, and independent states; and he relinquishes all claims to the government, propriety, and territorial rights of the same: the king here parts with *the states*, that is, the political machinery formed for the government of those colonies, the governor, the assembly, &c. &c. &c. and declares them independent; to make this independence quite clear and unclogged, he relinquishes all territorial sovereignty. The

thing given up by the king, is his own superintendance and authority over the local authority of those places; of the individuals his subjects, there residing, he says nothing; there is not a word in the treaty affecting their birthright, as British subjects.

There is certainly not a word expressed upon that point; but I think the great mistake in this discussion, and that which misleads those on the other side, is, an implication which they think necessarily arises upon this transaction of granting independence to America; and they allow themselves to be carried away by the force of expressions, which, without any defined meaning, seem to signify something, and are repeated, without examination into their import. It has been said, that by acknowledging the independence of the United States, the king *dissolved the allegiance* of the Americans, and they of course were made aliens; this is an inference drawn from the independence, but it is wholly a fiction of imagination among politicians; there is no such principle in the law of England; it never was heard of: can any book, case, or dictum be shown, that gives the most remote intimation of any such operation? In the cession of territory, the king has always forborne to declare any thing expressly on the article of allegiance, and never before has any one raised the construction, that allegiance was ever surrendered by the king, any further than the nature of the

cession did, in point of exercise and enjoyment, circumscribe the scope of it. As the king has, in no case of cession, made an actual relinquishment of allegiance due to him, so has he, in no case of such cession, ventured to take away what was not his, but belonged to the individuals his subjects; who were to suffer enough in being compelled thenceforward to live in a foreign land, and who might very well be indulged with the consolation of retaining their birthright of British subjects; a right which might be brought into enjoyment and exercise, whenever they should again come to live upon British ground.

With all the instances of cessions, which are examples to the contrary, I cannot understand, how any one should entertain the imagination of their effect in *dissolving personal allegiance*, accompanied too with such an inconsequent result, as, that the British subject, so released, becomes thereby an alien.

To return to the objection which I was to consider, in regard to the design and effect of stat. 22 Geo. III. c. 46; it appears, from what I have before detailed out of the Parliamentary Debates, that the statute was deemed necessary, in order to satisfy the scruples of some persons, who thought, that the king had not, at common law, power to alienate any part of his dominions; further, that it was necessary the king should have power to sus-

pend the operation of certain acts of parliament, which, it was foreseen, might stand in the way of making peace. It was afterwards contended, that the statute had also the special effect of authorising the king *to grant independence* to the colonies; because, as it empowered him to make peace or truce, any law, statute, matter, or thing to the contrary notwithstanding, it of course, say these objectors, empowered him to grant independence, or indeed any thing that should be deemed necessary towards making such peace or truce; meaning by such independence, disfranchisement, and converting the Americans into aliens.

After such explicit discovery, as was before made, of the nature and design of the act, how are we to acquiesce in the construction thus put upon it in the objection? What reason is there for saying, that the act has no meaning or object, unless the Americans were admitted to be aliens and foreigners, in a state of legitimate war, and not rebels?

The second of these renewed objections to the grand common law position, on which I build this argument, is, to my understanding, as extraordinary, and as anomalous, as the preceding; but it is not so novel. I admit, I have before heard the notion of Americans *domiciliating* themselves in the United States, and being, in consequence of such election, pronounced to be no longer British subjects, but aliens and American citizens only; yet it

always seemed to me to be an arbitrary and groundless assumption, totally irreconcilable to principle or precedent.

As to the precedent, I must again recur to the instances of the Floridas, Tobago, and other places, that have been ceded to foreign powers. Was it ever objected to the British-born subjects inhabiting those countries, that having domicilated themselves there, they were considered as aliens in the British dominions? Where should men be domiciliated, but where their home is? And did it ever enter into the mind of the king or his ministers, that, upon a cession of territory, the British-born subjects inhabiting there should migrate, at all hazard to their worldly affairs, and the prosperity of their family? There are no such migrations, no such expectations of them; nor have they ever been deemed necessary for keeping alive the birthright of a British subject. Why then should it be necessary, for the first time, in the case of the inhabitants of the United States?

I think it erroneous in principle, because it makes *that* depend on the option and capriciousness of the person himself, which has ever been deemed an indelible character, one he is not at liberty to put off, that of a British subject. All the maxims, that we have heard about birthright and natural allegiance, are contrary to such a supposition, of a person choosing whether he will cease

to be a British subject, and begin to be an American citizen; but all those maxims are consistent with the construction which I contend for, namely, that such persons owe a local allegiance while in America; and, when they come here, their rights of British subjects revive, and their natural allegiance attaches: and, it cannot be denied, that in such a state of things, there is a reciprocity of duty and protection, between the sovereign and the subject, which is quite commensurate with their respective situations.

This imagination of optional allegiance, and extinguishment of natural rights, is wholly inconsistent with the position resolved in Calvin's case, which is laid down generally, without making the consequence of continuing the rights of birth to depend on any condition or observance whatsoever. Such absolute, entire, and indelible quality, is what the common law ascribes to those rights of subjects that come to us by birth, and by birth only.

Such are the observations to which these two new objections seem to be open. These objections do not appear to me to have more force in them than the former; and I do not see any thing in either of them to invalidate the resolution in Calvin's case, and the application of it, without any qualification, or deduction, to citizens of the United States.

*Dec.* 15, 1808.

*December* 16, 1808.

In a conversation with a civilian upon this subject, I found he had made up his mind to the negative of the question; but it was upon principles wholly independent of the common law. He considered British-born subjects, residing in an island or country ceded by his majesty, to become thereby aliens; he could not, therefore, he said, doubt about the state of Americans, especially after the act of parliament, which has been so often cited. He called for some case lately decided in the courts at Westminster, to contradict what he alleged of ceded countries; I had none to adduce, and could only refer to the common law principle, which had never been denied.

I perceive, that the civilian went upon the law of his court, where they hold, that persons take their character from the country where they reside; so, the ceded country becoming foreign, they deem the inhabitants foreign too. Such is the rule in prize causes, where hostility is to be regarded, which must ever be a national, not a personal consideration; accordingly, an enemy's country makes all the inhabitants enemies. So, indeed, at common law, the country gives the character to the persons who inhabit it, in matters that are governed by the character of the country. The British-born subjects of a ceded colony lose their character of British colonists, because their country has become foreign; they are restrained by the navigation laws

that before protected them; they cannot trade as British colonists. They are foreigners, therefore, in every thing that relates to the country they live in, as the civilian contends; but the common lawyer will add, they are in their own personal rights still British subjects, as they were born; and they will be intitled to claim the privileges of such, whenever they remove from the foreign country which obstructs the application and exercise of them, and come to a place, that is, some place in the king's dominions, where alone the privileges of a British subject have their exercise and application.

In truth, the character of a British-born subject is not merely national and local, but personal and permanent. It is born with him, and remains with him during life, never to be divested; unchangeable, indelible. It is not so with what is called a *British subject;* that does, indeed, depend upon locality; and that is the character which the civilian contemplates. I believe, much of the misapprehension, upon this occasion, has arisen from not preserving the distinction between *British subjects*, and *natural-born British subjects;* they are not the same, though, I believe, they are reasoned upon as if they were.

*British subject*, and *alien*, are not terms contradictory; because the two characters may concur in the same person: the inhabitants of the Dutch

colonies, now in our possession, are *British subjects;* they have taken the oath of allegiance, and they have the advantages of British colonists; but they are aliens, because they were born out of the king's allegiance. The inhabitants of the Floridas, born while those were British colonies, are, however, not now British subjects, because they inhabit a foreign country; nor are they aliens, because they were not born out of the king's allegiance; but they are natural-born British subjects, because they were born within the king's allegiance: so that it may be predicated of the same person, that he is a "*British subject,*" and an "*alien;*" that he is "*a natural-born British subject,*" and not a "*British subject;*" accordingly as you speak of the local and national character, or of the personal character. "*British subject*" is a term of common parlance, that has not properly a legal defined meaning: it serves sufficiently in ordinary discourse, for "*natural-born subject,*" but it can be properly applied only for intimating the local and national character. The true legal description is that of *natural-born subject:* this is the opposite to *alien;* and these are the terms that describe the *personal* character, which is the only one sought in the present inquiry, and the only one that is a subject of discussion in the books of the common law.

Through the whole of the argument, I have been

insisting on this *personal* character of British-born Americans; but those who object to my conclusion in favour of them, from the common law principle (which principle, however, they do not pretend to dispute), keep their eye principally on the *local* and *national* character of the present Americans. Their two great topics are quite of that sort; namely, the stat. 22 Geo. III. c. 46, for making peace or truce with *the colonies and plantations;* and the definitive treaty, which acknowledges the independence of *the United States*, and relinquishes *sovereignty*, *propriety*, and *territorial dominion*. Surely all these are national and local ideas, rivetted to the very soil, and limited by metes and bounds. Nothing is, by either instrument, said or done, as to the *personal* character of the inhabitants; that was left, as the personal character of the inhabitants of the Floridas, to the sentence and disposition of the law, when any of the individuals, residing there, chose to remove himself into a situation, where his *personal* character could be brought into question, and considered distinctly from the *local* and *national* character, which the king of Great Britain had been pleased to superinduce upon him by ceding the country where he was born; that is, when any such individual should choose to come into the king's dominions, where alone his personal rights can have their application and exercise.

The only consideration for us, in this country, seems to be such personal character, whether it is

the case of a native of Florida, or a native of the United States, born within the king's allegiance.

*Dec.* 16, 1808.

*December* 17, 1808.

A passage has been cited by the objectors, from Mr. Wooddeson's lectures; and as this is the only book-authority they have been able to adduce, it must not be let pass without observation; especially as it has acquired a sort of reflected consequence, by being inserted in Sir Henry Gwillim's edition of Bacon's Abridgement, title "Alien." The passage is this, "But when by treaty, especially if ratified by act of parliament, our sovereign cedes any island or region to another state, the inhabitants of such ceded territory, though born under the allegiance of our king, or being under his protection, while it appertained to his crown and authority, become, I apprehend, effectually aliens, or liable to the disabilities of alienage, in respect to their future concerns with this country. And similar to this, I take to be the condition of the revolted Americans, since the recognition of their independent commonwealths."—[Vol. i. p. 382].

To those who insist on this as an authority for saying, that such persons become aliens, and cease to be natural-born subjects, it might be enough to reply, that a proposition laid down with an alternative, as this is, has not in it sufficient precision to be authority for any thing: "effectually aliens, *or*

liable to the disabilities of alienage," is a circumlocution that does not suit with the plainness required in a juridical proposition. And yet, I think, the author has expressed himself not unsuitably with another sense of the word *alien*, accompanied, as it here is, with an exposition. It seems to me that "*or*" is not intended here to be a conjunction merely; but it bears a sense that is not uncommon, it introduces a member of a sentence that is meant to be explanatory of the foregoing; and is the same as "or in other words," "or to speak more plainly," "or to speak more properly." In this sense of "or," he explains the meaning of "effectually aliens," by shewing, they are liable to the disabilities of alienage in respect to their "future concerns with this country." Their "future concerns with this country," must be the trade they carry on with this country; something which they transact from a distant place, something that affects the whole community, something that arises out of their locality and national character. He is speaking of the local and national character, which we discussed before (in pa. 38), and which was superinduced on the inhabitants of these ceded countries, in respect of which the inhabitants become a species of aliens, or as the author expresses it in an undefined epithet, "effectually aliens," or, I suppose, "in effect aliens;" that is, in the case of trading with this country.

I take this to have been what the author's mind

was then contemplating, the local and national character of such ceded colonists; and by no means their personal character, that of natural-born subjects, which he knew, as well as all lawyers, can neither be surrendered nor taken away.

Mr. Wooddeson has certainly been not sufficiently technical in expressing himself upon this occasion. It may be fit enough to oppose what he has said, by an expression in the treaty of peace, which, though in like manner not technical, has evidently a meaning that cannot be mistaken, and that makes against his conclusion. In the fifth article, it is agreed, that congress shall recommend to the legislatures of the respective states, to provide for the restitution of confiscated estates which belong to *real British subjects*. Now, if there are "real British subjects," it is implied, there are British subjects who are *not real*, that is, less so than the others. No one can doubt, that the one expression means British subjects, not comprehended within the new states, erected and recognized by the king's acknowledgment in the treaty; the other must mean those inhabiting the United States. It is plainly indicated, therefore, by this phrase, that both contracting parties in the treaty admitted, that the inhabitants of the United States did remain, in some sort, British subjects; and the mode in which they so continued can only be that, which I have been contending for.

*Dec.* 17, 1808.

According to the foregoing reasoning, I think the law officers, if consulted, would give an opinion somewhat to the following effect.

*Supposed opinion of the law-officers.*

" In obedience to your lordship's commands, we have considered the question, whether inhabitants of the United States, born there before the independence, are, on coming to this kingdom, to be considered as natural-born subjects; and we are of opinion, that such a person, coming to this kingdom, cannot be denied the character and privilege of a natural-born subject.

In forming this opinion, we have given due consideration to all the topics that have been suggested to us from different quarters, on both sides of the question, as well as to the principles of the common law, which are to be found in books of known authority amongst lawyers.

Among the suggestions that have been made to us, are stat. 22 Geo. III. c. 46, and the definitive treaty of peace with the United States; and we find ourselves obliged to declare, that nothing in those two instruments appears to us to make any alteration in the case of Americans, when compared with others of his majesty's subjects who reside in a ceded country. In like manner as the inhabitants, natural-born subjects of his majesty, in the two Floridas, ceded to the king of Spain, (at the same time that the independence of the United

States was acknowledged) are still deemed to retain their privilege and character of natural-born subjects, so, we think, these persons, being similarly circumstanced, when they come into this kingdom, cannot be denied to retain their original privileges and character.

Our reasons for thinking, that the statute and treaty make no difference or peculiarity in the case of the United States, are these: The statute, upon the face of it, appears to have been made for two purposes; First, To enable the king to make peace or truce with the colonies or plantations in question; Secondly, To enable the king to suspend the operation of certain acts of parliament that might stand in the way of peace. The need of the second provision is obvious; the need of the first is not so plain; but we are told, in a debate in the house of commons, by the attorney-general Wallace, who drew the bill and moved it, that it was intended to give the king a power of alienating those colonies; a power which he, and some others, considered the king as not possessing by the common law. Without saying any thing, at present, on the justness of such opinion, we allege it as the best testimony to the design of the act. This design is perfectly consistent with the conception and wording, and it does not appear to us necessary, or proper, to suppose any other meaning in this act. We conclude, therefore, that there was no particular design, by this legislative measure, to make

any alteration in the personal character of the Americans, beyond that which necessarily must, and always has followed upon the cession of any of his majesty's colonies.

After these observations on the act for enabling the king to make peace, we come to the definitive treaty itself; and we find ourselves compelled to declare, that as we perceive no design in the act to enable the king to alter the personal character of the Americans, so in the treaty we discover no declaration or provision that can be construed expressly, or impliedly, to alter their original character of natural-born subjects, and to make them aliens.

In the first article of the treaty, the king acknowledges the United States of New Hampshire, &c. &c. to be free, sovereign, and independent states; and he relinquishes all claim to government, propriety, and territorial rights of the same. It is upon this provision, and these words, that the separation and independence of those colonies are grounded. The effect of this provision appears to us to be confined wholly to the soil and territory, which is thereby made foreign, and ceases to be a part of the king's dominions; we cannot discover any thing that at all affects the personal character of the natural-born subjects, inhabiting such foreign territory.

Indeed, we are much surprised that any such

peculiar effect should be ascribed to this cession of territory to the United States, (for so it is, in truth) when, at the same peace, the adjoining colonies, the Floridas, were ceded to the king of Spain; and no such consequences of the cession are supposed by any body to affect the natural-born subjects residing there. We may here too remark, that the cession of the Floridas was made without any such enabling statute, by the king's common law prerogative; which demonstrates, that in the opinion of the majority of parliament, who approved the treaty, the act of the attorney-general Wallace owed its origin, not to an absolute necessity in law, but to an abundant caution, or some scruple in politics, which deserves no regard in a juridical consideration of the subject. We are not able to discover any distinction in the two cases of the Floridas, and of the United States. In both instances the soil was made foreign, and the inhabitants had superinduced upon them a new local and national character; that is, they became locally the inhabitants and subjects of a foreign nation, and they lost advantages of trade, and benefits of various sorts, which natural-born subjects must lose, when they inhabit, and make themselves subjects of a foreign land. But, under the control of this new local and national character, their personal character of natural-born subjects still remains; and we see nothing in law to prevent it reviving, and enjoying all its privileges,

when the person comes into the king's dominions, where, alone, the rights of a British-born subject have their full application and exercise.

Having declared this our opinion, that nothing is, *de facto*, done by the act or the treaty to take away the personal character of natural-born subjects residing in the United States, it may seem unnecessary, though we think it not unsuitable, to add, that we know of no instance where the crown has presumed to exercise the power of taking away the personal rights of a natural-born subject; neither have we met with any principle in the law of England, that warrants such a supposition; nor can we conceive any proceeding, by which such a divestment or extinguishment of natural rights can be enforced. As the common law recognizes no such principle as that of disfranchising a natural-born subject, the character has been deemed indelible; and the parliament has never interposed, on the occasions of cession of territory, to take from the British inhabitants of such countries that, which the common law has permitted them to retain.

Such having been the construction of law, in cases of cession, which have been made, sometimes, no doubt, against the wishes of the inhabitants, and always without asking their consent, a principle of law has grown up, and established itself, which it seems too late now to question in the case of the United States. We have given full consideration to the difference of circumstances which led to that

cession, the rebellion, and war that preceded it, and were the cause of it, and the claim of the colonists to be independent; but, we think, this difference of circumstances makes no alteration in the legal result arising from the new situation of the parties. Such matters are, as we think, wholly political; and as they are not of a nature to be subjected to any juridical examen, we do not see how they can be brought into the account, when we are applying the legal principle before mentioned.

Conformably, therefore, with the principle and practice that have long been acknowledged, and declaring that there appears no reason in law for not applying the same principle to the inhabitants of the United States, we repeat the opinion we before expressed, that the persons described in the question ought to be considered, in this kingdom, as natural-born subjects."

Such, I think, would be, or should be, the opinion of the law-officers on the present question.

*Dec.* 20, 1808.

*Reply to observations on the subject of the foregoing argument.*

*January* 17, 1809.

First, I cannot admit there is any straining to bring the Americans within Calvin's case; and I maintain, the circumstances, that distinguish them from the precise point in that case, are fairly and fully considered by me.

It may not be necessary, in arguing with you, to adduce such authority as Calvin's case, because you do not dispute it. But the persons I had to deal with were ignorant of the principles of that case, and I needed such an authority to set them right. I know no book case where the principles of allegiance and native rights are laid down and explained, except in that only instance; the principle and nature of allegiance, and of native rights, is the first step in the present argument, and the subsequent parts of it would have been without foundation, if I had not taken that case for a basis.

The necessity for going so far back in the argument was shewn to me by the civilian*; who laid down the law, that the king's subjects of a ceded country become thereby aliens; when he called for some decided case to show the contrary, I had no decided case (you know there are none) but the resolutions and arguments of Calvin's case. He felt this to be an important authority; and the piece of law, which you admit, I doubt whether you can ground upon any other authority in the books. The circumstances in Calvin's case are different from those of the Americans; but the principle is the same (I mean the principle of the resolution that I quote): whether that difference in circumstances makes any difference in the application of the principle is the very question in hand.

* Ant. pa. 30.

Secondly, You here admit, that natural-born subjects, continuing their residence in a ceded country, do not thereby become aliens: you go so far as to think, that, if they joined in war with their new sovereign against this kingdom, it would be treason in them. I will not say any thing upon this point, except to remind you, that my argument is wholly confined to an American coming to this country, and residing here.

The other point in this part of your answer makes the main of your third article.

Thirdly. Your third topic is, the difference between ceding a country to a foreign power, and the constituting of a sovereignty from among British subjects, and ceding the country to such new made sovereignty. You call it, making a treaty with *the subjects themselves*, that *they* should hold the country, as an independent state; "he ceded his sovereignty *to them*." You rely upon this difference in circumstances, which you make between ceding to a foreign sovereign, and ceding to British subjects, as you term it; and you mention one certain result from this difference, that, in the former case, the levying of war by the natural subjects would be treason; in the latter case, it would not. I protest, I do not discern this distinction; in both cases, the subject is put into such peculiar situation by the act of the new sovereign; and being so circumstanced, why should it be treason in an inhabitant of Florida, more than in an American, to

obey the militia law of his new sovereign, and bear arms against us, like the rest of his fellow subjects!

Some persons would argue differently from you on this point: those who distinguish the British subjects of the Floridas, because they were given up against their will, or without their consent, from the Americans, because these claimed to be independent, would not infer upon the former, who were wholly passive, the crime of treason, and acquit the latter, who sought and made choice of the peculiar situation of double allegiance, in which they have placed themselves.

However, this point, as I before said, does not bear upon our present question, which relates to the American, while he is in the king's dominions.

But you rely upon the difference of "the treating with the Americans, and giving up to British subjects the sovereignty of the country." I think there is in this an assumption, and a reliance upon words, which has no support from the real transaction. To come up to the representation you make about "*them*," and "*they*," there ought to be a covenant and grant from the king, to Mr. A., Mr. B., Mr. C.; and the said Mr. A., Mr. B., and Mr. C., ought to be plainly estopped and barred by what they took under such covenant and grant from the crown. When we had thus ascertained who are legal parties to the transaction, and legally bound by it, we might then inspect the charter or in-

strument, and search, whether the king, by the terms of it, relinquished his claims of allegiance wholly, or in part; and whether the British subjects, therein named, had expressly relinquished, or were expressly deprived of their native rights, or whether such deprivation arose out of it, by necessary construction.

I think, such should have been the form of the transaction, in order to come up to your supposition; but when we examine it, we find it to be quite another sort of proceeding. As to Mr. A., Mr. B., and Mr. C., it is a matter *inter alios acta;* they are not parties, not named, not alluded to; it does not appear to have been transacted by them, or for them. Let us consider the treaty of peace, which must be the instrument, if any, that produces the supposed effect.

The treaty declares New Hampshire, &c. &c. &c. to be free and independent *States*, and the king relinquishes the government of them. When this grant and covenant is brought to plain facts, it amounts to this, that the king will no longer send governors to those states, nor expect the legislative and executive authority to be subordinate to him. The king *gives* this to *the States;* but how can this be construed *to take* any thing away from Mr. A., Mr. B., and Mr. C.? The king gives away the allegiance, which *the States* owed him; it was his to give; but how should such free gift be construed to take away from Mr. A., and other individuals,

the private rights to which they were born? Two questions arise upon this, First, Are the native rights of individuals hereby, *de facto*, pretended to be taken away? Secondly, Could the king *de jure* take away such rights?

To talk of "treating with *them*," and "*they* holding the country independently of the king," is speaking in a popular manner, and without sufficient regard to juridical circumstances. Any inference of that sort will not be allowed by law to deprive a man, living peaceably in his house in New Hampshire, of his British rights, that he was born to, and that are personal to him, (namely, which he can carry about with him, and which do not depend on locality,) merely because some daring men have forced the king to allow the States of New Hampshire to govern him, without enjoying, any longer, the right of appeal to the king. I say, the law will not allow this, because personal rights of British subjects cannot be taken away from multitudes in a lump; they must be discussed in every individual case, and there must be a several judgment and execution against every person. Even the act of the king in this instance, though a national act, and relating to millions, is but a *personal* act; when he acknowledges them Free States, and relinquishes the government of them, he acts only for himself, his heirs, and successors; and accordingly thereto, and agreeably with the true principles of the law, he alone is bound, and

the sovereignty of those States ceases to be his. But where is the *personal* act of any American relinquishing his own rights? or if there was any such proceeding, in fact, shew me the authority in law that recognizes any such principle, as that a natural-born British subject can divest himself of his native character: there is no such authority; and there is the known maxim of law against it, *nemo potest exuere patriam.*

I cannot, therefore, bring myself to distinguish the treaty with America, from the ordinary case of cession to a foreign sovereign: in both cases, it is a transaction between the two sovereigns, in which the inhabitants bear no part; and it seems to me a departure from principle, to say, that the American is thereby rendered an alien, while the inhabitant of Florida is allowed to be still a British-born subject.

Fourthly, I have raised no question of the king's authority to make the American treaty. I agree with those who think he might have made it without the act of parliament; and I agree also with those who thought the treaty fell within the authority of the act. I am satisfied with the treaty, whether with or without the act; but I contend, that neither the act nor the treaty had in contemplation to make the Americans aliens; and that neither one or other of those instruments has, in point of law, the power of producing such an effect. I raise no question upon what passed in parlia-

ment; if the parliament approved the treaty, they left to us to draw the inferences, and make the construction that shall appear to belong to it.

Fifthly, and lastly, you admit there are difficulties in deciding that "the treaty exempted the Americans from their allegiance, and excluded them from their rights as British subjects." In my opinion, these difficulties are made and increased by introducing phrases, and raising constructions upon them, without looking to the real proceeding, and adhering faithfully to the letter of it. You talk here of exempting the Americans from their allegiance: Why make a question of allegiance, when the king does not claim it? And what consequences can be built on the affirmative or negative of this question? What is a subject's allegiance worth to the king, if he resides in America, although he is, *bonâ fide*, a native of London? It is worth nothing. And if he refuses to come home, what does the law say, and what did the parliament do in a like case, in stat. 14 and 15 Henry VIII. c. 4.*? Allegiance has nothing to do with the treaty. Allegiance is personal; the treaty is national and territorial. The treaty regulates land, its metes, and its bounds; and the government of it the treaty leaves and transfers to others, *the States* of the country; the *persons* and their allegiance remain unaffected. Allegiance is general

* Vid. ant. pa. 18.

or special, local or personal; these may, and do often, in fact, consist together in the same person; why not, then, in the instance of Americans?

It is for want of attending to this modification, to which allegiance is subject, that some persons started the expedient, which you here mention, and which seems to me to contain much more difficulty in it than the one it was meant to cure. You agree with those, who think, that such Americans, as "after a reasonable time allowed for election, subsequent to the ratification of the treaty, settled themselves in America, and chose their domicile there, became exempted from their allegiance, and excluded from their rights as British subjects."

This expedient of a "reasonable time," and "a domicile," for making a distinction between one American and another, seems to me to be a greater departure from principle, than any of the other anomalies that I have observed in their argument. There are, I admit, legal considerations that depend upon a man's local character, which may be changed by change of residence, and therefore must be ascribed to his own act and choice. But those are in cases of such a character as is capable of being acquired, and, as it is acquired, so it may be lost, by his own act; such is a man's local and national character. But the character of natural subject, which a man is born to, and to which is applied the maxim, *nemo potest exuere patriam;* to lay it down, as a position of law, that it is in a

man's own choice to decide whether he will put off this character or retain it, and that his continuing his native character depends upon altering his domicile; this is, surely, one of the most singular novelties that ever was attempted in the face of an acknowledged principle to the contrary. For which principle I must again refer to Calvin's case, the whole doctrine and result of which is, that the personal rights of a subject, to which he was born, remain through life, and through all circumstances, unchanged and indelible; and that allegiance and native rights arise wholly from *birth*, and do not depend on actual local sovereignty for their continuance.

Such a device as this is not interpreting the law, but making it. A temporizing scheme, reduced to an act of parliament, for settling this national question, might very well be so modelled: it would be a half measure, that probably would be thought reasonable enough; but this very character of it is sufficient to discredit it as a piece of juridical reasoning: it is void of all steadiness of principle; it has not even in it the consistency of the former arguments and conclusions, that "relinquishing the sovereignty," that "acknowledging the states to be free," &c. &c. *implied* that there was an end of allegiance and of British rights. The device was, I believe, contrived by those who found they could not maintain the above bold conclusions, in opposition to acknowledged principles of law; and, de-

sirous of doing something, they were content to lower their notions to a medium between the two, which would sound, as they thought, reasonable in the effect of it, however unsupported it might be in principle.

So much for this half measure of "reasonable time," and "domicile," which I have had occasion before to reprobate. I hope the difficulties, in point of law, with which this arbitrary notion is pregnant, will be avoided: if so, the other difficulties in point of fact, which you mention, will be escaped, namely, the necessity of enquiring in every particular claimant's case, when and how he was domiciliated in America, or in this kingdom.

Upon the whole I see nothing to distinguish, in a legal view, the condition of Americans from that of other British subjects residing in a ceded country; nothing done by the king, nothing by parliament, nothing by themselves; and it seems to me, the person in question coming to this country, is still entitled to the privileges of a natural-born subject.

*Jan.* 17, 1809.

*January* 21, 1809.

An authority is quoted for the notion of "optional domicile." It is said, that chief baron Eyre has been heard, over and over, to lay it down, that Americans domiciled in the United States could not be deemed British subjects, so as to navigate a British ship. There may be good reason for such

an opinion. The chief baron might have considered, that, under the order of council for carrying on the American trade, (it was before statute 37 Geo. III. c. 97.) American ships were to be navigated by subjects of the United States. He might consider domiciliation as the best evidence of being an American subject. It might appear to him reasonable, that such persons being allowed to navigate American ships, as American subjects, they should not be recognized, occasionally, as British subjects, when navigating a British ship. Such a discrimination might appear to him to promote the principle of our navigation system: as no ships are allowed to be British-built, unless built in the king's dominions; it might seem to him an appropriate construction, to exclude from the character of British mariners, all those who chose to domiciliate themselves in America, then become a foreign country.

Be it so; but can they report to us, the chief baron ever laid it down, that persons who so made themselves Americans, by residing in the United States, might not afterwards be deemed British subjects, and British mariners, by changing their domicile to some part of the king's dominions? Is there any thing in the principle of domiciliation, which will enable them to say, that the first choice is final, and the character thereby acquired cannot be put off? Is there not as much efficacy in a second, a third, or any other subse-

quent choice of domicile? And do not such persons become *toties quoties* successively British or American? And if not, why not?

If their notion is grounded on any principle, they should be able to explain to us, why the first choice of domicile precludes the advantage to be derived from any subsequent choice.

Such are the *queries* that may be put on this piece of exchequer law, confined only to the very peculiar case of navigation and of mariners. There still remains the principal *query*, why should such a construction on the navigation act, supported as it is there by the special circumstances of the case, be adopted, and made to govern in the general question of natural-born subject, where there is nothing similar to make the application of it fit or colourable? Certainly domiciliation, or residence, temporary or permanent, was never made a part of the consideration, whether a person is a natural-born subject; but simply this was the question, whether he was born within the king's allegiance? However, if domiciliation weighs any thing, the claimant, in this case, is resident here, and professes to make this kingdom his future residence. Perhaps the chief baron, upon a *habeas corpus*, would, in the case of this claimant, have deemed his present residence, and his determination declared to reside here in future, to be a sufficient choice of domicile within the principle of his exchequer decision; perhaps he might consider this

case as standing on different grounds from the exchequer case, and to be decided on general principles, without regard to domiciliation.

We are so uninformed as to the extent of what the chief baron is supposed to have ruled at *nisi prius*, that it seems to afford no safe ground of reasoning.

*Jan.* 21, 1809.

*March* 22, 1809.

I have been desired, by a great lawyer, to look at the statute *de prerogativâ regis*, ch. 12. *de terris Normannorum*. I suppose, he meant this should prove to me, that on king John losing Normandy, the Normans became thereby aliens, and therefore the lands holden by them in England escheated to the king; but the statute does not import this, nor is it so understood by Staunforde. On the contrary, Staunforde understands, that the Normans still continued English subjects, and were *ad fidem utriusque regis*. The statute expressly speaks of those who were *non ad fidem regis angliæ*, which must be such as were born after the severance of the two countries; and the design of the statute is, to fix, that the escheats, in the case of such *post nati*, accrued to the king, and not to the lord; and that the king was to grant them to be holden of the lord, by the same services, as before.

This chapter, therefore, of the statute *de prerogativâ regis* is an express authority, that the severance of Normandy from the English crown did not

make the inhabitants there aliens, though their children, born after the severance, were aliens.

This authority becomes also an answer to another point maintained by the same great lawyer; he goes beyond the rest that I have had to contend with, except the civilian, and he holds with the civilian, that the inhabitants of a ceded colony become thereby aliens. Yet, in this, I cannot but allow there is consistency; for the principle appears to me to be the same: those who call the Americans aliens, ought to consider the inhabitants of Florida, ceded at the same time, in the same light; and those who consider the inhabitants of Florida as not deprived of their personal rights of Englishmen, ought to admit the American claim to continue natural-born subjects.

*Mar.* 22, 1809.

*March* 24, 1809.

Perhaps the objectors have never considered the persons to whom naturalization and denization are granted. In both cases, in the act of parliament, and in the patent, the party is alleged to be born out of the king's allegiance; and in applying for either, he must allege the same in his petition; but an American cannot do this with truth. What then is to be the conclusion on the peculiar circumstances and situation of this supposed alien? Is he to be deemed an alien beyond all other aliens, that is, irredeemably such? Assuredly he is not susceptible of denization or naturalization in the

ordinary course, because he cannot bring himself within the description, which alone makes him the object of such favour; or may we conclude, that, not having the defect, which is to be supplied by such grant, he is already in possession of the character to be conferred by it; in other words, he is not an alien, but a natural-born subject?

The latter appears to me the just conclusion; and I shall accordingly say, with confidence, that there is the authority of the lord-chancellor in cases of denization, and of the two houses of parliament in cases of naturalization, for the proposition, that *birth out of king's allegiance*, is the only circumstance which constitutes an alien. We may be sure such forms would not have been settled and constantly acted upon, if they were not known to be required by the general law of the land. Indeed, it is nothing more than the definition of alien laid down in all the books, whether elementary or practical; the following examples are sufficient:

Natural-born subjects, are such as are born within the dominion of the crown of England; that is, within the ligeance, or, as it is generally called, the allegiance of the king; and aliens, such as are born out of it.—[Blackstone, 1. book. ch. 10.]

An alien is one, who is born out of the ligeance of the king.—[Comyn's Digest. article, alien.]

An alien, is one born in a strange country.—[Bacon's Abridgement, article, alien.]

And thus I conclude this discussion, as I began

it; relying upon established and known positions of law for maintaining juridical truth, against hypothesis and the speculations of political reasoning.

*March* 24, 1809.

Nothing has yet been said of *post nati* Americans, who seem also to have, in construction of law, similar pretensions. They are within the wording of certain statutes, made in favour of children born in foreign parts of British parents; and there seems no reason why those statutes should not apply to such children born in the United States, as well as to those born in other foreign countries. Accordingly, if the *ante nati* Americans continue natural-born subjects, then the rights and privileges of the father are preserved to the children by stat. 7 Anne, ch. 5, and stat. 4 Geo. II. ch. 21. and to the grandchildren by stat. 13 Geo. III. ch. 21. So that the third generation of Americans are in the same legal predicament as the *ante nati;* consequently, at the present moment, and for years to come, there may be very few aliens in the population of the United States, amongst persons of British descent. The parliament has gone still further in favoring these new foreigners; for, even after the third generation, when Americans will become unquestionably aliens in point of law, some of them may be, and may continue to be, lawful holders of land in this kingdom, under stat. 37 Geo. III. ch. 97. sect. 24,

25. An anomaly, which never was before seen in our law.

Should there be dissatisfaction upon any of these points, whether regarding the *ante nati* or the *post nati*, there appears no remedy but in Parliament. The Courts cannot depart from established precedent and principle; Parliament alone can overrule their decisions, and alter its own enactments.